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 XXX.

VICTORIA, B.C.
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1923.

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
HIS HON. JOHN CHARLES McINTOSH,	Nanaimo

ATTORNEYS-GENERAL:

THE HON. JOHN WALLACE DEBEQUE FARRIS, K.C.
THE HON. ALEXANDER MALCOLM MANSON, K.C.

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RULES OF COURT

PROVINCIAL SECRETARY'S OFFICE,
April 13th, 1923.

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

That Sub-rule (*a*) of Order 11, Rule 1, be repealed, and the following substituted therefor:—

"1. (*a.*) The whole subject-matter of the action is land situate within the jurisdiction (with or without rents or profits); or the perpetuation of testimony relating to land within the jurisdiction; or."

And that the following Sub-rule shall be added in Order 11, Rule 1, immediately after Sub-rule (*e*) thereof:—

"(*ee.*) The action is founded on a tort committed within the jurisdiction."

And that the following rule shall be added immediately after Order 11, Rule 1, *viz.*:—

"2. Notwithstanding anything contained in Rule 1 of this Order, the parties to any contract may agree:—

"(*a.*) That the Supreme Court of British Columbia shall have jurisdiction to entertain any action in respect of such contract, and, moreover, in the alternative.

"(*b.*) That service of any writ of summons and any such action may be effected, at any place within or without the jurisdiction, on any party, or on any person on behalf of any party, or in any manner specified or indicated in such contract. Service of any such writ of summons at the place (if any), or on the party, or on the person (if any), or in the manner (if any) specified or indicated in the contract shall be deemed to be good and effective service wherever the parties are resident, and if no place or mode or person be so specified or indicated, service out of the jurisdiction of such writ may be ordered."

That Rule 8 of Order 11 is hereby repealed, and the following rule substituted therefor:—

"8. Service out of the jurisdiction may be allowed by the Court or a Judge of the following processes or of notice thereof, that is to say:—

"(*a.*) Originating summonses under Order LIVA. or LV., Rule 3 or 4, in any case where, if the proceedings were commenced by writ of summons, they would be within Rule 1 of this Order.

"(*b.*) Any originating summons, petition, notice of motion, or other originating proceeding:—

"(1.) In relation to any infant or lunatic or person of unsound mind;

or

"(2.) Under any Statute under which proceedings can be commenced otherwise than by writ of summons; or

"(3.) Under any Rule of Court or practice whereunder proceedings can be commenced otherwise than by writ of summons.

"(*c.*) Without prejudice to the generality of the last foregoing subhead, any summons, order, or notice in any interpleader proceedings, or for the appointment of an arbitrator or umpire, or to remit, set aside, or enforce an award in an arbitration held or to be held within the jurisdiction.

"(*d.*) Any summons, order, or notice in any proceedings duly instituted, whether by writ of summons or other originating process as aforesaid."

These rules may be cited at the "Rules of the Supreme Court, 1923," and shall come into operation on the first day of May, 1923.

By command.

J. D. MACLEAN,
Provincial Secretary.

PROVINCIAL SECRETARY'S OFFICE,
April 18th, 1923.

HIS HONOUR the Lieutenant-Governor in Council, under the authority of section 72 of the "Supreme Court Act," and of subsection (4) of section 27 of the "Land Registry Act, 1921," directs that the following Rules of Court be prescribed in connection with the grant of Letters of Administration to the case of real estate:—

1. The existing practice of the Court with respect to non-contentious business shall, so far as the circumstances of each case will allow, be applicable to Grants Probate and Administration made under the authority of the "Land Registry Act, 1921."

2. Every person to whom administration is granted shall enter into a bond together with one or more surety or sureties, as the Court shall think fit, made in favour of such person and drawn in such form as may be directed by the Court or Judge or by Rules of Court, conditioned for the making of a true inventory and account including the disposition thereof, of the real estate which has come into his hands or under his control under such grant.

3. Such bond shall be in penalty of double the amount of which the real and personal estate of the deceased shall be sworn, unless the Court, which it may do, shall direct the same to be reduced; and the Court may also direct that more bonds than one shall be given so as to limit the liability of any surety.

These Rules may be cited as the "Rules of the Supreme Court" under Part 2, Division 2 of the "Land Registry Act, 1921," and shall come into force on the 30th day of April, 1923.

By command.

J. D. MACLEAN,
Provincial Secretary.

NOTICE

HIS HONOUR the Lieutenant-Governor in Council, under the authority of clause (*c*) of subsection (1) of section 253 of the "Land Registry Act," chap. 26, Statutes, 1921, directs that the following rules be enacted for the purpose of governing the practice and the Land Registry procedure under subsection (11) of section 11 of the Bankruptcy Act," being chap. 36 of the Statutes of Canada of 1919 and amendments thereof:—

1. Where a receiving order or authorized assignment, with an affidavit attached in the form provided in subsection (11) of section 11 of the "Bankruptcy Act," being chapter 36 of the Statutes of Canada of 1919 and amendments thereof, is filed in the proper Land Registry Office, the Registrar shall register the same by entering the name of the assignor in a book kept for that purpose and called the "Bankruptcy Index," and such entry shall constitute a sufficient registration of the assignment or receiving order.

2. Where the property described in the affidavit, required to be filed under the said subsection of the "Bankruptcy Act," is not registered in the name of the assignor, the trustee may file a caveat in the Land Registry Office in respect of that property and such caveat may be in the Form J of the "Land Registry Act," and shall be verified by the oath of the trustee or his solicitor or agent; and shall contain an address within the Province within which notices may be served; and shall also contain a schedule showing descriptions of the property to be charged; and a statement of the documents and other facts upon which the claim of the assignee is founded.

3. Where a caveat has been filed under the last-mentioned rule, and notice has been served as mentioned in the caveat, then on the expiration of the period of twenty-one days from the date of the service of the notice, or if no notice has been served, then on the expiration of the period of two months from the date of the receipt of the caveat by the Registrar, the caveat shall be deemed to have lapsed, unless the trustee, his solicitor or agent, has, within the period mentioned, filed with the Registrar evidence that proceedings have been taken before a Court or Judge to establish the title of the trustee to the land or change effected by the caveat, or his right as set out in the caveat.

4. The provisions of section 209 to 214, inclusive, of the "Land Registry Act" shall, *mutatis mutandis,* apply on receipt of the caveat.

5. The fee for filing the caveat shall be governed by item 27 of the scale of fees of the Land Registry Act."

And that notice of this Order in Council shall be published in five consecutive issues of the Gazette and shall be effective on the completion of such publication.

By command.

J. D. MacLEAN,
Provincial Secretary.

REPORTS OF CASES

DECIDED IN THE

COURT OF APPEAL, SUPREME AND COUNTY COURTS

OF

BRITISH COLUMBIA,

TOGETHER WITH SOME

CASES IN ADMIRALTY

IN RE PUBLIC WORKS ACT AND N. F. MACKAY.

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Sale of land—Contract—Crown a party—Required for public works—Price to be fixed by arbitration—Award—Enforcement—Order in council necessary—R.S.B.C. 1911, Cap. 189, Sec. 3.

A contract for the sale of land to the Crown for the purpose of construction of a public work under section 3 of the Public Works Act, in order to be enforcible against the Crown must be authorized by order in council (McPHILLIPS, J.A. dissenting).

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

Statement

APPEAL by N. F. Mackay from the order of GREGORY, J., of the 14th of March, 1920, dismissing an application by way of originating summons to enforce an award of arbitrators appointed in pursuance of a contract for the purchase of certain land to be used in connection with the construction of a proposed public work. Previously to taking these proceedings Mr. Mackay applied to the Crown for a *fiat* to proceed by petition of right, but this was refused. In August, 1918, Mr. Mackay, and the Crown, represented by the Minister of Public Works, entered into an agreement whereby Mackay agreed to sell and the Crown agreed to purchase certain lots in Victoria,

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and without reciting that any dispute arose as to the purchase price, they agreed that the purchase price should be determined by arbitration, as near as may be in the manner provided by the Public Works Act. The parties then proceeded in accordance with the agreement, arbitrators were appointed, and after taking evidence they made an award fixing the value of the property at $107,400. The Government changed in the meantime, and the new Government refused to complete the sale in accordance with the finding of the arbitrators. The facts are set out fully in the judgment of the learned trial judge.

Harold B. Robertson, and Ernest Miller, for the applicant.
Carter, for the Minister of Public Works.

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GREGORY, J.: This is an attempt by originating summons to enforce an award. The applicant has already attempted to accomplish the same purpose by petition of right, but the Crown has refused a *fiat.*

As such a petition is as a rule granted *ex debito justitiæ,* it must be assumed that there was some very strong reason for withholding a *fiat.* This of itself would seem to justify the Court in refusing the leave required by section 15 of the Arbitration Act to be given for the enforcement of an award as a judgment; for it is not the province of the Court to review the act of the Executive Council, through whom the Crown acts; but there are, I think, other grounds for dismissing the summons.

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On the 23rd of August, 1916, Mr. Mackay and the Crown, represented by the Minister of Public Works, entered into an agreement. The Public Works Act, Cap. 189, R.S.B.C. 1911, Sec. 3, enables the Lieutenant-Governor in Council to acquire and take possession of any lands, the appropriation of which is, in his judgment, necessary for the use, construction, etc., of any public work. By section 4, in case the owner refuses or fails to agree to convey, provision is made whereby the minister may tender the reasonable value of the lands, with a notice that the question will be submitted to arbitration. Section 12 provides that "where any dispute shall arise touching claims for money

or compensation under this Act," etc., "arbitrators shall be appointed, and such appointment . . . . shall be deemed a submission to arbitration."

Section 30 provides that the submission may be made a Rule of Court. The Arbitration Act, Cap. 11, R.S.B.C. 1911, Sec. 15, says:

"An award or a submission may, by leave of the Court or a Judge, be enforced in the same manner as a judgment or order to the same effect."

Section 24 provides that, "this Act shall . . . . apply to any arbitration to which the Crown, as represented by the Provincial Government, or any department or head of any department . . . . is a party," and section 25 provides that it "shall apply to every arbitration under any Act . . . . except," etc.

It is argued on behalf of the applicant that these statutory provisions render the award enforcible in the same manner as any award under or within the provisions of the Arbitration Act, as section 21 of the Crown Procedure Act, Cap. 63, R.S.B.C. 1911, provides that nothing in that Act "shall prevent any suppliant from proceeding as before the passing of this Act."

Assuming that an award made by arbitrators appointed under section 12 of the Public Works Act may be enforced summarily under the Arbitration Act, it is necessary to see whether the agreement in dispute is equivalent to an appointment under section 12 of the Act, which "shall be deemed a submission to arbitration." GREGORY, J.

The agreement is in form nothing more than an ordinary agreement for the sale and purchase of real estate, and the only mention of the Public Works Act is in the recital and in paragraph 2. The recital is as follows:

"WHEREAS His Honour the Lieutenant-Governor in Council of the Province of British Columbia, has deemed it necessary to acquire and take possession of the lands and premises hereinafter described for the purpose of the construction of the Johnson Street Bridge, so called, in the City of Victoria, being a proposed public work of the said Province, and has requested such possession thereof without delaying to give the notice required under the provisions of the Public Works Act of the said Province, which possession the vendor has in consideration of the terms of this agreement agreed to give."

Paragraph 2 of the agreement is as follows:

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"The purchase price of the said lands shall be determined by arbitration, as near as may be in the manner provided by the Public Works Act, chapter 189, of the Revised Statutes of British Columbia 1911, for the determination of disputes arising touching claims for money or compensation under the said Act; and except as in this agreement is otherwise provided, the provisions of that Act relating to the appointment of arbitrators, the conduct of the arbitration, and the making of the award thereunder shall *mutatis mutandis* apply to the arbitration under this agreement for the determination of the said purchase price."

Section 3 of the Act enables the Crown to take possession of any lands required for public works and to enter into any contract with reference to acquiring the same, through the proper minister, and if the minister and Mr. Mackay had agreed upon the contract price or value of the lands, and inserted the same in the contract, instead of the provision for the ascertainment of the same by arbitration, it will not be disputed, I suppose, that Mr. Mackay could only enforce the contract in the usual way by petition of right, and the contract would be governed by all the provisions of the Act governing contracts made by the minister. The contract itself does not purport to make the arbitration or submission in all respects similar to a submission under the Public Works Act, for it only provides that "Except as in this agreement is otherwise provided, the provisions of that Act relating to the appointment of arbitrators, the conduct of the arbitration and the making of the award," etc., apply to the arbitration for the determination of the purchase price. It does not bring into operation any other section of the Act, and says nothing about enforcing the award when made. It is to be noted, too, that the provisions of the agreement are in a number of respects different from the provisions of the Act, *e.g.*, the time for the payment of the purchase price, the time for taking possession of the lands, the provisions as to the payment of the cost of the arbitration, etc.

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The only arbitration provided for by the Public Works Act is one "when any dispute shall arise": see section 15. There has been no dispute between Mr. Mackay and the Crown. They have simply agreed in advance that the value of the lands to be conveyed shall be arrived at in a certain way, and that there is a very grave difference between the two: see the remarks of the Master of the Rolls, Sir John Romilly, in *Collins* v. *Collins*

(1858), 26 Beav. 306 at p. 312 *et seq.;* see also the remarks of Lord Esher, M.R. in *In re Carus-Wilson and Greene* (1886), 18 Q.B.D. 7.

One is a proceeding to prevent disputes arising and the other one to settle disputes that have arisen or may arise, and it is the latter which is an arbitration in the proper sense of the term. The fact that the agreement has been made a Rule of Court amounts to nothing; that was done in the *Carus-Wilson and Greene* case just referred to, and see *Re City of Toronto Leader Lane Arbitration* (1889), 13 Pr. 166 at p. 171, where Street, J. says:

"Such an order is merely a necessary form in order to give the Court jurisdiction over the award; it binds no one, it concedes nothing."

It is made *ex parte* and without notice, so it is difficult to see how it could adversely affect the rights of any person who has not been heard.

The agreement is not a submission under our Arbitration Act. Section 2 of that Act provides that "submission" means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not.

The fact that the agreement calls the method by which the sale price is to be arrived at "an arbitration" does not make it an arbitration enforcible by motion like an ordinary award. The Land Clauses Consolidation Act, 1845, 8 & 9 Vict., c. 18, and The Public Health Act, 1875, 38 & 39 Vict., c. 55, provides means for assessing damages, etc., by arbitration, and yet the awards thereunder are not enforcible summarily. *Re Newbold and The Metropolitan Railway Co.* (1863), 14 C.B. (N.S.) 405; *Brierley Hill Local Board* v. *Pearsall* (1884), 9 App. Cas. 595, but the damages or compensation being ascertained, the award should be enforced by action.

The decision under the Arbitration Act, 9 & 10 Wm. III., c. 15, provides another illustration of the impossibility of enforcing an award of arbitrators, where there has been nothing in dispute, as differences or controversy between the parties: *Hemingway's Arbitration* (1834), in note to *Parkes* v. *Smith* (1850), 15 Q.B. 297 at p. 305; also reported in 3 N. & M. 860.

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While the language in all the statutes under which these decisions were given is undoubtedly different from the language of our Public Works and Arbitration Acts, they are all alike in this respect, that it is an essential preliminary to summary enforcement of an award under them that there must be a dispute, difference or controversy between the parties. In Halsbury's Laws of England, Vol. 1, p. 440, the cases are collected which shew the distinction between an agreement for valuation and a submission by arbitration.

The case of *In re Northern Counties and Vancouver City* (1901), 8 B.C. 338, although under another statute, is to the same effect. Counsel attempted to distinguish these cases on the ground of the differences in the statutes and emphasized the fact that there was no right of appeal under the English statutes, and alleged that there was such a right in British Columbia. Such a difference might reasonably be a good ground for adopting a different practice, as all questions could be raised on the arbitration. He referred to our practice under the Railway Act, Cap. 194, R.S.B.C. 1911. Section 68 of that Act provides for an appeal "upon any question of law or fact." He relied strongly on the case of *Sweinsson* v. *Rural Municipality of Charleswood* (1917), 3 W.W.R. 201, which seems to question the decision in 8 B.C. 338. That case was under The Municipal Act of Manitoba, Cap. 133, R.S.M. 1913, and

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The Arbitration Act of the same Province, Cap. 9 of the same statute, subsection (*h*) of section 4 of which provides that "the award . . . . shall be final and binding," subject to the provisions of sections 13 and 22. Section 13 deals with the misconduct of an arbitrator, and section 22 makes the most sweeping provision for an appeal to the Court of Appeal, and gives that Court right to "reverse, alter or vary the award . . . . in any manner that seems just."

The case of *Re Colquhoun and the Town of Berlin* (1880), 44 U.C.Q.B. 631, referred to in the *Sweinsson* case at p. 208, is governed by practically similar sections: see p. 209.

It is, I think, open to question whether the Arbitration Act has anything to do with the present case, as section 30 of the Public Works Act provides for the making of the submission a

Rule of Court, and so it seems to be complete in itself, but assuming that sections 24 and 25 of the Arbitration Act do bring in the submission under that Act, then we look in vain for any general right of appeal given by it. Clause (*h*) of the Schedule provides that the award shall be "final and binding." There is no qualification whatever to this, and the Schedule is by section 4 made a provision in all submissions. The only right in the nature of an appeal is that given by section 14, which is limited to removing an arbitrator who has misconducted himself, or setting aside an award on the same ground or upon the ground that the award or arbitration has been improperly procured.

Mr. *Carter,* for the Crown, also referred to the following as authority for the proposition that where there is a substantial question raised as to the right to recover at all, it should be done by action: *Clemons* v. *St. Andrews* (1896), 11 Man. L.R. 111; *Brierley Hill Local Board* v. *Pearsall* (1884), 9 App. Cas. 595; Russell on Arbitration and Award, 8th Ed., pp. 295, 298, 309 and 341. He raised a serious question as to the binding effect of the agreement on the Crown, but in the view I have taken, it is unnecessary to discuss that question.

GREGORY, J.

While I have come to the conclusion that the summons must be dismissed, I feel that I may be permitted to follow the example of Prendergast, J. in *Canadian Domestic Engineering Co.* v. *Regem* (1919), 2 W.W.R. 762, and recommend that some consideration be shewn by the Crown to Mr. Mackay, for there appears to be no question that he acted *bona fide* throughout and has been put to a great deal of expense through no fault of his, and it is equally clear that he had good reason for believing that the administration with whom he was dealing fully intended to carry out the contract and pay the award.

From this decision Mr. Mackay appealed. The appeal was argued at Victoria on the 31st of January and 1st and 2nd of February, 1921, before MACDONALD, C.J.A., GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Harold B. Robertson, for appellant: This is an application under section 15 of the Arbitration Act. They say that the

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agreement between Mackay and the Public Works Department does not come within the Arbitration Act, and as the award only fixed the amount, and not the liability to pay, the Courts will not enforce payment under said section 15. We paid half the cost of the arbitration and of the umpire. We were unable to obtain the amount of the award from the incoming Government and then applied for a petition of right, which was refused. They say we lack an order in council authorizing the purchase, and secondly, there is absence of a seal. My contention is the award is good on its face: see *Rex* v. *Vancouver Lumber Co.* (1920), 1 W.W.R. 255. By reason of sections 3 to 11 of the Public Works Act, we contend the minister has full power to acquire lands. He may determine to acquire land without the passage of an order in council: see *Morris & Bastert, Limited* v. *Loughborough Corporation* (1908), 1 K.B. 205 at pp. 215-6; *The Gresham Blank Book Co.* v. *Regem* (1912), 14 Ex. C.R. 236 at p. 239. On the question of presumption of authority see *Marshall* v. *Lamb* (1843), 5 Q.B. 115. As to the necessity of a seal see Halsbury's Laws of England, Vol. 8, p. 308, par. 697; *Bailiffs of Yarmouth and Cowper's Case* (1629), Godb. 439; *Reg.* v. *The Inhabitants of St. Paul* (1845), 7 Q.B. 232; *In re Sandilands* (1871), L.R. 6 C.P. 411 at p. 413. Crown lands can only be disposed of by order in council, but that is provided by statute, and is different from the present case. The minister is the agent of the Crown, and may enter into this agreement. Their case rests on the argument that the minister acted without the sale being authorized by order in council, but the minister having done what he did under the Act creates an estoppel, and we paid half the arbitration fees: see *Attorney-General to the Prince of Wales* v. *Collom* (1916), 2 K.B. 193. There is estoppel by payment of money: see *Plimmer* v. *Mayor, &c., of Wellington* (1884), 9 App. Cas. 699. We have an award and we paid $150: see *Attorney-General for Trinidad and Tobago* v. *Bourne* (1895), A.C. 83; *Kennard* v. *Harris* (1824), 2 B. & C. 801; *Powis* v. *City of Vancouver* (1916), 23 B.C. 180 at p. 186. On the question of validation of the contract see *Attorney-General of British Columbia* v. *Bailey* (1919), 27 B.C. 305 at pp.

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318-9. It is not necessary for us to inquire whether an order in council had been passed: see *Nowell* v. *Mayor, &c., of Worcester* (1854), 9 Ex. 457. The two points dealt with by the learned judge were, first, that it was not an arbitration that could be enforced under section 15 of the Arbitration Act, but under section 3 of the Public Works Act he has power to contract and he did contract. Under section 2 he is the agent of the Government, and the arbitration is authorized by section 12 and an umpire is appointed: see *Re Hopper* (1867), L.R. 2 Q.B. 367 at p. 372 *et seq.* Secondly, there was no dispute as to the price of the property between the parties, and therefore nothing to arbitrate as contemplated by the Act, but the arbitration was regularly heard, and witnesses on both sides as to valuation: see *Re An Arbitration between Hammond and Waterton* (1890), 62 L.T. 808 at p. 809; *Taylor* v. *Yielding* (1912), 56 Sol. Jo. 253. As to whether the Court has jurisdiction to enforce the award under section 15 of the Arbitration Act see Archbold's Q.B. Practice, 13th Ed., Vol. 2, p. 1316. As to enforcing an award by making it a rule of the Court see also *Nichols* v. *Chalie* (1807), 14 Ves. 265 at p. 267; *Lucas* v. *Wilson* (1758), 2 Burr. 701; *Hales* v. *Taylor* (1726), 2 Str. 695; Archbold's Q.B. Practice, 13th Ed., Vol. 2, pp. 1252-6. On the question of jurisdiction to deal with the award see *In re Robert Evan Sproule* (1886), 12 S.C.R. 140; *The King* v. *The "Despatch"* (1915), 21 B.C. 503 at p. 504; *Sweinsson* v. *Rural Municipality of Charleswood* (1917), 3 W.W.R. 201 at p. 203; *Stalworth* v. *Inns* (1844), 13 M. & W. 466; *Dickenson* v. *Allsop* (1845), *ib.* 722; *In re Hall and Hinds* (1841), 2 Man. & G. 847. There are no disputes of fact here, just two questions of law, so that the matter can be dealt with as well by summons as by action: see *In re Powers. Lindsell* v. *Phillips* (1885), 30 Ch. D. 291 at p. 296; *Williams* v. *Local Union No. 1562 U.M.W. of A.* (1919), 1 W.W.R. 217 at p. 239; *Cameron* v. *Cuddy* (1914), A.C. 651 at p. 656; *Bentley* v. *Manchester, Sheffield and Lincolnshire Railway Company* (1891), 3 Ch. 222; *Ashby* v. *White et al.* (1703), 2 Ld. Raym. 938; 1 Sm. L.C., 12th Ed., 266 at p. 286. At law we have no right to bring an action, but by statute a remedy is

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provided. We should not be enforced to go without a remedy. We are asking the Court to proceed under section 15 of the Act, and we should not be refused because there may be another remedy. If we come under section 15 of the Arbitration Act, section 30 of the Public Works Act gives us the right to apply. The order can be enforced: see Chitty's Prerogatives of the Crown, 1820, pp. 348-9; Audette's Practice of the Exchequer Court, pp. 84-5.

Argument

Carter, for the Crown: The acquiring of land for the Crown must be done by order in council unless there is an Act authorizing the minister to enter into a contract. There must be a delegation of authority by statute. As to section 3 of the Public Works Act, if it gives the minister power to do what he did, the first part of the section is nugatory. Under that section there must be an order in council. There must be a resolution of the Council: see *Rex* v. *Vancouver Lumber Co.* (1920), 1 W.W.R. 255; *Canadian Domestic Engineering Co.* v. *Regem* (1919), 2 W.W.R. 762 at p. 777. *The Jacques-Cartier Bank* v. *The Queen* (1895), 25 S.C.R. 84; *Humphrey* v. *The Queen* (1892), 20 S.C.R. 591 at p. 593. As to the seal, a seal of a company cannot be changed except by resolution; in this case the seal of the department was in the hands of the chief clerk, and should have been used. The authority of the minister to act without an order in council is dealt with in *City of Swift Current* v. *Leslie et al.* (1916), 10 Sask. L.R. 1. As to estoppel, a recital in an agreement cannot bind the Province. The Governor in Council had nothing to do with the payment made: see Robertson's Civil Proceedings by and against the Crown, pp. 576 and 578; *Humphrey* v. *The Queen* (1891), 2 Ex. C.R. 386; (1892), 20 S.C.R. 591. The Arbitration Act does not apply to the enforcement of an award under the Public Works Act. Proceedings for enforcement under the Public Works Act are inconsistent with the Arbitration Act and therefore, as provided in section 25 of the Arbitration Act, does not apply. Under the Public Works Act the method of enforcement is under section 30. As to making the award a rule of the Court see Annual Practice, 1921, Vol. 2, p. 2181. This arbitration proceeded under the Public Works Act, and it was

necessary to make it a rule of the Court. You cannot get an attachment against the Crown. Stress should be put upon the words "unless inconsistent." This is not an arbitration within the meaning of the Public Works Act; it is simply an agreement for purchase and sale of land. This is not a submission, but merely a means of finding a price. This is only a term of the contract: see *In re Lee and Hemingway* (1834), 3 N. & M. 860; 15 Q.B. 304; *Re Arbitration between Joseph Walker and Local Board of Beckenham* (1884), 50 L.T. 207; *In re Carus-Wilson and Greene* (1886), 18 Q.B.D. 7; *Collins* v. *Collins* (1858), 26 Beav. 306; *Re Langman and Martin et al.* (1882), 46 U.C.Q.B. 569. An application under section 15 of the Arbitration Act does not lie when the award, as in this case, only ascertains the amount to be paid but not the liability to pay: see Russell on Arbitration and Award, 9th Ed., 322; *In re Northern Counties and Vancouver City* (1901), 8 B.C. 338; *Brierley Hill Local Board* v. *Pearsall* (1884), 9 App. Cas. 595; *Beckett* v. *Midland Railway Co.* (1866), L.R. 1 C.P. 241; *In re Willesden Local Board and Wright* (1896), 2 Q.B. 412 at p. 417; *Tourangeau* v. *Township of Sandwich West* (1920), 48 O.L.R. 306 at p. 318.

Argument

Robertson, in reply, referred to *In re Kitsilano Indian Reserve* (1918), 25 B.C. 505 at p. 508; Russell on Arbitration and Award, 10th Ed., 258-9, and *Re An Arbitration between Hammond and Waterton* (1890), 62 L.T. 808.

Cur. adv. vult.

29th April, 1921.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The appellant entered into what purports to be an agreement for sale of his lands to His Majesty, represented by the Honourable Thomas Taylor, then Provincial minister of public works, the acquisition of the land being for a purpose within the provisions of the Public Works Act. The agreement recites that: "Whereas His Honour the Lieutenant-Governor in Council of the Province of British Columbia has deemed it necessary to acquire and take possession of the lands [in question]," it is witnessed that the parties to the agreement, namely, the appellant, as vendor, and His Majesty,

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as purchaser, agreed to the terms and conditions in the agreement mentioned.

The power to acquire land for the purposes aforesaid is given by section 3 of the Public Works Act, Cap. 189, R.S.B.C. 1911. The relevant parts of that section are as follows:

"The Lieutenant-Governor-in-Council may acquire and take possession, for and in the name of His Majesty, of any land . . . . which is in his judgment necessary for the use . . . . of any public work . . . . and the said minister [of Public Works] may, for such purpose, contract with all persons."

The appellant has failed to prove that an order in council was passed authorizing the acquisition of this land. The evidence is all to the contrary. The question then is: Can the agreement with the minister be enforced when not founded upon an order in council? If it can, then the reference to the Lieutenant-Governor in Council mentioned above is negligible, and the exercise of his "judgment" in the matter may be dispensed with. In my opinion, that is not the true meaning of section 3, read either alone or in conjunction with the rest of the Act. The statute is a public one, and all persons entering into contracts of the character aforesaid are presumed to be acquainted with it.

There was some suggestion in argument that the transaction had the approval of the Cabinet, but there was no suggestion that it had the assent of, or had ever been brought to the notice of the Lieutenant-Governor, so that it is not necessary here to consider whether a verbal order in council, something of which I have never heard, if proved, would have sustained the contract. In my opinion, the Legislature has clearly made it a condition to the acquisition of such lands as are in question, that the decision of the Council should be signified in the customary way by minutes of council, which should then be duly assented to by the Lieutenant-Governor, and that in the absence of such, the Province should not be put under obligation to the party with whom the minister purported to contract.

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None of the several cases to which we were referred are of much assistance, since the decision of the appeal depends upon the construction to be placed on the language of the statute itself. In any case, the appellant cannot get much comfort

from them. In this view of the case it becomes unnecessary to consider the other points raised in the argument.

I would dismiss the appeal.

GREGORY, J.

GALLIHER, J.A.: I have given very careful consideration to the various points argued by Mr. *Robertson,* to the Public Works Act, and the various authorities cited, and it appears to me that the insuperable obstacle in the way of the applicant's success lies in the fact that there was no order in council in the first place, and secondly, no ratification of the minister's act by any body competent to ratify it. These matters have been dealt with by the Chief Justice, in whose judgment I concur. In this view it becomes unnecessary to deal with the other questions upon which the judgment below proceeded.

The appeal should be dismissed.

GALLIHER, J.A.

MCPHILLIPS, J.A.: This appeal involves the consideration of a point of law of some nicety, and at first sight would seem to present an insuperable barrier to the success of the appellant. I have, however, after careful consideration, arrived at the conclusion that the Public Works Act (R.S.B.C. 1911, Cap. 189) in its terms is so framed that it is not a condition precedent to the entry into a contract by the minister of public works that there should first be passed an order in council where lands are to be acquired and possession taken of them, and even if I were wrong in this, then I am of the opinion that in view of all the surrounding facts, it is not open to the Crown to now contend that by reason of the non-passage of an order in council, all is abortive. Section 3 of the Act reads as follows:

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"The Lieutenant-Governor in Council may acquire and take possession, for and in the name of His Majesty, of any land, tenements, hereditaments, streams, waters, watercourses, fences, and walls, the appropriation of which is in his judgment necessary for the use, construction, or maintenance of any public work or building, or for the use, construction, or maintenance of hydraulic privileges made or created by, from, or at any public work, or for the enlargement of or improvement of any public work, or for obtaining better access thereto; or for the purpose of establishing a reserve for the protection of any animals, birds or fishes; and the said Minister may, for such purpose, contract with all persons, guardians, tutors, curators, and trustees, whatsoever, not only for themselves, their heirs, successors, executors, administrators, and assigns, but also

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for and on behalf of those whom they represent, whether infants, absentees, lunatics, married women, or other persons otherwise incapable of contracting, possessed of, or interested in such lands, real property, streams, water and watercourses; and all such contracts, and all conveyances or other instruments made in pursuance of any such contract, shall be valid to all intents and purposes whatsoever."

It is also useful to note the interpretation of "Minister" as set forth in section 2 of the Act, which reads as follows:

"In the construction of this Act—'Minister,' 'the Minister,' 'the said Minister,' means Minister of Public Works of this Provnice or the person acting as such for the time being, and every person duly authorized by the Lieutenant-Governor in Council to act as and for the said Minister, and any agent duly appointed in writing by the said Minister for the purposes of this Act."

It is only necessary to give careful reading to the provisions of the Act and it is apparent that the minister of public works has been given by the Legislature, in apt words, the authority to enter into contracts for the acquirement of and the taking possession of lands. The contract of the minister is the statutory method fixed for the Lieutenant-Governor in Council, *i.e.*, the Crown, to acquire the lands and possession thereof. It is to be noted that in section 3 of the Act we have these words, "and the said minister may for such purpose contract with all persons." Now, what purpose does the language refer to? Unquestionably the purpose is, that "the Lieutenant-Governor in Council may acquire and take possession, for and in the name of His Majesty of any land" (these are the opening words of the section) which the minister has contracted for, and it will be seen that the section further provides, in respect to the contracts authorized to be entered into, that, "all such contracts and all conveyances or other instruments made in pursuance of any such contract shall be valid to all intents and purposes whatsoever."

MCPHILLIPS, J.A.

Admittedly a contract was entered into, it is a well constituted submission to arbitration, and it was in the following terms: [The learned judge quoted the contract in full and continued.]

There can be no question that it was the intention of the Crown to acquire the lands. In fact, the Crown was by the agreement given possession of the lands. The Government of

British Columbia desired to acquire the lands and take possession of them in the carrying out of the construction of the Johnson Street bridge, a public work, and following the agreement, arbitrators were duly appointed by the Crown and the appellant, and an award was made in due course.

Some argument was directed to the point that it was not really an arbitration, as there were no disputes or differences, merely the arriving at the value of the lands. It is a fair inference, if there is nothing more, that there must have been disputes or differences of opinion, otherwise what need for an arbitration? If I think it necessary I will later advert to this point. The award was in the following terms:

"We, the undersigned, the arbitrators appointed herein, award that the sum of $46,800 shall be paid to the said K. S. Munn for the purchase of lot one hundred and eighty-two 'B' (182B); and we award that the sum of $107,400 shall be paid to the said N. F. Mackay for the purchase of lots one hundred and eighty-two 'A' (182A) and one hundred and eighty-two 'G' (182G)."

Later some correspondence took place between the solicitors for the appellant and the Honourable W. J. Bowser, K.C., the Prime Minister, which reads as follows: [The learned judge, after quoting the correspondence, continued.]

It is to be observed that the Prime Minister says "we are satisfied with the award," and the fact is that the Crown was represented by counsel at the arbitration, and no question of the validity of the transaction is set up until after a change of Government takes place. Then, following a petition of right filed by the appellant, a *fiat* is refused upon the ground that there was no supporting order in council, that the agreement for the acquisition and possession of the lands was not sealed with the seal of the department of public works, that there were no accepted plans for the bridge, and the proposed acquisition of the lands was not justified by the conditions then or previously existing. Later the submission to arbitration was made, in accordance with the Supreme Court practice, a rule of the Supreme Court, the order reading as follows: [The learned judge quoted the order of GREGORY, J. and continued.]

Then proceedings were taken against the Crown by way of originating summons to enforce the award. The application

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came on for hearing before Mr. Justice GREGORY, and that learned judge dismissed the summons to enforce the award, and from that judgment this appeal is taken.

The appellant, if not able to succeed in enforcing the award under the provisions of the Public Works Act and the Arbitration Act (R.S.B.C. 1911, Cap. 11) is without remedy, as without leave from the Crown, and that leave has been already refused, no action can be brought against the Crown whereby any enforcible judgment against the Crown can be imposed.

In this connection I would refer to what Lord Buckmaster said in *Esquimalt and Nanaimo Railway Company* v. *Wilson* (1919), 3 W.W.R. 961 at p. 967; [(1920), A.C. 358 at p. 367]:

> "In proceedings for which a petition of right is the proper course, the Courts, as already pointed out, would undoubtedly decline to entertain an action brought against the Attorney-General in the ordinary way."

I refer to this point because the learned counsel appearing at this Bar and representing the Crown submitted that the proper course for the appellant to take was to sue upon the award by way of an ordinary action at law, and I would further refer to what Sir George Farwell said in delivering the judgment of their Lordships of the Privy Council in the *Eastern Trust Company* v. *McKenzie, Mann & Co., Limited* (1915), A.C. 750 at pp. 759-60.

The present case is one to which the maxim *Omnia præsumuntur rite et solenniter esse acta* is applicable (see *per* Pollock, C.B., *Reed* v. *Lamb* (1860), 6 H. & N. 75 at pp. 85-6; *per* Crompton, J., *Dawson* v. *Willoughby* (1865), 5 B. & S. 920 at p. 924), but it may be said, of course, if necessity there be for an order in council, that the contrary is shewn (see *per* Story, J., *United States Bank* v. *Dandridge* (1827), 12 Wheat. 64 at pp. 69, 70; *Davies* v. *Pratt* (1855), 17 C.B. 183; *Earl of Derby* v. *Bury Improvement Commissioners* (1869), L.R. 4 Ex. 222 at p. 226). I do not consider that *Rex* v. *Vancouver Lumber Co.* (1920), 1 W.W.R. 255 is conclusive in the present case against the appellant, where it was said in the judgment of their Lordships of the Privy Council, delivered by Viscount Haldane at p. 256, that

> "The grant of this lease was made, not under the Great Seal of Canada,

but under a statutory authority, conferred by 57 & 58 Vict. (Canada), ch. 26, which provided that the Governor in Council might authorize the sale or lease of any lands vested in Her Majesty which were not required for public purposes, and for the sale or lease of which there was no other provision in the law. It is obvious that this provision made it necessary that the requisite authority should be conferred by an order in council."

The statute (57 & 58 Vict. (Canada), Ch. 26) there under review was quite different in its terms, reading as follows:

"3. The Governor in Council may authorize the sale or lease of any lands vested in Her Majesty which were not required for public purposes, and for the sale or lease of which there is no other provision in the law."

Here, in the Public Works Act, there is provision made in the statute in precise terms defining the *modus operandi* and giving to the minister the statutory authority to proceed, acquire and take possession of land for the Crown, and the subject was in no way called to look for or deal with any other authority.

The whole question is: Had the minister statutory authority to do what he did? It cannot be said that it is unknown to the law that there can be the sale of lands of the Crown or purchase of lands on behalf of the Crown without an order in council supporting the transaction, notably the Commissioners of Woods, Forests and Land Revenues in England may do so; the statute gives authority (Crown Lands Act, 1829, 10 Geo. IV., c. 50), it is true in some cases subject to the consent of the treasury. The Commissioners of His Majesty's Works and Public Buildings in England are constituted a corporation, the First Commissioner may be a member of the House of Commons (Crown Lands Act, 1851, 14 & 15 Vict., c. 42, s. 20) and the *ex officio* commissioners are invariably members of the ministry, and the commissioners of works may purchase and sell lands and no order in council would appear to be necessary (Halsbury's Laws of England, Vol. 7, pp. 132, 136).

Numerous instances might be cited, but after all, the question must be determined upon the particular statute law under which the authority is claimed, and little assistance can be gleaned by references to cases based on other statute law. Lord Parmoor, in *City of London Corporation* v. *Associated Newspapers, Limited* (1915), A.C. 674 at p. 704 said:

"I do not think that cases decided on other Acts have much bearing on

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the construction of the Acts or sections on which the present case depends. So far, however, as it is allowable to be guided by decisions in analogous cases I agree . . . ."

It is helpful to observe what the statute law is in England in the course of arriving at a decision of what the intention of the Legislature was, as undoubtedly the Public Works Act as well as the Arbitration Act were framed upon analogous statute law of England. Section 3 of the Public Works Act is a statutory delegation of authority to the minister; but admittedly the minister must exercise the authority in accordance with the statutory provisions and in the spirit of the statute. This, in my opinion, the facts amply shew (*Richards* v. *Attorney-General of Jamaica* (1848), 6 Moore, P.C. 381 at p. 399; *Marshall* v. *Lamb* (1843), 5 Q.B. 114; *The Gresham Blank Book Co.* v. *Regem* (1912), 14 Ex. C.R. 236).

The Public Works Act provides for arbitration, and the Arbitration Act is applicable generally to all arbitrations under any Act (*In re Jackson and North Vancouver* (1914), 19 B.C. 147), and specifically to arbitrations to which the Crown is a party (R.S.B.C. 1911, Cap. 11, Sec. 24). Section 37 of the Public Works Act, empowering the minister to enter into contracts, calls for the seal of "his department." The minister was not aware that there was any official seal, and I do not consider that it was established there was. He used the ordinary wafer seal, and upon the authorities it is clear, in my opinion, that the contract was effectively and validly sealed, and it is to be observed that the Department of Public Works Act (R.S.B.C. 1911, Cap. 190) does not in its provisions mention any official seal.

Finally, upon all the facts of the present case, even apart from the view expressed that the statute law supports the validity of the contract and the award, the facts support estoppel against the Crown, and I would refer to what Atkin, J. (now Lord Justice Atkin) said in *Attorney-General to the Prince of Wales* v. *Collom* (1916), 2 K.B. 193 at p. 204.

The award, in my opinion, was a valid award and is binding upon the Crown, and not having been moved against within the required period (*In re Kitsilano Indian Reserve* (1918), 25 B.C. 505 at p. 508), and the submission having been made a

Rule of Court, the award is enforcible, which, with great respect to the learned trial judge, should have been the judgment of the Court below (*In re Harper and Great Eastern Railway Co.* (1875), L.R. 20 Eq. 39).

No question of want of title was raised, and as I understand it, it is admitted that good title can be given the Crown, and that being the case (*Creelman* v. *Hudson Bay Insurance Company* (1919), 88 L.J., P.C. 197; (1920), A.C. 194), the appellant is entitled to be paid by the Crown the compensation awarded. Erle, C.J., in *Re Newbold & The Metropolitan Railway Co.* (1863), 14 C.B. (N.S.) 405, said at p. 411:

"As at present advised, I think the award of arbitrators or an umpire under this Act stands in the same position as the assessment of damages by a compensation jury."

The arbitration here was an effective one, in my opinion, and in pursuance of the statute law referred to binding upon the Crown, and the aidance of the Court was rightly and properly resorted to. It is instructive upon this point to refer to *Cameron* v. *Cuddy* (1914), A.C. 651. The head-note reads:

"In an action upon a contract whereby the parties have provided for arbitration as a means of ascertaining the amount due under the contract, if arbitration proceedings have proved abortive it is the duty of the Court to supply the defect by itself ascertaining the amount due,"

and I would in particular refer to what Lord Shaw of Dumfermline said at p. 656.

The objection here pressed on the part of the Crown, that because *simpliciter,* no order in council was passed there is no liability, admittedly would have force in most cases, but I have endeavoured to shew that it is without force in the present case. One maxim that is pertinent at the moment is that referred to in Broom's Legal Maxims, 8th Ed., p. 34: *Rex non debet esse sub homine, sed sub Deo et sub lege, quia lex facit regem* (Bract. Lib. i. fo. 5; 12 Rep. 65.)—The King is under no man, yet he is under God and the law, for the law makes the King." It is true there is another maxim which reads: *"Rex non potest peccare.* (2 Rolle, R. 304.)—The King can do no wrong" (Broom, p. 39), but here we have the requisite statute law to satisfy the further maxim: *"Roy n'est lie per ascun statute, si il ne soit expressement nosme.* (Jenk. Cent. 307.)—The King is

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not bound by any statute, if he be not expressly named to be so bound" (Broom, p. 58).

As we have the Crown specifically named, and the contract to be enforced is the contract of the minister authorized by Parliament to contract, it follows as a matter of necessary legal sequence that in the present case the Crown is bound by the contract and also bound by the award.

I would allow the appeal.

EBERTS, J.A. would dismiss the appeal.

Appeal dismissed, McPhillips, J.A. dissenting.

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

Solicitor for respondents: *W. D. Carter.*

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MACINNES v. DALY: GWYNN, GARNISHEE.

Winding-up—Solicitor engaged by liquidator—Costs—Personal liability of liquidator—Set-off of solictor's debt to company—Garnishee—R.S.C. 1906, Cap. 144, Sec. 38.

The solicitor appointed by the liquidator of a company under authorization by the Court, pursuant to section 38 of the Winding-up Act, has no claim against the official liquidator personally for his costs, but must look to the assets of the company in liquidation, and as against a garnishing creditor of the solicitor, the liquidator may set off against the costs owing to the solicitor a debt owing by the solicitor to the company.

Statement

APPEAL by the garnishee from an order of MORRISON, J., of the 22nd of February, 1921, that the garnishee pay $750, being moneys due by the garnishee to the defendant, and attached under attaching order of the 12th of January, 1921. The plaintiff obtained judgment against the defendant on the

21st of December, 1920, for $2,549.91. The garnishee, who was official liquidator of the Dominion Trust Company, had prepared a bill for submission to the Dominion Parliament for passage in connection with the said liquidation, and in his capacity as liquidator he employed Charles Wilson, K.C., to represent the Dominion Trust Company in liquidation in connection with the passage of the Bill. Mr. Wilson, on leaving Ottawa, employed the defendant to complete the business in Ottawa in connection with the passage of the said Bill, and the defendant rendered a bill for his services for $750. The garnishee claimed he was not personally liable, but the said indebtedness to the defendant was a debt of the Dominion Trust Company. The learned trial judge made the order as applied for, finding that in the circumstances the garnishee was personally liable, following *Burt* v. *Bull and Ward* (1894), 64 L.J., Q.B. 232.

Statement

The appeal was argued at Vancouver on the 8th of April, 1921, before MACDONALD, C.J.A., GALLIHER and EBERTS, JJ.A.

Wilson, K.C., for appellant: Gwynn, the garnishee, gave Daly credit for the $750, off-setting a portion of the debt due from Daly to the company. The liquidator is not personally liable for Daly's fees. He would have to pay Daly before he paid himself and to that extent only is he liable: see *Cole* v. *Eley* (1894), 2 Q.B. 180 at p. 187. Daly could not maintain an action against Gwynn, and that is the test: see *Webster* v. *Webster* (1862), 31 Beav. 393; 135 R.R. 484. There can be no action against the liquidator without leave of the Court, and this applies to garnishee proceedings. He entered into the ordinary contract of retaining a solicitor: see *Graham* v. *Edge* (1888), 20 Q.B.D. 538; *In re Ebsworth & Tidy's Contract* (1889), 42 Ch. D. 23 at p. 38.

Argument

J. A. MacInnes, for respondent: A liquidator acts as an officer of the Court and is personally responsible for all his acts. We contend we come under the case of *Burt, Boulton & Hayward* v. *Bull* (1895), 1 Q.B. 276; *Boehm* v. *Goodall* (1911), 1 Ch. 155; *Gooch's Case* (1872), 7 Chy. App. 207 at p. 211.

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A liquidator is always a receiver, and he incurred liability as an officer of the Court. It was a step taken in the course of the winding-up. If there is a personal liability no set-off would arise: see *Nelson* v. *Roberts* (1893), 69 L.T. 352.

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Argument

Wilson, in reply: There is a marked distinction between a receiver and a liquidator: see Palmer's Company Precedents, Part II., p. 385. A receiver is at times held personally responsible, but never a liquidator: see *In re Anglo-Moravian Hungarian Junction Railway Co. Ex parte Watkin* (1875), 1 Ch. D. 130.

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MACDONALD, C.J.A.: In proceedings under the Winding-up Act, Cap. 144, R.S.C. 1906, the liquidator was authorized by the Court, pursuant to section 38 of the Act, to appoint a solicitor, and, acting on this authority, he appointed the defendant to promote a Bill before Parliament to facilitate the winding-up. The plaintiff, a creditor of the defendant, sued him, and attached the costs owing to him by the liquidator of the company in liquidation, the Dominion Trust Company. The defendant was largely indebted to the company, and the liquidator claimed to set-off the said indebtedness against these costs. Against this claim it was argued that the debt attached was one owing by the liquidator personally and that there could be no set-off.

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This was the sole question argued in the appeal. Mr. *Wilson* relied strongly on *In re Anglo-Moravian Hungarian Junction Railway Co. Ex parte Watkin* (1875), 1 Ch. D. 130, and Mr. *MacInnes,* counsel for the respondent, relied with equal confidence upon *Burt* v. *Bull and Ward* (1894), 64 L.J., Q.B. 232. There was no special agreement between the liquidator and the solicitor in respect of the costs. It was decided in *Burt* v. *Bull and Ward, supra,* that a receiver and manager appointed by the Court to carry on an insolvent's business and who retained a solicitor in connection therewith, was personally liable to the solicitor, though he might recoup himself out of the estate. The decision in *Ex parte Watkin, supra,* was that an

official liquidator who appointed a solicitor with the approval of the Court, was not personally liable to the solicitor for his costs, but that the solicitor must be held to have contracted, relying upon the assets of the estate. The decision in each case was that of the Court of Appeal.

No reference to the earlier case was made in the later one, so that unless the earlier one was overlooked, and I cannot think that it was, the two cases are not to be regarded as parallel ones. In other words, a different rule with respect to the rights of the solicitor has been laid down where he was solicitor in winding-up to that which was adopted where he was the solicitor for a receiver and manager. It is impossible to read the reasons of the four judges who decided *Ex parte Watkin, supra,* and the judgment of Vice-Chancellor Bacon in a previous case approved by the Court of Appeal, without seeing that the rule has been clearly laid down that in compulsory winding-up, as well as in voluntary winding-up, the solicitor appointed with the approval of the Court is not the solicitor of the liquidator, but must look to the assets of the company in liquidation for his costs, which the Act makes a preferential claim. This result was arrived at with due consideration of the statute which governed such proceedings, namely, the Companies Act, 1862.

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The sections of our Winding-up Act corresponding to the ones referred to in the English case are practically the same as those of the Companies Act of 1862. There is no distinction between the facts of the two cases, with one exception, in *Ex parte Watkin* the solicitor was appointed by the liquidator, which appointment was approved by the Court. Here the liquidator was authorized by the Court, pursuant to said section 38, to appoint a solicitor. I cannot see in that circumstance any material distinction between the two cases. The point in both is that the solicitor was appointed in pursuance of the statute.

I would therefore allow the appeal.

GALLIHER, J.A.: Mr. *MacInnes* frankly stated in the argument that if he was not within the decision of *Burt* v. *Bull and Ward* (1894), 64 L.J., Q.B. 232, that he was out of Court. This

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was a case where a manager and receiver appointed by the Court (in an action by debenture-holders) for the purpose of carrying on the business was held personally responsible for timber ordered from the plaintiff in the course of carrying on the business, and is a decision of the Court of Appeal composed of Lord Esher, M.R., Lopes and Rigby, L.JJ.

In *Nelson* v. *Roberts* (1893), 69 L.T. 352, the manager and receiver, who was also executor of the estate, in the course of his duties as such receiver, purchased certain lambs from a debtor of the estate. In an action for the price of the lambs, the Court, Mather and Wright, JJ., held the liability was a personal one, and that the receiver could not set off the debt due the estate as against the price of the lambs.

Both these cases were decided subsequently to *In re Anglo-Moravian Hungarian Junction Railway Co. Ex parte Watkin* (1875), 1 Ch. D. 130, and in neither case was reference made to it. In the *Anglo-Moravian* case, *supra,* it was decided that

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a solicitor appointed by the official liquidator with the sanction of the Court, could claim only as against the assets of the company. That was a case of compulsory winding-up wherein the provisions of the Companies Act came up for consideration. [The learned judge here quoted the judgment of Brett, J. at p. 135 to the end of the first paragraph on p. 136, and continued].

Similar provisions have to be considered in the case at bar, but did not have to be considered in the *Burt* case or in *Nelson* v. *Roberts, supra,* which probably accounts for the fact that in neither of these cases was the *Anglo-Moravian* case referred to.

It appears to me that the *Anglo-Moravian* case is directly in point here, and it is the decision of a very able Court and should be followed.

The appeal should be allowed.

EBERTS, J.A.

EBERTS, J.A. would allow the appeal.

Appeal allowed.

Solicitor for appellant: *Geo. A. Grant.*
Solicitor for respondent MacInnes: *C. S. Arnold.*
Solicitor for respondent Daly: *A. Whealler.*

THE WESTERN CANADIAN RANCHING COMPANY LIMITED v. THE DEPARTMENT OF INDIAN AFFAIRS AND THE BOARD OF INVESTIGATION UNDER WATER ACT.

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THE WESTERN CANADIAN RANCHING CO. v. DEPARTMENT OF INDIAN AFFAIRS

Water and watercourses—Record—Irrigation—Indian Reservation—Board of Investigation—Jurisdiction—B.C. Stats. 1914, Cap. 81, Sec. 288.

The Western Canadian Ranching Company Limited held two water records from St. Paul's Creek, dated respectively the 9th and 14th of December, 1869, at the bottom of the first there being a foot-note inserted by the official issuing it as follows: "This record is made subject to the rights of the Indians of using the water on the Reserve opposite Kamloops." In 1877 the Indian Reserves Commission, in its report fixing the boundaries of the Kamloops Reserve, added the words: "The prior right of the Indians as the oldest owners or occupiers of the soil to all the water which they require or may require for irrigation and other purposes from St. Paul's Creek and its sources and northern tributary is, so far as the Commissioners have authority in the matter, declared and confirmed to them," and in the schedule of the annual report of the Department of Indian Affairs of the 30th of June, 1902, under "Remarks," is the item, "Five hundred inches of water recorded from St. Paul's Creek, and all the water from all sources of water supply on the reserve. Allotted by Joint Reserve Commission, July 29, 1877." On the claim of the Department of Indian Affairs to rights to the water of St. Paul's Creek before the Board of Investigation under the Water Act, 1914, the Board granted the Department of Indian Affairs a water licence out of St. Paul's Creek for certain volumes of water for irrigation and domestic purposes for use on the Indian Reserve, with priority as of the 8th of December, 1869. On appeal by the Western Canadian Ranching Company Limited:—

Held, that the Board of Investigation had acted without jurisdiction in granting a licence to the Department of Indian Affairs to divert water from St. Paul's Creek for use on the Indian Reserve.

Per MACDONALD, C.J.A.: The powers conferred on the Board as to adjudicating on claims under section 288 of the Act do not extend to a claim not founded upon a record or right obtained pursuant to an Act or Ordinance, and the Indians' claim was not so founded.

Statement

APPEAL by the Western Canadian Ranching Company Limited from an order of the 24th of December, 1920, of the Board of Investigation under the Water Act, wherein the Department of Indian Affairs was granted a water licence out of St.

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Paul's Creek for 2,226 acre-feet of water per annum for irrigation purposes, and 25,000 gallons per day for domestic purposes for use on the Kamloops Indian Reserve, with priority as of the 8th of December, 1869. The plaintiff Company are the holders of two water records that were issued respectively on the 9th and 14th of December, 1869. At the foot of the first record the official added the words:

"This record is made subject to the rights of the Indians of using the water on the Reserve opposite Kamloops."

In 1877 the Indian Reserves Commission fixed the boundary of the Kamloops Reserve and added the following words to their report:

"The prior right of the Indians as the oldest owners or occupiers of the soil to all the water which they require or may require for irrigation and other purposes from St. Paul's Creek and its sources and northern tributary is, so far as the Commissioners have authority in the matter, declared and confirmed to them."

Statement

Also in the schedule of "Indian Reserves" in the supplement to the annual report of the Department of Indian Affairs for the year ending June 30th, 1902, in the column headed "Remarks" is the following item:

"Five hundred inches of water recorded from St. Paul's Creek, and all the water from all sources of water-supply on the reserve. Allotted by Joint Reserve Commission, July 29, 1877."

No actual record of water under any Act was produced or proven. The plaintiff Company appealed mainly on the ground that the evidence did not shew that the claim of the Department of Indian Affairs was founded on any record granted for the use of water out of St. Paul's Creek.

The appeal was argued at Vancouver on the 7th of April, 1921, before MACDONALD, C.J.A., GALLIHER and EBERTS, JJ.A.

Argument

Mayers, for appellant: As to the effect of the Act of 1897 within the railway belt see *Burrard Power Company, Limited* v. *Regem* (1911), A.C. 87. Our rights were acquired in 1869, and the first question is whether the words in the record as to the rights of the Indians are of any effect. The only way to acquire a right to water is by the statutory method of staking, and excludes the power to put any other matter on the record.

The Act of 1888 shewed the Legislature recognized no right, and the Indians only had the same rights as other individuals owning land. The Board had no power to make the allotment, and there is nothing to shew in the books what legal rights they had: *see Morens* v. *Board of Investigation* (1915), 31 W.L.R. 468.

Carter, for the Attorney-General: The allotments were irregular and void. This was not in the railway belt.

W. C. Brown, for the Department of Indian Affairs: The land is in the railway belt. The record was validated by the Act of 1914. The plaintiff's record of 1869 only gave him the unoccupied waters, and this reserve was created in 1865, and we are entitled to certain waters by virtue of that Act, which is a prior right.

Argument

Mayers, in reply, referred to *Martley* v. *Carson* (1889), 20 S.C.R. 634.

Cur. adv. vult.

29th April, 1921.

MACDONALD, C.J.A.: The Ranching Company claims to be the present holders of two water records, the first issued to Robert Thompson and James Todd, on the 9th of December, 1869, and the second to John Holland on the 14th of December, 1869. At the foot of the first record, the official who made it added these words:

"This record is made subject to the rights of the Indians, of using the water on the Reserve opposite Kamloops."

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The Land Act, 1865, under which water records were then made, enacted that "Every person lawfully occupying and *bona fide* cultivating lands, may divert any unoccupied water" for certain specified purposes.

The Indian lands on which the water in dispute has been used were reserved for the use of the Kamloops tribe in 1866. No record under said Land Act, or any other Act or Ordinance, in favour of the Indians, or of any individuals of the tribe, has been produced or proven. It was indeed not argued that there was a record of that nature at all. In 1877 the Indian Reserves Commission, instructed by the Governments of Canada and

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British Columbia, fixed the boundaries of the Kamloops Reserve, and they added these words to their report:

"The prior right of the Indians as the oldest owners or occupiers of the soil to all the water which they require or may require for irrigation and other purposes from St. Paul's Creek [the creek in question] and its sources and northern tributary is, so far as the Commissioners have authority in the matter, declared and confirmed to them."

Again, in the schedule of "Indian Reserves" in the Supplement to the Annual Report of the Department of Indian Affairs for the year ending June 30th, 1902, there is this item in the column headed "Remarks":

"Five hundred inches of water recorded from St. Paul's Creek, and all the water from all sources of water-supply on the reserve. Allotted by Joint Reserve Commission, July 29, 1877."

It appears that on the 26th of September, 1888, an application for a record of 500 miners' inches of water from this Creek, for use on the said Indian Reserve, was filed in the office of the Dominion Lands Agent at New Westminster. It is upon these four items and riparian rights that the Indian Department, respondent, relies to sustain the order for the conditional licence made by the Board, allotting 500 inches to the respondent for use upon the Reserve.

The Board constituted under the provisions of the Water Act, 1914, was, by section 288 of the Act, given its powers to investigate into and adjudicate upon conflicting claims for the use of water. As I read that section, the power conferred is confined to adjudication upon the claims of persons holding, or claiming to hold, records under any former Act or Ordinance, and upon all other claims and rights to the use of water under any former Act or Ordinance. If, therefore, the respondent's claim was one not falling within the language just used, that is to say, was not one founded upon a record or right obtained pursuant to an Act or Ordinance, the Board had no jurisdiction to make the order appealed from, which is one granting a conditional licence to the respondent to divert 500 inches of water from said Creek for use of the Indian tribe on the Kamloops Reserve. Whatever rights to the use of the water the respondent or the Indian tribe, or the individuals thereof, may have outside the jurisdiction of the Board, either at common law or by virtue of the Acts and declarations referred to above, I am

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constrained to think that those put forward do not fall within the language of said section 288.

Apart from any power which may have been conferred upon the Board by section 6 of the Act, which section was not relied upon by counsel, doubtless because the time had passed for taking advantage of it, the jurisdiction of the Board is as defined in said section 288. I do not find, and we were not referred to any other section of the Act giving the Board a larger or more extensive jurisdiction, at all events, a jurisdiction which would cover the facts relied upon by the respondent as establishing its right to apply for a licence to divert and use water from this Creek.

This will leave the parties, in respect of their several rights, in the position which they occupied respectively at the date of the initiation of the proceedings before the Board.

MACDONALD, C.J.A.

I would allow the appeal.

GALLIHER, J.A.: I agree with Mr. *Mayers's* contention that the Board had no power to create rights. The Board is defined in the interpretation section to the Act, Cap. 81, B.C. Stats. 1914, as follows: " 'Board' means the Board of Investigation under this Act," and in Part VIII. of the Act, its functions and procedure are set out, section 288(1), and stated to be:

"Shall hear the claims of all persons holding or claiming to hold records of water and all other claims and rights to the use of water under any former Act or Ordinance."

It is clear the Indians do not hold under any former Act or Ordinance. The question then is: Do they hold under a record? The Board evidently proceeded upon the ground that they did. The evidence adduced in support of this was a photostat copy of a list shewing water allotted to the Indians by the Indian Reserve Commission in 1877, and filed by J. W. McKay, Indian Agent, with the Agent of Dominion Lands at New Westminster. Dealing with this, the Indian Reserve Commission had no power to allot or deal with water allotment under their commission. In their report they have dealt with it in this way:

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"The prior right of the Indians as the oldest owners or occupiers of the soil to all the water which they require or may require for irrigation

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and other purposes from St. Paul's Creek and its sources and northern tributary is, so far as the Commissioners have authority in the matter, declared and confirmed to them."

This can in no sense be called an allotment, and if it could, would be beyond their powers. The fact that it was treated as an allotment in the Dominion Blue Book, 1902, does not, in my opinion, add any force to the contention.

I can find nothing in the evidence to justify the Board in treating the different steps taken as constituting a record. The records granted Robert Thompson and James Todd on December 9th, 1869, were made subject to the rights of the Indians. Do these latter words mean subject to what rights they then had, or whatever rights might at some future time be determined? I agree with Mr. *Fulton's* submission before the Board that it was the then rights of the Indians. To adopt the other construction might be to render useless the records granted to Thompson and Todd, and under which the complainants now base their claim.

In fact, Mr. *Mayers* has convinced me that in so far as taking water from the Creek is concerned, that would be the outcome. In this view it appears to me that the ruling of the Board was wrong and that the appeal should be allowed.

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

Appeal allowed.

Solicitors for appellant: *Fulton, Morley & Clark.*

Solicitors for respondent, the Department of Indian Affairs: *Ellis & Brown.*

ULLOCK v. PACIFIC GREAT EASTERN RAILWAY COMPANY.

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ULLOCK v. PACIFIC GREAT EASTERN RY. CO.

Negligence — Collision — Automobile and gasoline railway-car — Railway crossing—"Train," meaning of—R.S.B.C. 1911, Cap. 194, Secs. 191-2.

The plaintiff was injured while riding as a guest in an automobile which collided with a passenger-car of the defendant Company. The jury found the Company negligent in travelling at an excessive speed and not ringing a bell, in violation of the British Columbia Railway Act. The passenger-car had its own motive power, consisting of a gasoline-engine, in the forepart of it, all being under one roof.

Held, on appeal, affirming the decision of MURPHY, J. (GALLIHER, J.A. dissenting), that on the evidence contributory negligence should not have been found, and that the passenger-car of the defendant Company comes within the expression "train" within the British Columbia Railway Act. The provisions of the Act therefore applied to the defendant's passenger-car, and the verdict of the jury should be sustained.

APPEAL by defendant from the decision of MURPHY, J. and the verdict of a jury in an action for damages for injuries sustained in a collision between a train of the defendant Company and an automobile in which the plaintiff was riding as a guest in the early afternoon of the 13th of April, 1920. One Paine was driving on the left side of the front seat of an Overland car of which he was the owner. He had a passenger in the back seat, and he picked up the plaintiff, who sat in the front seat with him on the right side, as he was on his way to the Lyall Shipyards. He came along Marine Avenue from Lonsdale Avenue to the east, and turned south on Bewicke Avenue. While crossing the defendant Company's track just before reaching Lyall's yards they were struck by a train of the defendant Company coming from the west, and the motor-car was carried 247 feet. The regular brakes were broken by the impact, and the conductor, after discovering the break, had to resort to the hand-brake at the rear. The street was fairly level for 200 feet from the track (with slight incline towards the track). There was a shingle mill about 50 feet to the left of the road and about 158 feet north of the track, and a shed or

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mill office about 12 feet high, standing 15 feet west of the road and 61 feet north of the track. A side track immediately north of the main track ran off from the main track near Bewicke Avenue westward, and on this side track stood three or four box-cars, the nearest, according to plaintiff's evidence, being 90 feet, and according to the defendant's, about 120 feet west from Bewicke Avenue, otherwise the view of the main track was clear. As the motor-car came within about 50 feet of the track, and was passing over a 12-foot plank road, the driver turned out to pass on the east side of a load of shingle-bolts being unloaded, and in so doing the wheels on one side of the car went off the plank road on to a fill. While passing the load of shingle-bolts the motor-car was travelling at about five miles an hour, but in approaching the track it was going about eight miles. The three men in the auto swore they did not see the train until it was upon them. There was much conflict of evidence as to the speed at which the train was going, the motorman on the train and the conductor saying they were not going more than 10 miles an hour, whereas witnesses for the plaintiff fixed the speed at from 30 to 35 miles an hour. The *locus in quo* was within the limits of North Vancouver, but it was a somewhat sparsely settled district. The jury found negligence on the part of the defendant owing to lack of bells on approaching a crossing, as required by statute, and that there was excessive speed in crossing the highway; also that the plaintiff was not guilty of contributory negligence.

The appeal was argued at Victoria on the 21st, 24th, 25th and 26th of January, 1921, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Argument

S. S. Taylor, K.C., for appellant: The train operates by gasoline. The first point, and most important, is that there was contributory negligence. The defendant was sitting next the driver of the automobile on the side towards the approaching train. The only excuse they have is the box-cars intervening, and this was on a side track 90 feet from the road. When they were 26 feet from the track they could see down the track past the box-cars. It was a fine clear day: see *Dublin, Wick-*

low, and Wexford Railway Co. v. *Slattery* (1878), 3 App. Cas. 1155 at p. 1166; *Maltby* v. *British Columbia Electric Ry. Co.* (1920), 28 B.C. 156; *Fraser* v. *B.C. Electric Ry. Co.* (1919), 26 B.C. 536. The air brakes were smashed, and that accounts for the distance they went after the impact. As to the law with relation to the plaintiff not being the driver of the automobile see *The "Bernina"* (1888), 13 App. Cas. 1 at p. 16; *Loach* v. *B.C. Electric Ry. Co.* (1914), 19 B.C. 177 at p. 182; (1916), 1 A.C. 719. He admits a clear view of the track past the box-car when 19 feet from the track. The Act says "when any train is approaching a highway." I contend this is not a train within the meaning of the Act. This is an electric-car and is distinct: see *Columbia Bithulitic Limited* v. *British Columbia Electric Rway. Co.* (1917), 55 S.C.R. 1 at p. 35; 37 D.L.R. 64 at p. 86; *Brenner* v. *Toronto R.W. Co.* (1907), 13 O.L.R. 423 at p. 438. There is no evidence of excessive speed, and they all swore they saw the train just as it struck them. As to objections to the charge and occurrences during trial see *Hallren* v. *Holden* (1913), 18 B.C. 210 at pp. 214-5; *Watt* v. *Watt* (1905), A.C. 115 at p. 118. As to mentioning the amount of damages claimed see 41 Sol. Jo. 204; *Carty* v. *B.C. Electric Ry. Co.* (1911), 16 B.C. 3. As to judge's charge see *Bradenburg* v. *Ottawa Electric R.W. Co.* (1909), 19 O.L.R. 34 at p. 38. With relation to the difference between being picked up by the driver and being a hired car see *British Columbia Electric Railway Company, Limited* v. *Loach* (1916), 1 A.C. 719; *The "Bernina"* (1888), 13 App. Cas. 1; *Brooks* v. *B.C. Electric Ry. Co.* (1919), 27 B.C. 351. The statute says a thickly populated district. This was a very sparsely populated district: see *Andreas* v. *Canadian Pacific Ry. Co.* (1905), 37 S.C.R. 1 at p. 15. The damages were excessive: see *Tait* v. *B.C. Electric Ry. Co.* (1916), 22 B.C. 571.

Argument

D. Donaghy, for respondent: There are only ten feet open to see up the track. As to whether this is a train within the Act see *Crevelling* v. *Canadian Bridge Co.* (1914), 20 B.C. 137. They are bound by the course counsel took on the trial: see *McCord* v. *Cammell and Company* (1896), A.C. 57 at p. 65; *Canadian Pacific Ry. Co.* v. *Hansen* (1908), 40 S.C.R.

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194 at p. 196. On the question of failure to whistle, and inference by the jury as to the effect of, see *Wabash Railway Co.* v. *Follick* (1920), 60 S.C.R. 375 at p. 383. He has a right to rely on the statute: see *Doyle* v. *Canadian Northern Ry. Co.* (1919), 24 Can. Ry. Cas. 319; 46 D.L.R. 135; *Grand Trunk Rway. Co.* v. *Griffith* (1911), 45 S.C.R. 380 at p. 399; *The Canada Atlantic Railway Company* v. *Henderson* (1899), 29 S.C.R. 632 at p. 636; *Smith* v. *Canadian Pacific Ry. Co.* (1920), 3 W.W.R. 1028. As to recovery when provisions of the Railway Act are not complied with see *Columbia Bithulitic Limited* v. *British Columbia Electric Rway. Co.* (1917), 55 S.C.R. 1 at pp. 31 and 34. When they do not ring the bell they cannot run at an excessive speed: see *Winnipeg Electric Rway. Co.* v. *Canadian Northern Rway. Co.* (1919), 59 S.C.R. 352 at p. 362. As to stating amount of damages claimed to jury see *Klamborowski* v. *Cooke* (1897), 14 T.L.R. 88; Mayne on Damages, 9th Ed., 140; *Watkins* v. *Morgan* (1834), 6 Car. & P. 661; *Cheveley* v. *Morris* (1779), 2 W. Bl. 1300; 96 E.R. 762. As to excessive damages see *Wand* v. *Mainland Transfer Company* (1919), 27 B.C. 340 at p. 344. Ringing a bell is an absolute duty crossing a road.

Argument

Taylor, in reply.

Cur. adv. vult.

29th April, 1921.

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

I find it impossible to say that the jury could not reasonably find as they did.

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The appellant complains also of the amount of the damages awarded. Again, I am unable to say that the jury could not properly award the sum complained of.

MARTIN, J.A.: Two heads of negligence have been found by the special jury, failure to ring the bell, and excessive speed, in violation of sections 191-2 of the Railway Act, R.S.B.C. 1911, Cap. 194.

MARTIN, J.A.

Objection is taken that said sections do not apply to a single passenger-car with its motive power, a gasoline-engine, in the forepart of it all under one roof, because it is submitted that

that does not come within the expression "train," as the context and other sections under the heading of "The working of trains" shew that only coal or wood or oil-burning engines with a car or cars attached can be held to be a "train" within the Act. After a careful consideration of all the relevant sections, I am of the opinion that the expression "train" or "engine and trains" is not confined to detached rolling stock, but may reasonably include rolling stock of combined classes, *i.e.*, with the engine as part of what would otherwise be a train; in other words, a combination of engine and car. These definitions are not ironclad or unalterable, but expand to include what may fairly be covered by them in scientific, industrial, commercial or other development, as, in effect, section 25(4) of the Interpretation Act, Cap. 1, R.S.B.C. 1911, declares, thus:

"The law is to be considered as always speaking, and whenever any matter or thing is expressed in the present tense, the same is to be applied to the circumstances as they arise, so that effect may be given to each Act, and every part thereof, according to its spirit, true intent, and meaning."

In *Columbia Bithulitic Limited* v. *B.C. Electric Ry. Co.* (1916), 23 B.C. 160; (1917), 1 W.W.R. 227; 55 S.C.R. 1; (1917), 2 W.W.R. 664, which was a decision on what was an "electric and street-car service" (p. 675), it was held that "an electric tramcar is neither a 'locomotive' nor an 'engine'" within sections 267 and 274 of the Canada Railway Act (which correspond to sections 184 and 191 of said B.C. Act), but a distinction in that Act is drawn between a "train, or engine or electric-car" as it is drawn in the British Columbia Act in sections 194-5, and there is a fundamental difference between an electric trolley line car with no engine and a combination gasoline-car with its own engine and independent power. There are difficulties in the application of the Act, especially as to the steam-whistle required by section 184, which require amendment, but all I am deciding now is that this combination gas-car in operation on this railway line is a train within the meaning of the said group of sections, and therefore it was open to the jury to find on the facts if the statutory requirements had been complied with or not, and I am unable to see my way to disturb their finding in the negative.

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Being of this opinion on the meaning of the word "train,"

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which is the most important point in the case, and in the absence of any finding of contributory negligence, I have reached the conclusion, after careful consideration of the charge as a whole, that the other objections to the judgment cannot be sustained, and therefore the appeal should be dismissed, with costs.

GALLIHER, J.A.: In this case I would allow the appeal.

The jury answered certain questions, finding the defendant guilty of negligence and the plaintiff not guilty of contributory negligence, making no finding as to ultimate negligence, which I do not think enters into the question here. On these findings, judgment was entered for the plaintiff.

I am aware that I must face the rule which has been frequently laid down that a Court of Appeal should not disturb the findings of the jury on a question of fact unless it is satisfied that they could not reasonably come to their conclusion upon the evidence. The jury may have come to their conclusion based upon what they considered the duty cast upon the plaintiff in approaching a dangerous crossing on a highway by a railway train, and considered that duty was fulfilled by approaching at the rate they did of eight miles an hour and keeping a look-out.

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I think in a case of this kind there is a greater duty cast upon them than that. I know the expression "have their car under control" is often used. This is, in a sense, an indefinite expression, but I take it, as applied here, would mean control for stopping. I think it is the duty of every person approaching a crossing of this kind to reduce his speed to such an extent that his car can be stopped almost immediately to avoid accident in case a train looms up unexpectedly, and that is the care reasonable men should be expected to exercise. Based on these premises, I say the jury could not reasonably acquit of negligence.

Mr. *Taylor* relied strongly on *Maltby* v. *British Columbia Electric Ry. Co.* (1920), [28 B.C. 156]; 2 W.W.R. 543. That was a decision of this Court (MARTIN, J.A. dissenting). The case was very much along the lines of the present case, and

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there we sustained the trial judge in setting aside the verdict of the jury. This case is not as strong as the *Maltby* case, and might be differentiated on the facts. Moreover, the evidence as to blowing the whistle convinces me that a jury should have found (if it was necessary to their conclusions) that had the parties in the motor been listening or paying attention for signs of danger, they could and ought to have heard the whistle and should not have attempted to cross before the train passed.

MCPHILLIPS, J.A.

EBERTS, J.A.

McPHILLIPS and EBERTS, JJ.A. would dismiss the appeal.

Appeal dismissed, Galliher, J.A. dissenting.

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

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May 6.

THE KING v. HODGES

Bankruptcy — Building contract — Ships for Crown — Default — Right of Crown to possession as against trustee in bankruptcy—Application by Crown—Jurisdiction—Can. Stats. 1919, Cap. 36, Sec. 39.

The judge of the Court exercising jurisdiction in bankruptcy may entertain and grant an application for recovery from the trustee in bankruptcy of possession of ships partly built and materials in connection therewith and the necessary portion of the bankrupt's building yards claimed by the applicant under a lien to secure the completion and delivery of the ships, in accordance with the bankrupt's contract with the applicant, and which ships, etc., under such claim and for such purpose, had, prior to the order declaring the bankruptcy, been taken possession of by the applicant, and subsequently to such order had been taken possession of by the trustee in bankruptcy.

Such applicant, though not a "creditor" or "secured creditor" under The Bankruptcy Act, comes within the words "any other person aggrieved by any act or decision of the trustee" in section 39 of said Act.

Contractors agreed with the Crown to construct and deliver certain ships, and further agreed, in order to ensure the construction, completion and delivery of the ships under the conditions of the contract, to erect and maintain upon a suitable site a complete shipbuilding and

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engineering plant. Payment was to be made in instalments. The contract provided, *inter alia*: "The hulls of the vessels and materials, their engines, boilers and auxiliaries and fittings whether such shall be actually on board the vessels or in the building yards and whether wrought or in the rough state shall from time to time after the first instalment of purchase price shall have been paid and thenceforth until the vessels shall have been completed and actually delivered . . . . be subject to a lien in favour of the Minister for all moneys paid to the contractors on account of the purchase price which lien shall be for securing the completion and delivery of the vessels in accordance with these presents . . . ."

Clause 16 provided: "If . . . . it appears that the rate of progress . . . . is not such as to ensure the completion . . . . within the time herein prescribed or if the contractors . . . . shall persist in any such course violating the provisions of this contract the Minister shall have the power . . . . either to take the work or any part thereof out of the hands of the contractor . . . . and to relet the same to any other person . . . . or to employ additional workmen and provide material, tools, and all other necessary things at the expense of the contractors . . . . and the contractors . . . . shall in either case be liable for all damages and extra cost . . . . which may be incurred by reason thereof . . . . The contractors shall commence and carry through with all possible dispatch all work under this agreement and shall give precedence in the yard and other works to all work herein contained, and shall not enter into any other contracts or other work or service which would interfere with the completion and delivery of the work provided under this agreement within the time stated except with the approval of the Minister."

Held, affirming the decision of MURPHY, J. (MCPHILLIPS, J.A. dissenting in part), a breach having occurred such as above specified, the Crown was entitled to take (and as against a receiver in bankruptcy to retain) possession of the ships, together with the slips in which they stood, with free access to so much of the contractor's yards as was reasonably necessary to be used in completing the work, and also all material, engines, etc., and fittings which were actually on board the ships or in the building yards, and whether wrought or in the rough; but not to make use of the contractor's plant and equipment.

Statement

APPEAL by the Crown from an order of MURPHY, J. of the 22nd of February, 1921, on motion by the Minister of Marine and Fisheries for an order directing the trustee in bankruptcy of the Prince Rupert Dry Dock and Engineering Company, Limited, to allow the agents of the Minister to enter upon the shipyards occupied by said Company and take possession of the ships thereon which were partly constructed by said Company, together with the material, plant and equipment and to com-

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plete the construction of the ships. By a contract dated the 21st of February, 1919, between the Minister of Marine and Fisheries and the Prince Rupert Dry Dock and Engineering Company, Limited, the Company agreed to construct and deliver two steel, single screw, cargo steamers for the Government. After the ships were partly built the Company defaulted and on the 1st of December, 1920, the Minister in alleged pursuance of power conferred by a clause of the contract took possession of the ships and certain materials and also the yard, plant and equipment. On the 7th of December following an order was made adjudging the Company bankrupt and the trustee in bankruptcy was appointed receiver and took possession in January, 1921, of all the bankrupt's assets including those in the possession of the Crown as above set out.

Statement

Reid, K.C., for the Crown.
Wilson, K.C., for the Receiver.

22nd February, 1921.

MURPHY, J.: There being no suggestion that at the time the contract herein was entered into any question of the possible bankruptcy of the Company could have been in contemplation, it follows the contract is a protected transaction and the rights of the parties are to be determined in the same manner as if no bankruptcy had taken place: *Hawthorn* v. *Newcastle-upon-Tyne and North Shields Ry.* (1840), 9 L.J., Q.B. 385; *Ex parte Dickin; In re Waugh* (1876), 46 L.J., Bk. 27; *In re Keen and Keen* (1902), 71 L.J., K.B. 487. The case of *Thompson* v. *Cohen* (1872), 41 L.J., Q.B. 221, cited in opposition to this view, in my opinion, has no application. There the bankrupt had been discharged and defendant had no interest in the property, merely a licence to seize. As shewn hereafter, in my opinion, the contract herein does give the Crown a lien in the nature of an interest in property as distinguished from a mere licence to seize, bringing this case within the distinction made in *In re Lind* (1915), 84 L.J., Ch. 884. If this view is correct, the question as to whether possession was taken before or after the date when legally the order declaring the Company bankrupt took effect, is irrelevant, as shewn by the

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cases cited. Likewise, I think the question whether the sheriff had seized the goods claimed by His Majesty herein before possession was taken on His Majesty's behalf or not, is irrelevant. Any statutes requiring registration of applicant's lien would not apply to the Crown unless specially named, and my attention has not been called to any such provisions. The sheriff, therefore, would have to hold the goods subject to the lien of the Crown or give up possession of them. On the material before me, I find, in case such finding is relevant, that the sheriff merely made a formal seizure and left no one in possession. His reason for so doing was to save himself expense. The question of abandonment of possession or not is one of fact: *Bagshawes, Limited* v. *Deacon* (1898), 67 L.J., Q.B. 658. This cannot depend on the sheriff's intention, as shewn by such cases as *Blades* v. *Arundale* (1813), 1 M. & S. 710; *Ackland* v. *Paynter* (1820), 8 Price 95 and, as a fact, apart from intention, I think the sheriff did clearly abandon possession. I find the Crown obtained possession of the goods claimed on December 1st, 1920. If I am right thus far, the real question for decision is to properly construe the contract, and in performing this task, the official assignee is to be regarded as standing in the shoes of the company. Admittedly, there has been a breach justifying the Crown in exercising any remedial measures for its protection which the contract con-

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tains. By clause 16 the Crown on breach, as therein specified (which breach has occurred), has

> "power without previous notice or protest and without process or suit at law either to take the work or any part thereof out of the hands of the contractors or sub-contractors and to relet the same to any other person or persons without its being previously advertised or to employ additional workmen and provide material tools and all other necessary things at the expense of the contractors or sub-contractors and the contractors or sub-contractors shall in either case be liable for all damages and extra cost and expenditure which may be incurred by reason thereof and shall in either of such cases likewise forfeit all moneys then due under the conditions and stipulations or any or either of them herein contained."

This necessarily implies, I think, power to seize and take possession of at least the ships under construction, the slips in which they stand and so much of the yards as are necessary to be used in completing the ships. If not, the provisions, as

to reletting the contract or alternatively completing the ships, would be abortive.

By clause 1 the contractors are bound to erect and maintain a complete shipbuilding and engineering plant, etc., adequate to insure the construction and delivery of the vessels as set out in the contract.

By clause 15, it is provided:

"The hulls of the vessels and materials their engines boilers and auxiliaries and fittings whether such shall be actually on board the vessels or in the building yards and whether wrought or in the rough state shall from time to time after the first instalment of purchase price shall have been paid and thenceforth until the vessels shall have been completed and actually delivered to the Minister or an officer appointed by him, be subject to a lien in favour of the Minister for all moneys paid to the contractors on account of the purchase price which lien shall be for securing the completion and delivery of the vessels in accordance with these presents but the existence of such lien shall be subject to the exercise of the rights of the contractors with respect to any unpaid balance due to them in respect of or in connection with the vessels."

It is to be noted that under this clause the lien, whilst in amount confined to moneys paid to the contractors on account of the purchase price, has as its object the securing the completion and delivery of the vessels in accordance with the contract. This object, in my opinion, would be utterly defeated when the nature of the goods on which the lien fastens is kept in mind if on breach the power to seize said goods and utilize them or have them utilized in completing the ships was not necessarily implied in the authority given by clause 16 to take over and complete the work or have it completed. Such was, in my opinion, the clear intention of both parties to the contract and although its wording might have been clearer, for the reasons hereinbefore given, I am of opinion the applicant is entitled to succeed in so far as the goods set out in that part of clause 15 above quoted are concerned.

MURPHY, J.

From this decision the Crown appealed. The appeal was argued at Vancouver on the 5th of April, 1921, before MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Reid, K.C., for appellant: They are not a secured creditor within the Bankruptcy Act: see *In re Waugh. Ex parte Dickin* (1876), 4 Ch. D. 524. We are within section 39 of

Argument

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the Bankruptcy Act and not within section 6 at all. We let the contract to Wallace to complete the ships: see *The "Niobe"* (1891), A.C. 401 at p. 408.

Griffin, for respondent: As to what the term "works" include see *The Uplands, Limited* v. *Goodacre & Sons* (1913), 18 B.C. 343. That the materials and plant pass to the assignee see *Tripp* v. *Armitage* (1839), 4 M. & W. 687; *Hawthorn* v. *Newcastle-upon-Tyne and North Shields Ry.* (1842), 3 Q.B. 734; *Baker* v. *Gray* (1856), 17 C.B. 462; *Seath* v. *Moore* (1886), 11 App. Cas. 350 at pp. 377 and 381-3. You cannot create a lien on future articles: see *Reid* v. *Macbeth & Gray* (1904), A.C. 223. The proper course in this matter was by action and not by petition. This lien is in the nature of an equitable right, a charge, and the remedy for a lien is a sale and a sale only. The right of possession does not go with a lien. As to the nature of an equitable right see Halsbury's Laws of England, Vol. 13, p. 93, par. 102; Vol. 19, p. 27, par. 41. As to equitable charges see Halsbury's Laws of England, Vol. 21, p. 94, par. 132; p. 83, par. 151. The Crown is in default in not filing a statutory declaration giving particulars of securities with the trustee, and has no right to ask for possession. As to the question of possession the bankruptcy order relates back to the time of the application. As to the effect of the bankruptcy on the position of the creditors see Halsbury's Laws of England, Vol. 2, p. 197, pars. 314-5.

Argument

Reid, in reply: The Crown was in possession and was ousted from possession by the trustee. As to jurisdiction under section 39 of the Bankruptcy Act see *Ex parte Fletcher. In re Hart* (1878), 9 Ch. D. 381 at pp. 383-4. With relation to title in possession having a lien see *Richards* v. *Symons* (1845), 8 Q.B. 90. We do not put in a valuation as we can stand on our security.

Cur. adv. vult.

6th May, 1921.

MARTIN, J.A.

MARTIN, J.A.: This is an appeal from an order in bankruptcy made by Mr. Justice MURPHY on February 22nd last, whereby the trustee and receiver in bankruptcy was directed to restore to the plaintiff appellant the possession of two ships

under construction at Prince Rupert, with their engines, boilers, etc., and certain material in the building yard. Several questions are raised for our consideration.

(1) With regard to the objection to the jurisdiction of the learned judge below to entertain the application by the Crown arising out of the contract in question, I am of the opinion that he had power to do so under section 39 of The Bankruptcy Act, Cap. 36, of 1919, the Crown coming within the expression "any other person aggrieved by any act or decision of the trustee." Under the contract the Crown, though a lienholder, is clearly not a "creditor" at present, whatever it may become later on under par. 16 by completing itself the building of the two ships after taking them out of the contractors' hands, if that course is decided on; nor is the Crown a "secured creditor" as defined by section 2 (*gg*), because there is no "debt due or accruing to [it] from the debtor." All it has is a lien under par. 15 upon "the hulls of the vessels and materials, their engines, boilers, and auxiliaries and fittings, whether such shall be actually on board the vessels or in the building yards and whether wrought or in the rough state," such lien being only to the extent of "all moneys paid to the contractors on account of the purchase price which lien shall be for securing the completion and delivery of the vessels in accordance with these presents . . . . ."

The objection therefore should be overruled.

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(2) Under the contract the Crown advanced 35 per cent. of the purchase-money and in alleged pursuance of power conferred under par. 16, took possession, we are satisfied, on December 1st last, of the two ships and certain materials and also the yard, plant and equipment. On December 7th an order was made adjudging the contractors bankrupt and the trustee in bankruptcy was appointed receiver and took possession, on or about January 4th last, of all the bankrupts' assets, including those in the possession of the Crown as above set out, but by the order appealed from, dated February 22nd last, the receiver was ordered to give up possession to the Crown of the two ships "together with the slips in which the said ships stand and free access to so much of the said yards of the said company as shall be found reasonably necessary to be used in the

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work of completing the said ships," and also "all material, engines, boilers and auxiliaries and fittings which were . . . . actually on board the said vessels or either of them or in the building yards and whether wrought or in the rough."

It is submitted by the Crown that under the proper construction of the contract taken as a whole and in order to carry out its intention, *i.e.*, "to complete the work" contracted for, *viz.*, the completion of the two ships, it has the power to take possession of and use not only the said slips on which are the ships, and so much of the yard as is necessary to carry out the work of completion, but also to make use of the plant and equipment though no lien is given thereupon.

It is conceded that there is no clause which expressly authorizes this use of the plant and equipment, but our attention has been directed to several clauses in the contract which are relied upon to support that submission, which was not accepted by the learned judge below. I have carefully examined the whole contract in this light, but after having done so, find myself unable to differ from the conclusion reached below. At its best the language in par. 16, which is chiefly relied upon, is ambiguous and only affords room for inferences which are, to me, uncertain and the more so because in all the similar contracts cited where the use of plant is conferred, it has been done in no uncertain manner by apt language as, *e.g.*, in *Seath* v. *Moore* (1886), 11 App. Cas. 350 at p. 355; 55 L.J., P.C. 54, and *Reid* v. *Macbeth & Gray* (1904), A.C. 223 at p. 225; 73 L.J., P.C. 57.

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(3) On the cross-appeal it is submitted that there can be no lien upon materials except such as have been "affixed to or in a reasonable sense made part of the *corpus*" of the ship, as expressed in the two cases cited, which I have examined with care. In my opinion, however, they have no real application, because they were both decided on the point of sale of goods and the passing of the right of property under the alleged sale in question. But no such questions arise here, because there has been no sale and the right of property remained in the contractors, and all that is being dealt with is a lien of a very unusual kind conferred not upon the builder but upon the pur-

chaser in the manner aforesaid. I am quite unable to see in principle why that lien should not as a matter of contract extend as well to materials built into a ship or lying upon her deck (as to which there could be no question) as to those lying by her side in the yard: it is all a question of appropriation to the contract and it is not disputed here that the materials in question were brought into the yard by the contractors to be built into these ships under the contract. In *Reid's* case, *supra,* Lord Davey's judgment shews that much turned upon an expression in the contract "as the same proceeds" and he went on to say at p. 231 ((1904), A.C.):

"But whether you put the one or the other of those meanings upon the words, it is clear, whatever else may be obscure in this fourth clause, that the goods in question are only to become the property of the purchaser from time to time as progress is made in the construction of the ship."

How different are those circumstances from the present case, which is one in which there is not only a contract for completed ships, but a very unusual covenant in it to secure the purchaser, by means of a special lien, for his advances upon the purchase-price. And it is to be observed that even in the *Seath* case, *supra,* Lord Watson at p. 384 (11 App. Cas.) uses this significant language:

"Had they inspected the work and material, as the purchasers had done in *Clarke* v. *Spence* [(1836)], 4 A. & E. 448, and *Wood* v. *Bell* [1856)], 5 El. & Bl. 772; 6 El. & Bl. 355, there would have been room for the inference that they had accepted as in terms of the contract the work, so far as completed and accepted, and that the bankrupt had no longer the right to alter or reconstruct any part of it, thereby necessitating a second inspection."

But, as I have said, it was not even suggested here that the materials in question had not in fact been brought into this yard for the construction of these ships under this contract.

(4) It was submitted that this lien should have been enforced by an action and given effect to by an appropriate decree, and that it would be unfair to recognize the lien upon the bankrupts' property unless the Crown conforms to the Act by filing a claim and valuing its security under section 46(3) and consenting to a sale of the property subject to the lien, if that should be best to direct. But in the first place, the Crown, as already pointed out, is in the present circumstances, under

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this peculiar lien, not a creditor and so cannot file a claim or value its security, and in the next place, all that the present application is directed to is to correct, under section 39, the wrongful "act" of the trustee by ordering him to restore to the Crown that possession which it was wrongfully deprived of by him. That does not prevent any further adjudication between the parties which may be necessary under the contract, but it is an expeditious and appropriate means of restoring the *status quo ante*. The general expressions of Lord Justice James in *Ex parte Fletcher; In re Hart* (1878), 9 Ch. D. 381; 39 L.T. 187, are much in point.

It follows that the appeal and cross-appeal should be dismissed.

GALLIHER, J.A.: On the question of jurisdiction raised by Mr. *Griffin,* my view is that the matter is properly in Court for determination.

In the main appeal Mr. *Reid* contends that the plant and equipment should have been declared subject to use by the Crown in the completion of the contract. Usually there are express words in contracts of this nature, giving such privileges or rights, but they are absent here, but if upon reading the whole contract and considering its object and scope such could be read into the contract without doing violence to its terms, the Court could do so. Certainly, much can be said in favour of that view, but on the whole and considering that the learned judge below decided against it, I am unable to say that he is clearly wrong.

GALLIHER, J.A.

As to the cross-appeal, I think the learned judge was justified on the authorities in coming to the conclusion he did.

The result is, the appeal and cross-appeal will be dismissed.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I am of the opinion that Mr. Justice MURPHY arrived at the right conclusion in holding that His Majesty the King was entitled to resume and have possession of the two ships and slips in which they stand and free access to the yards, in the work of completing the same, and that the receiver should return to His Majesty the King all material on board of the ships, whether wrought in or in the rough, and

free possession thereof. I however think, with great respect, that the judgment of the learned judge did not go far enough, but should have extended to the right to the possession in His Majesty the King of all the plant and equipment in use in the carrying out of the undertaking of the construction of the ships, in that the same constituted a part of the "work" entered upon and contracted to be performed.

The contract has to be read as a whole (*Richards* v. *Bluck* (1848), 6 C.B. 437; *Miller* v. *Borner & Co.* (1900), 1 Q.B. 691; *David* v. *Sabin* (1893), 1 Ch. 523) to arrive at its true meaning, it is the reasonable conclusion to arrive at—and even if necessity required it, words could be read into the contract (*Waugh* v. *Bussell* (1814), 5 Taunt. 707; 15 R.R. 624; *Coles* v. *Hulme* (1828), 8 B. & C. 568; *Mourmand* v. *Le Clair* (1903), 2 K.B. 216; *Eliot's Case* (1777), 2 East, P.C. 951; 1 Leach 175; *Wilson* v. *Wilson* (1854), 5 H.L. Cas. 40; *Whitehouse* v. *Liverpool Gas Co.* (1848), 5 C.B. 798; *Mallan* v. *May* (1844), 13 M. & W. 511, 517). The contract provides that if there should be any failure upon the part of the contractors to duly complete and execute the construction of the ships that then His Majesty the King should be at liberty to relet the work, and note this language (see paragraph 16 of the contract):

"employ additional workmen and provide material tools and all other necessary things at the expense of the contractors or sub-contractors and the contractors or sub-contractors shall in either case be liable for all damages and extra cost and expenditure which may be incurred by reason thereof and shall in either of such cases likewise forfeit all moneys then due under the conditions and stipulations or any or either of them herein contained."

The above language, in my opinion, gives the key to the true meaning and intent of the contract, *i.e.*, it was plainly the intention that the assembled plant and equipment was to remain in possession of His Majesty the King during the time it would take to construct the ships. In short, the plant and equipment can well be said by the dictionary we have at hand in the contract itself to be a part of the work that His Majesty the King was entitled to take possession of; otherwise, with great respect to all contrary opinion, all would be chaos and the right to complete the ships would be hampered and delayed, well-nigh

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rendered impossible within any reasonable period of time because of the necessity to assemble the needed plant and equipment, that is to say the defaulting contractors (the receiver in bankruptcy has no higher position, in my opinion) could by possessing themselves of the plant and equipment render it impossible for His Majesty the King to, within any reasonable time, bring about the completion of the ships. To state this proposition and visualize it brings immediate refutation to any contrary view; it is and must be idle contention, and further is most unconscionable and offends, as I read the contract, against the plain terms of the contract and the unquestionable intention of the parties to the contract. One way to discern the meaning of the contract is to ponder over, for a moment, the words to be found in the above quotation: "employ additional workmen and provide material, tools and all other necessary things at the expense of the contractors."

What would be the position of affairs if His Majesty the King disregarded the plant and equipment upon the ground brought there by the contractors, and proceeded at great expense and got other plant and equipment to complete the ships—would any such outlay be allowed? It must be admitted it would not. It is not common sense, and why should the Court be driven to enunciate a nonsensical meaning to words used that can be given a plain common sense and reasonable meaning? It is profitless to say that the receiver in bankruptcy, the respondent contending otherwise, would not be able to complain if other plant and equipment had to be obtained and that no effective complaint on that score could be raised—that is no sufficient answer. The action of the receiver in taking possession of this plant and equipment was absolutely unjustifiable and cannot be supported. In my opinion, it was in breach of his duty, as his duty was to see to it that the completion of the ships should be facilitated at the least possible expense, and to comport himself as the contractors would have been called to comport themselves if there had been failure, independent of bankruptcy; so that the bankrupt estate, if not receiving any advantage from the completion of the ships, would not be chargeable with any unnecessary outlay for the placing of plant

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and equipment upon the ground already there, and rightly available under the terms of the contract.

Further, it must have been in the contemplation of the parties that the plant and equipment necessary to carry the ships to completion would be available and capable of use in the event of there being default upon the part of the contractors when it is considered that even apart from the well-known principle that in commercial contracts, time is of the essence of the contract. The contract may be said to have been an emergency contract, entered into during the continuance of the Great War, and the ships were to be built at a point somewhat remote and away from shipbuilding facilities that would be available at large shipbuilding centres. It is inconceivable that it could have been the intention that the contractors defaulting in the work could withdraw the plant and equipment, thereby rendering it impossible to take immediate steps to complete the ships (*per curiam Pannell* v. *Mill* (1846), 3 C.B. 625). These considerations are all helpful in the endeavour to determine the real meaning of the contract. It certainly would be inequitable to accede to the contention advanced by the receiver (the respondent) and given effect to by the learned judge. If the contract was in its terms intractable, then admittedly the contract would control, but I fail to see anything in the writing that admits of it being successfully maintained that His Majesty the King is disentitled from insisting upon the possession of the plant and equipment during the time that it will necessarily take to complete the ships.

I see nothing to prevent the sense I deduce from the words and language appearing in the sixteenth paragraph of the contract, and it is a conclusion that admits of its being reasonably certain that such was the intention of the parties to the contract (*per curiam Ford* v. *Beech* (1846), 11 Q.B. 852, 866; *The "Niobe"* (1891), A.C. 401-408).

Then it is to be remembered that the construction of a contract shall be taken most strongly against the grantors (see *per* Lord Selborne in *Neill* v. *Duke of Devonshire* (1882), 8 App. Cas. 135 at p. 149, and *Birrell* v. *Dryer* (1884), 9 App. Cas. 345 at p. 350).

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I conclude by referring to what Mr. Justice Duff said in *Meeker* v. *Nicola Valley Lumber Co.* (1917), 55 S.C.R. 494 at p. 507. There a contract in absolute terms was under review and we can view the situation here. What would have been said if the contingency of failure upon the part of the contractors was discussed at the time of the entry into the contract? It is reasonable to say that the contractors would have said: "Undoubtedly if we fail to complete the ships completion can be gone on with and as the contract provides the plant and equipment can be used in the completion of the ships." Such a statement would be a rational one coming from the contractors and a fair and honest one, not the unfair and dishonest contention that comes from the receiver and which he ought not be allowed to put forward, which in my opinion is against the reasonable and fair meaning of the contract. The Court should not hesitate to frown upon such a contention, which not only offends against equity and good conscience, but cannot be supported by the terms of the contract. Mr. Justice Duff in the case above referred to said:

MCPHILLIPS, J.A.

> "To apply the test often suggested by eminent judges—it is not possible —having regard to the dictates of common experience—to doubt that if the subject had been mentioned [here it would be the utilization of the plant and equipment, although as I view it, the contract is sufficient in its terms] at the time the contract was entered into that the appellant would not have been left free to obstruct by its conduct and declarations the respondent's application for a grant while retaining in full literal force the condition that the grant should be produced in order to entitle the respondent to receive the final instalment of the purchase-money."

I would allow the appeal.

With respect to the cross-appeal, I am in agreement with my brother MARTIN and would dismiss it.

EBERTS, J.A.

EBERTS, J.A. would dismiss the appeal.

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

Solicitors for appellant: *Bowser, Reid, Wallbridge, Douglas & Gibson.*

Solicitors for respondent: *Griffin, Montgomery & Smith.*

STEWART AND HAYES v. MOLYBDENUM MINING AND REDUCTION COMPANY, LIMITED *ET AL.*

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STEWART v. MOLYBDENUM MINING & REDUCTION CO.

Mines and minerals—Agreement for sale of claims—Default in work by purchaser—Expiry of claim—Restaking by purchaser—Trustee for vendor—Soldiers' relief—B.C. Stats. 1915, Cap. 3; 1916, Cap. 4.

The benefits under the Allied Forces Exemption Act, 1915, with relation to mineral claims owned by enlisted men are confined to claims so owned at the date of the declaration of war. This limitation was not removed by the amending Act in 1916, which was intended to provide for cases not covered by the former Act and which, upon proof of *bona fides* on the part of the enlisted man and of other circumstances proper to be considered, should, in the opinion of the Lieutenant-Governor in Council, merit relief.

If by an agreement for sale of a mineral claim the purchasers agree to perform and record the assessment work, but do not do the work, and on the claim expiring, restake it, the restakers or purchasers therefrom with knowledge of the facts, will in equity be held to be trustees for the vendor.

APPEAL by plaintiffs from the decision of HUNTER, C.J.B.C. in an action tried by him at Victoria on the 4th to the 11th of June, 1919, and 16th of September, 1920, for a declaration that they are the owners of an undivided half interest in the "Conundrum" mineral claim on Alice Arm, in the Skeena Mining Division of Cassiar District, or in the alternative, for a declaration that the defendants Ross and Teetzel and the defendant Company are trustees for the plaintiff and the defendant Annie McGrath of the "Molybdenum," "Success" and "Moly One" claims, being relocations of the Conundrum claim. The Conundrum mineral claim was staked by Joseph McGrath on the 5th of June, 1906, and recorded on the 13th of June following, and he kept the claim in good standing by doing the assessment work and recording it until the 13th of June, 1915. On the 20th of January, 1908, he conveyed a one-half interest in the claim to one Piggott, who, on the 24th of May, 1915, conveyed said interest to the plaintiff Stewart, who held it in trust for the Stewart Trading Company. McGrath transferred the other one-half of the claim to his wife,

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Statement

Annie McGrath, in October, 1908, and she retransferred the same interest to him on the 9th of June, 1915. After doing his assessment work on the claim in 1914, McGrath joined His Majesty's Naval Forces, and he died in January, 1916. He willed all his property to his wife. On the 30th of October, 1913, one Hayes staked the Blackwell mineral claim, adjoining the Conundrum, on which the assessment work was recorded for six successive years. Hayes transferred a half interest in the Blackwell to McGrath in May, 1915. The claims were found to contain molybdenum ore. In October, 1914, McGrath entered into a tentative agreement with one Clifton P. Riel for a bond on the claims, Riel to inspect the properties before a formal agreement was to be entered into. On the 26th of May, 1915, Stewart and McGrath gave an option to Riel, who was to purchase the two properties for $35,000 (Hayes being a party to this agreement). One of the terms was that the purchaser was to do the assessment work and record it. Riel failed to do the work, and the Conundrum expired on the 13th of June, 1915 (unless protected by the Allied Forces Exemption Act). By a later agreement on the 19th of August, 1915, the time for the first payment under the bond was extended from the 1st of December, 1915, to the 2nd of August, 1916, Riel, through one Teetzel found out the approximate value of the ores on the claims and they entered into an agreement with one Ross, in the way of a partnership, on the 2nd of July, 1915, to work the properties, Ross agreeing to finance the milling and refining of the ores. Two brothers named Stilwell then became interested, and the Molybdenum Mining and Refining Company was formed and incorporated in May, 1916. On the 3rd of June, 1915, Riel found the Conundrum would run out on the 13th of June, and he told McGrath he would not have time to do the work. McGrath concluded that his being on active service would protect the property, and he immediately had the half interest in his wife's name retransferred to himself. In the following July, Riel, being on the property, and concluding later that there might be some question as to the Conundrum being protected, relocated the ground by staking the Molybdenum claim himself and staking the "Success" as agent

for Teetzel. On the incorporation of the company in May, 1916, with a capital of $100,000, the relocated claims were transferred to it (including two fractions subsequently staked), and Riel, Teetzel, Ross and the Stilwells entered into a partnership agreement as to their respective interests in the Company. Riel then went on the property and worked the properties until the end of 1916, expending in development about $100,000.

Hankey, for plaintiffs.
Maclean, K.C., for defendants.

29th October, 1920.

HUNTER, C.J.B.C.: In this case I have had the advantage of a complete and careful argument by both the learned counsel engaged, and it was my intention to go fully into the points raised, but circumstances have combined to prevent my doing so, and I must, therefore, content myself with merely stating my conclusions.

I think that the plaintiff Hayes had no right of action against the Company. As to the other plaintiffs, I am of the opinion that the Conundrum claim lapsed on the 13th of June, 1915, and was not revived by the Exemption Act, 1915. The Conundrum ground was relocated and recorded by Riel and his associates, who conveyed to the Company, but the plaintiff rests his action mainly on the agreement of August 19th, 1915, by which the co-owners of the Conundrum and Hayes, the owner of the Blackwell, agreed to sell those claims for $35,000 to Riel.

It is said that the Company is bound by its terms on the ground that it had notice of it, but it was not a party to it nor did it have express notice of it, and I find that neither the Stilwells nor the Company ever recognized anything more than a moral obligation to pay the purchase price if it came out of the ground. Moreover, it appears to me that the action of Riel, in locating and dealing with the new claims, was acquiesced in by the plaintiff, and this view is strongly corroborated by the giving of the subsequent agreement to Riel pending the litigation.

At any rate, the plaintiff stood by while large sums of money were expended on the ground without notifying either the Stil-

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wells or the Company that he had had any claim against them or it, and the principle applies that if a man is silent when in fairness he ought to speak, he must remain silent when in fairness he ought not to speak.

The action must be dismissed, with costs.

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From this decision the plaintiffs appealed. The appeal was argued at Victoria on the 7th, 8th and 9th of February, 1921, before MACDONALD, C.J.A., MCPHILLIPS and EBERTS, JJ.A.

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Argument

Hankey, for appellants: The bond was in effect when Riel and his party restaked. There is a constructive trust, and they are estopped from denying our interests: see *De Bussche* v. *Alt* (1878), 8 Ch. D. 286 at p. 315; *Edwards* v. *The Grand Junction Railway Company* (1836), 1 Myl. & Cr. 650. Under the Allied Forces Exemption Act we say the claims are kept in good standing, as McGrath was on active service and the property was retransferred to him on the 9th of June, 1915, the claim being in good standing until the 13th of June, 1915. On the question of registration of the transfer see *Dumas Mines* v. *Boultbee* (1904), 10 B.C. 511. On the construction of the statutes with reference to exemption see *Bentley* v. *Rotherham and Kimberworth Local Board of Health* (1876), 4 Ch. D. 588 at p. 592; *In re Watts. Cornford* v. *Elliott* (1885), 29 Ch. D. 947 at p. 950; *River Wear Commissioners* v. *Adamson* (1877), 2 App. Cas. 743 at p. 765. The intention of the Act was to protect soldiers. As to the enacting part of an Act prevailing over the preamble see *Crespigny* v. *Wittenoom* (1792), 4 Term Rep. 790 at p. 793; *Lees* v. *Summersgill* (1811), 17 Ves. 508 at p. 511; *Hurlbatt* v. *Barnett & Co.* (1893), 1 Q.B. 77 at p. 79. There were eight years' work done here: see *Reid* v. *Collister* (1919), 59 S.C.R. 275. As to claims lapsing under statute see *The Queen* v. *Overseers of Tonbridge* (1884), 13 Q.B.D. 339 at p. 343; *Plumstead Board of Works* v. *Spackman, ib.* 878 at p. 887. The claim lapsed on the 13th of June, 1915, but Riel did not go up until July and left in October, he undertaking to keep the claims alive. The question of election depends on the circumstances of each case: see *In re Vardon's Trusts* (1885), 31 Ch. D. 275 at p. 279; *Dillon* v. *Parker*

(1818), 1 Swanst. 359 at p. 404; *Seaman* v. *Woods* (1857), 24 Beav. 372 at p. 381. It is a question of fact whether election has taken place: see *Calder* v. *Dobell* (1871), L.R. 6 C.P. 486 at p. 491. The Company did not have a free miner's certificate: see *Roundy* v. *Salinas* (1915), 21 B.C. 323. We contend we are the equitable owners of the relocations by Riel: see *Griffith* v. *Owen* (1907), 1 Ch. 195 at p. 205; *Stewart* v. *Westlake* (1906), 148 Fed. 349; *Stratton* v. *Murphy* (1867), I.R. 1 Eq. 345 at p. 359.

Maclean, K.C., for respondents: We are not trespassing on the Blackwell mine, so Hayes has no action. He is not interested in the Conundrum. The bond is with Riel even today: see *Moore* v. *Deal* (1917), 24 B.C. 181. There is no evidence that the Stilwells knew of the bond. Stewart and McGrath did not obtain any right to relocate, so they have no interest in Riel's relocations: see *Brightman & Co.* v. *Tate* (1919), 1 K.B. 463. The case of *Snyder* v. *Ransom* (1903), 10 B.C. 182, was overruled by *Brownlee* v. *McIntosh* (1913), 48 S.C.R. 588 at p. 590. It would be a fraud on the part of the former owners to get Riel to relocate for them. On the question of disclosure see *Gluckstein* v. *Barnes* (1900), A.C. 240 at p. 247. As to laches and estoppel see *Prendergast* v. *Turton* (1841), 1 Y. & C.C.C. 98 at p. 110; Lindley on Mines, 3rd Ed., 2189; Halsbury's Laws of England, Vol. 13, pp. 166-7, pars. 199, 200-1. Argument

Hankey, in reply.

Cur. adv. vult.

On the 6th of May, 1921, the judgment of the Court was delivered by

MACDONALD, C.J.A.: In my opinion, the Allied Forces Exemption Act, Cap. 3 of the statutes of 1915, did not relieve the owners of the "Conundrum" mineral claim from their obligation to do and record the annual assessment work. The preamble to the said Act does, I think, confine its benefits to mineral claims owned by enlisted men at the date of the declaration of war, and as the deceased McGrath did not own the "Conundrum" mineral claim at that date, he is not within its Judgment

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purview. But it was submitted that the amending Act, Cap. 4 of 1916, in effect removed the limitation in respect of the date of ownership. This amendment enables the Lieutenant-Governor in Council to grant relief from forfeiture of mineral claims and then proceeds:

"It being the intent of said chapter 3 and of this Act that forfeiture or loss of rights arising under the Mineral Act or the Placer-mining Act on or after the 4th day of August, 1914, shall be avoided if the recorded owner of the mineral claim or interest therein has enlisted for active service at home or overseas against the King's enemies."

I read this not as being intended to remove the date limit set by chapter 3, but as being intended to provide for cases not covered by it, and which, upon proof of *bona fides* on the part of the enlisted man and of other circumstances proper to be considered, shall, in the opinion of the Lieutenant-Governor in Council, merit relief. If otherwise, there would be no sense in providing for the intervention of the Lieutenant-Governor in Council. As no application was made in this case to the Lieutenant-Governor in Council, further consideration of this Act becomes unnecessary.

But the above does not dispose of the case. It appears that by an agreement for sale of 26th May, 1915, between the owners of the said mineral claim, plaintiff Stewart and said McGrath, and one Riel, the latter agreed to do and record the assessment work which would be due on the 13th of June of that year. Riel made default, and thus brought about the expiry of the claim. The owners, under the belief, no doubt, that the claim was a subsisting one, on the 19th of August, 1915, entered into another agreement for sale with Riel, in substitution for the first. Included in the agreement was an adjoining claim named the "Blackwell," owned by one Hayes; but while Hayes is a party to this action and to the appeal, I am unable to see how he is concerned with the relief which the plaintiff Stewart claims. He was concerned with the agreement aforesaid, but as that was afterwards cancelled before the commencement of this action and as the action has to do with the ownership of the "Conundrum" ground, in which he has no interest, I think his presence here may be ignored.

Judgment

Riel had as his associates Teetzel, Ross, and ultimately the

firm of Stilwell Brothers, and in October or November, 1915, Riel, Ross and J. B. Stilwell visited the claim, and upon search in the mining recorder's office, were told that the claim had probably expired by reason of the failure of the owner to do and record the assessment work aforesaid. The "Conundrum" ground was thereupon restaked by Riel in the presence of, or with the knowledge of the others above-mentioned, under the names "Molybdenum," "Moly One," "Moly One Fractional" and "Success." They were so restaked in the names of Riel, Teetzel and Riel's wife.

Having in mind the fact that it was Riel's default which brought about the loss of the "Conundrum" to its owners, the restakers must in equity be held to be trustees for these owners. The restaking included other ground not within the limits of the "Conundrum." Whether or not all the restaked ground is to be deemed to be held in trust or only that formerly embraced by the "Conundrum" is a question which was not argued before us. When the plaintiff Stewart learned the facts above recited, he demanded that the new claims should be transferred to himself and his co-owner McGrath, but received no answer to the letter making the demand.

I do not think that Riel and his associates aforesaid intended in the beginning to do an injustice to the owners of the "Conundrum." I think their intentions were to repair the injury done by Riel's default. Their intention was to treat Stewart and McGrath as the owners and to treat the agreement of the 19th of August as still subsisting and applicable to the restakings, should the "Conundrum" be held to have expired. That agreement called for a payment of purchase-money of $10,000 to be made on or before the 2nd of August, 1916, the whole purchase price being $35,000. Riel and his associates proceeded to exploit and develop the ground, and spent large sums, aggregating in the neighbourhood of $100,000, in doing so. This was done, I think, not on the assumption that the ground was theirs under the restakings, but that they would get it under the agreement of the 19th of August. I think that all parties acquiesced in that situation, because as late as February, 1916, the agreement of the 19th of August was amended with the con-

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sent of all parties, and in effect re-executed. Matters went on in this way, but default was made in payment of the said $10,000 on the 2nd of August. Most, if not all, of the moneys spent on the ground was expended before the vendors under the August agreement cancelled it, pursuant to a term enabling them to do so upon default in payment of purchase-money. In the meantime, namely, in May, 1916, Riel and his associates incorporated the defendant Company and transferred the restakings, and I think also the benefits of the agreement of the 19th of August to the Company. I do not regard this fact as of importance.

The promoters of that Company, with the possible exception of the Stilwells, were from the beginning well aware of the facts from which a Court of Equity would infer a trust of the restakings in favour of the owners of the "Conundrum," and there is evidence that the Stilwells were also aware or had sufficient notice of the facts leading to the same conclusion. They could not have regarded the restakings as the property of the restakers in view of their recognition of the rights of the vendors under the August agreement. The promoters of the Company therefore, and the directors and shareholders who authorized the taking over of the restakings, were possessed of knowledge which precludes the Company from claiming to be innocent purchasers for value without notice.

Judgment

Nothing appears to have been done in respect of the default of the 2nd of August until December or January following, when notices were given cancelling the agreement of August, because of such default. Up to this point in the relationship of the parties I find nothing which would deprive the vendors of the "Conundrum" of their right to be regarded in equity as the owners of the ground under the restakings. After the said cancellation, the actions of the parties on both sides give rise to considerable embarrassment. Options of purchase were given by each side, concurred in by the other, which appear to recognize an interest in each, that is to say, that Stewart and Mrs. McGrath, the widow and executrix of McGrath, had an interest to the value of $35,000, and that the defendants, other than Mrs. McGrath, also had interests of considerable value in the

property in question, and this is not unnatural, since, in addition to the plant and machinery placed there by defendants, there was the fact of the additional ground taken in by the restakings.

It is also to be noticed that Stewart, as shewn by the correspondence of his solicitors, with Riel and Ross, was firmly contending that the "Conundrum" had not expired, but had been protected by the statutes above mentioned, thus asserting a claim adverse to the one which he is now, in my opinion, confined to, namely, that the restakings are now held by the Company in trust for himself as to an undivided one-half thereof. But after careful consideration of the correspondence and of the evidence, I am convinced that what took place between the parties between January, 1917, and the issue of the writ in this action in February, 1918, were attempts at settlement more or less confused, because Stewart had some ground, as his legal advisers thought, for still holding to the "Conundrum" as a valid claim, and I cannot see that what took place in these endeavours to sell the property and compose their differences amounted to an abandonment of Stewart's equitable rights in the restakings, which he promptly in the beginning asserted. In his statement of claim he claims alternatively, and in my opinion he is entitled to a declaration that the defendant Company is a trustee of an undivided half interest in so much at least of the ground covered by the said restakings as was formerly embraced within the boundaries of the "Conundrum" mineral claim. Just how this may be carried out has not been adverted to in argument, whether by a transfer of a half interest in the restakings or by partition, I shall not inquire into, as I have heard no argument upon the point, but if necessary, counsel may have the opportunity of speaking to that question.

Judgment

I should add, out of respect for the opinion of the learned Chief Justice, who tried the action, that I am unable to agree with his finding that the plaintiff was estopped because of his standing by while moneys were being expended upon the property and not more promptly and effectively asserting his rights. Riel and his friends were quite well aware of his rights and

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the rights of Mrs. McGrath; not only so, but as above pointed out, they spent their money on the assumption that they were getting the property in pursuance of the agreement of the 19th of August. The evidence points conclusively to the willingness of the vendors to accept what their agreement would give them in full satisfaction of their interests, which they doubtless thought was confined to the "Conundrum" ground alone.

The appeal should be allowed.

Appeal allowed.

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Solicitors for appellants: *Wootton & Hankey.*

Solicitors for respondents Molybdenum Co. and Ross: *Elliott, Maclean & Shandley.*

Solicitors for respondents Riel and Teetzel: *Courtney & Elliott.*

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STEPHENS v. BURNS *ET AL.*

Woodman's lien—Contract for cutting logs—Contractor to furnish supplies—Right to lien—R.S.B.C. 1911, Cap. 243, Sec. 3.

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The Woodman's Lien for Wages Act was enacted for the benefit of wage-earners, and a person entering into a contract to cut logs, and furnish his own supplies, at a given price per thousand feet is not entitled to a lien under the Act.

Statement

APPLICATION to enforce a woodman's lien upon logs cut by the plaintiff under a contract to cut logs and furnish his own supplies at a given price per thousand feet. Heard by GREGORY, J. at Chambers in Vancouver on the 11th of May, 1921.

McTaggart, for plaintiff.
H. I. Bird, for the lien-holder.
Darling, for defendants.

18th May, 1921. GREGORY, J.

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GREGORY, J.: The sole question for determination is whether a person entering into a contract to cut logs, and furnish his own supplies, at a given price per thousand feet, is entitled to a lien therefor upon the logs so cut under the Woodman's Lien for Wages Act, being Cap. 243, R.S.B.C. 1911.

It is contended that there is no lien in such case, the remuneration for such cutting not being in the nature of wages. Section 3 of the Act provides that "any person performing any labour, service, or services in connection with any logs . . . . shall have a lien thereon for the amount due for such labour, service, or services," etc. The language of this section does certainly appear to give the person actually cutting the logs a lien for the amount due for such cutting.

The interpretation section provides that the labour or service entitled to a lien is not only that of the person actually cutting, but extends to cooks, blacksmiths, etc., and others usually employed in connection with such work, and the amendment to this section by Cap. 92, B.C. Stats. 1919, Sec. 2, extends it to the work of physicians and surgeons entitled to receive payment "out of any fund made up from deductions by an employer from the wages of such cooks, blacksmiths, artisans, and others, arising from such labour and service," etc. This extends the lien to persons who, though they do not actually do work upon the logs, are a necessary part of a logging camp, and who would have no occasion to be there if it were not for the presence of the actual loggers.

Judgment

To make sure that cooks, blacksmiths *et al.* shall have a lien under section 3 the interpretation section provides that " 'person' in section 3 . . . . shall include cooks, blacksmiths, artisans and all others usually employed in connection with such labour."

In a very similar case, *Desantels* v. *McClellan* (1915), 7 W.W.R. 1221, Beck, J. held that there was a lien, and this precedent has been strongly pressed upon me, and if the statutes or their plain objects were similar I would gladly follow it. But the statutes are, I think, different not only in language, but in the class of persons intended to be benefited.

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The Alberta statute, while very similar in the lien-enacting clause (section 3, Cap. 28, 1913, 2nd Session) to ours, does not contain the word "wages" from beginning to end, and "wage-earners" are only referred to once, *viz.*, in the interpretation clause of "labour-service or services," which is very like ours before our 1919 amendment, but with these words added at the end, "whether performed by wage-earners or others," and the omission of such words from our statute is, I think, very significant. At page 1222 Beck, J. calls attention to this expression and the absence of the word "wages," and says "there are no other expressions in the Act throwing light upon the question." If I may say so without impertinence, I quite argee with his decision. Schedule "A" of the Alberta statute, providing for the form of claim of lien, at the end, shewing how the amount claimed is arrived at, illustrates the same as follows: ". . . . at (per day, month or quantity)," which I think shews that the Alberta Legislature intended to protect persons whose remuneration was arrived at in some other way than by day, weekly or monthly wages.

The case of *Baxter* v. *Kennedy* (1900), 35 N.B. 179, to which Beck, J. refers, and distinguishes, is apparently in accord with my view, but I am unable to obtain a copy of the report. I see that this decision, which is that of the Full Court of New Brunswick, has been criticized by Mr. Edward P. Raymond in a very instructive and exhaustive article upon the subject of Woodmen's Lien in 26 C.L.T. 249.

Judgment

In all these cases the decision must rest entirely upon the wording of the statute. One must endeavour to discover from the language of the Act itself the evil aimed at, and to construe the Act as liberally as possible to give effect to the correction of such evil.

Section 1 of our Act is: "This Act may be cited as the 'Woodman's Lien for Wages Act.'" The title at the head of the chapter is the same. The interpretation section, as amended in 1919, again refers to wages. Section 8 requires that a judgment declaring a lien "shall declare that the same is for wages," etc. Section 37 deals with persons making contracts for the supply of logs, and requires that he shall, before making any

payment under such contract, require the person to whom payment is to be made to furnish a pay-roll or sheet of the wages and amount due, etc., and by section 38, if he pays without requiring such pay-roll or sheet, he becomes liable at the suit of any workman or labourer engaged under the contract for the amount of pay so due. Schedule B provides a form for such pay-roll, and it provides for the number of days employed and the rate of pay per day. Schedule A furnishes the form for statement of claim of lien and the only suggestion shewing the amount due is ". . . . per month or day as the case may be."

Any one of these references, taken alone, might mean very little, but taken together seem to me to indicate that the persons sought to be benefited by the Act were wage-earners. Contractors were clearly thought of, as shewn by sections 37 and 38, and it may well be that the Legislature overlooked the fact that very humble individuals might take a contract and intend to do all the work himself, and a contract by such a person, in which it was provided that the employer was to furnish all material, supplies and machinery for handling the logs, and in which it was quite clear that the contractor was only being paid for his manual labour, even if at a certain rate per thousand feet, might be held to fall within the statute. But it is well known that the logger does not live at home and walk to his work daily. He goes out into the woods, has to be supplied with food, axes, and other means of handling his logs. If his contract requires him to supply these, as in the present case, then his remuneration, or contract price, covers such costs as well as the cost of his actual labour. It is one sum covering all items, and there is no means of dividing it and ascertaining "the amount due for such labour," etc., as required by section 3. There is no amount due for labour alone; there is only one amount due, and that covers all the services rendered and all the material supplied, and it is not divisible. No one has ever suggested that the Act gives a lien to any person supplying donkey-engines, ropes, axes, or any other material to a logging camp, and yet these men can perform no useful work without such things. If the statute had said "the value of such labour,"

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etc., that amount could be ascertained apart from the value of the supplies.

My attention has been called to the decision of HOWAY, Co. J. in *Ross* v. *McLean* (1921), 1 W.W.R. 1108, in which he apparently comes to a different conclusion. The report does set out the contract, and it may be that the employer supplied everything but labour in that case, but, with great deference to him, he appears to me to have only considered section 3 of the Act, and if other sections throw light on the proper interpretation to be placed on that section, as I think they do, such other provisions must be looked at.

The statute is for the protection of wage-earners and the other special persons named whose services arise out of their work, and unless the claimant can bring himself within one or the other of these two classes, I do not think he has any lien. In 25 Cyc., p. 1585, a great many cases are collected. Each case, of course, must be looked at with the statute under which it is decided, but there is this statement:

Judgment

> "In most of the States it is held that the statute is designed solely for the protection of labourers performing physical labour with their own hands and with their teams, under the direction of an employer, and for fixed wages."

That seems to me to be the object of our Act, and a reference to the meaning of the word "wages" in any judicial dictionary will shew, I think, that the idea carried with it a very different position from that of the contractor in the present case.

Application dismissed.

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Real property—Caveat—Filed by registrar—Lapsing of—Application of sections 63 and 69 of the Land Registry Act, R.S.B.C. 1911, Cap. 127, Secs. 14, 66, 69 and 114—B.C. Stats. 1912, Cap. 15, Sec. 28; 1914, Cap. 43, Secs. 29, 63 and 66.

A *caveat* filed by the registrar under section 62A of the Land Registry Act is not subject to the provisions of section 69 as to a *caveat* lapsing unless evidence of proceedings to establish the right claimed is filed within two months (MACDONALD, C.J.A. dissenting).

The provisions in section 63 of the Act that *caveats* shall be verified by the affidavit of the caveator or his agent and shall contain an address for service does not apply to a *caveat* filed by the registrar under section 62A, nor is such *caveat* required to give the nature of the estate or interest claimed.

On a summons issued under section 66 of the Act against the registrar as caveator to withdraw his *caveat* on the ground that it had lapsed under section 69, the application was refused.

Held, on appeal, sustaining the order, that an issue should be directed to determine the "question of right of title," as section 60 is wide enough to cover such a direction where it is raised on the affidavits filed.

APPEALS from two orders of FORIN, Co. J., of the 20th of December, 1920, in proceedings arising from a certain *caveat* which was lodged by the district registrar of titles against certain property in Trail City (east 50 feet of lots 17, 18, 19 and 20, block 12) under section 62A of the Land Registry Act. The plaintiff obtained a deed of the land from the sheriff under an order of the Court. On applying for registration it was found that the registrar had filed a *caveat* at the instance of a telegram received by him from the Attorney-General. On the expiration of two months the plaintiffs proceeded, by way of petition to a judge in Chambers under section 114 of the Act, praying that the district registrar of titles be directed to proceed with the application for a certificate of indefeasible title, the registrar having declined to register the title because of the *caveat*. At the same time an application was made by way of summons issued under section 66 of the Act against the caveator (the registrar) to withdraw his *caveat*, on the ground that it

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had lapsed under section 69. Both petition and application were refused. The plaintiffs appealed from both orders.

The appeals were argued together at Vancouver on the 1st and 2nd of March, 1921, before MACDONALD, C.J.A., MARTIN and GALLIHER, JJ.A.

Hamilton, K.C., for appellants: A *caveat* is a creature of the Land Registry Act, and can only be made effective when done in pursuance of the Act; no other method is effective: see *The Queen* v. *Cruise* (1852), 2 Ir. Ch. R. 65. Something substantially the same as Form H. should be filed. First, the particulars required in a *caveat* are not there, and secondly the affidavit required was lacking on the filing of the *caveat.* Section 70 specifically mentions the Crown by way of exception, but this is not a right the King had before the Act was passed: see *The King* v. *Wright* (1834), 1 A. & E. 434. We are not appealing from the discretion of the registrar, but we contend there was no evidence at all on which he could so act. The next point is that if the *caveat* stands, it lapsed, under section 69, as no action was taken within two months. Under section 66 we are entitled to ask for relief, as the Crown has not shewn any interest or taken any action in support of the *caveat.* We also claim the benefit of section 28 of chapter 15 of the Act of 1912. As to costs see *Moore* v. *Smith* (1859), 1 El. & El. 597.

Argument

Carter, K.C., for respondent: There is evidence of delivery, as this land was donated to the Crown in 1897 and a lock-up was erected on it. It is still used at times: see *Entwisle* v. *Lenz & Leiser* (1908), 14 B.C. 51. The Court cannot give the order, as they cannot register under section 14 of the Act. There is not a word about title on this application, and Hamilton knew there was a donation to the Crown. The removal of the *caveat* will not assist them: see sections 63 and 66 of the Act of 1914; *Esquimalt and Nanaimo Railway Company* v. *Granby Consolidated Mining, Smelting and Power Company, Ld.* (1920), A.C. 172. The registrar acts in both a ministerial and judicial capacity. Section 70 of the Act applies, and the *caveat* properly remains on the record.

Hamilton, in reply, referred to *In re Land Registry Act and*

Scottish Temperance Life Assurance Co. (1919), 26 B.C. 504, on the question of costs.

Cur. adv. vult.

7th June, 1921.

MACDONALD, C.J.A.: It is not necessary, in my reading of sections 69 and 70 of the Land Registry Act, to decide whether the *caveat* filed by the registrar was effectually filed or not. I will assume for the purpose of this appeal that what he did in that regard was good in law.

Section 69 in effect declares that unless the person on whose behalf (in this case His Majesty the King) the *caveat* was lodged, within two months thereafter shall file with the registrar evidence that he has taken proceedings to establish his title, the *caveat* shall be deemed to have lapsed. That this section was intended to apply to a *caveat* filed by the registrar is shewn by the amendment of section 70 made by Cap. 43 of the Statutes of 1914, Sec. 31. The object of section 69 is to prevent a cloud remaining upon a title after the lapse of two months. If it were not for that section, the caveatee would be put to the expense of going to the Court for relief, a course which I think the Legislature intended to obviate by the section, the benefit of which I do not think it intended to confine to particular classes of *caveats*.

The language is capable of two constructions, but I prefer to adopt the liberal and reject the narrow one. I would therefore allow the appeal.

MARTIN, J.A.: These are two appeals arising out of the same *caveat*. The first comes up from a petition to a judge in Chambers under section 114 of the Land Registry Act, R.S.B.C. 1911, Cap. 127, praying that the district registrar of titles be directed to proceed with the appellants' application for a certificate of indefeasible title, the registrar having declined to register the title because, according to his notice to the appellants, "there is a *caveat*, No. 99, lodged against the lands herein in favour of His Majesty the King," which was lodged by the registrar under power given him so to do by section 62A, but it is submitted that the *caveat* does not in essentials comply with

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the Form H given in section 63 and therefore should be wholly disregarded as not being a *caveat* in the proper sense. The *caveat* lodged is as follows:

"Take Notice that I, Elliott Seymour Stokes, District Registrar of Titles, Nelson, B.C., on behalf of His Majesty the King forbid the registration of any memorandum of transfer or other instrument affecting the east 50 feet of lots 17, 18, 19 and 20, block 12, Trail City, map 464, until this *caveat* be withdrawn by me, or by the order of a Court of competent jurisdiction or a judge thereof.

"Dated this 3rd day of September, A.D. 1920.

"E. S. STOKES,
"District Registrar."

The Form H, which, be it noted, is directed to the registrar, is as follows [Form J of 1921]:

"Take notice that I, A.B., of [*insert residence and description*], forbid the registration of any memorandum of transfer or other instrument dealing with [*here describe land and refer to certificate of title*] until this *caveat* be withdrawn by the caveator or be discharged by the order of a Court of competent jurisdiction or a judge thereof," etc.

The provision in section 63 that *caveats* shall be verified by the oath of the caveator or his solicitor or agent and shall contain an address for service clearly does not, in my opinion, apply to special *caveats* filed by the registrar *ex mero motu* under section 62A, because everyone must take cognizance of his "address," and no affidavit of verification would be required in the case of such an official, who was taking steps to examine the title and at the same time protect the assurance fund in accordance with facts coming to his attention during his investigation under section 14 to "satisfy" himself of the goodness of the title, and as the prime object of a notice of *caveat* (see Form H) is to give notice to the registrar himself (to whom it has to be directed) to arrest the progress of the proceedings before him or his officers, that object must be borne in mind in construing the section. If, then, no affidavit or address for service is necessary, why, in strictness, should the registrar be called upon to inform himself of the "nature of the estate or interest claimed" by himself, when that is something which he already must be presumed to know? After a careful consideration of all the sections discussed, I am of opinion that the statute does not require him in such a *caveat* to state to himself the interest

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he claims, and it has not been suggested that he would, upon request, refuse to disclose to any party interested the nature of his claim—it would, of course, be his manifest duty to do so. I am therefore of opinion that the objection to the form of this *caveat* cannot prevail.

Then it is submitted that it has lapsed under section 69, but that section does not, I think, apply to this case as being one "filed by the registrar or lodged on behalf of the Crown," which is the first excepted class (if not, indeed, two classes, having regard to the amendment of 1914, Cap. 43, Sec. 31, allowing for the first time the registrar to file), the second (or third) being composed of those lodged "on behalf of any *cestui que trust,* heir-at-law," etc., and therefore it is still in force, and hence the petition to set it aside and proceed with the registration must be dismissed.

The second appeal comes up on a summons issued under section 66 against the caveator (the registrar) to withdraw his *caveat* on the sole ground that it has lapsed under section 69, and the section goes on to provide that the Court or judge may, "upon such evidence as the Court or judge may require, make such order in the premises, either *ex parte* or otherwise, as to the said Court or Judge may seem fit; and where a question of right or title requires to be determined, the proceedings followed shall be as nearly as may be in conformity with the Rules of Court in relation to civil causes."

The only order made upon the summons was the refusal of it, thus leaving matters in *statu quo* merely, and it is submitted that section 66 is wide enough to cover the direction of an issue to determine the "question of right or title" which is undoubtedly raised on the affidavits filed. I think that the section is wide enough to cover that very necessary direction, and it is to be regretted that the learned judge was not, as I understand counsel, plainly asked by either of them to make it, as I have no doubt he would have done, since it was the obvious and proper thing to do. Both sides are now, however, as I understand them, agreeable to that being done, and it is essential that it should be done, otherwise, in the face of section 116A, the registrar will be unable to issue the certificate without the curial declaration required thereby, and a deadlock will be created detrimental to all concerned. The proper order to make, there-

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fore, is to direct that the order be varied by adding a direction that an issue be tried to determine the "question of right or title," which issue would be in the form of proceeding most "in conformity with the Rules of Court in relation to civil causes," as said section directs.

Because of the Crown Costs Act, R.S.B.C. 1911, Cap. 61, I say nothing about the costs.

GALLIHER, J.A.

GALLIHER, J.A.: I am in agreement with my brother MARTIN.

First appeal dismissed, Macdonald, C.J.A. dissenting, second appeal allowed in part.

Solicitors for appellants: *Hamilton & Wragge.*
Solicitor for respondent: *James O'Shea.*

IN RE WONG SHEE.

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

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IN RE WONG SHEE

Immigration—Person of Chinese origin—Enters Canada from United States—Order for deportation—Refused by United States officials—Order to deport to China—Power—R.S.C. 1906, Cap. 95, Sec. 27A; Can. Stats. 1908, Cap. 14, Sec. 6.

A woman of Chinese origin entered Canada from the United States, where she had lived for 14 years. She was convicted for entering Canada without payment of the tax payable under the Chinese Immigration Act, and in pursuance thereof she was ordered to be deported. The United States authorities refused to allow her to re-enter the United States, and the immigration officials proposed to deport her to China.

Held, that there is no power under the Act to deport to a country other than that from which the immigrant entered.

Statement

APPLICATION for the release of one Wong Shee on *habeas corpus,* on the ground that she was being unlawfully detained by the comptroller of immigration at Vancouver, B.C. The applicant, a woman of Chinese origin, unlawfully entered Canada by crossing the line near Blaine, Washington, without

reporting to the customs authorities nor complying in any way with the provisions of the Chinese Immigration Act. She was arrested by the immigration authorities and convicted by HOWAY, Co. J. on the 16th of October, 1918, for that she did on or about the 21st of May, 1918, being a person of Chinese origin, land in Canada without payment of the tax payable under the Chinese Immigration Act. Pursuant to the said conviction, she was ordered by the minister of immigration and colonization to be deported pursuant to section 27A of said Act. The United States authorities would not receive her back to the States, where she had lived for fourteen years, and the Canadian immigration officials then proposed to deport her to China. Heard by HUNTER, C.J.B.C. at Chambers in Vancouver on the 20th of May, 1921.

Statement

R. L. Maitland (*Orr,* with him), for the applicant: There is no power under the Chinese Immigration Act to deport an immigrant to a place other than the port of entry. Section 27A of the Act contemplates that the immigrant be deported to the country from whence he came into Canada.

Reid, K.C., for the Comptroller of Immigration: The United States refused to accept her, therefore the Immigration department has a perfect right to send her to China, which was the country of her origin. The minister of colonization has the power to make an order that she be forced to leave Canada and the immigration officials have the authority to carry this order out.

Argument

HUNTER, C.J.B.C.: According to Mr. *Reid's* argument a man who happened to be born in Mexico, although not of Mexican race, could be sent back to Mexico, even if he had left when a child. It might as well be argued that he could be sent to the North Pole. If the American immigration people refuse to admit her, it then becomes a matter for diplomatic negotiations and representations should be made to Washington. The prisoner is discharged, but there shall be no action against the immigration department as a result.

Judgment

Application granted.

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CITY OF GREENWOOD v. CANADIAN MORTGAGE INVESTMENT CO.

THE CORPORATION OF THE CITY OF GREENWOOD v. CANADIAN MORTGAGE INVESTMENT COMPANY.

Municipal law—Corporation—Taxation—Lien for taxes—Enforcement—Courts—Jurisdiction to vacate order.

A municipal corporation cannot enforce the preferential special lien for taxes given by section 229 of the Municipal Act, B.C. Stats. 1914, Cap. 52, as amended by section 9, B.C. Stats. 1919, Cap. 63, by an order to appropriate to itself the rents and profits of the land due to a mortgagee in possession, who is collecting them: The proper course is a direction by the Court for sale in the usual way in an action or proceedings which can only be commenced after application therefor and such notice as the Court may direct.

A judge may reopen an order made by him in order to hear a claim not considered and which could not previously be presented, and the order may be varied so as to give effect to such claim.

An order had been made for enforcement of the special lien above mentioned by collection of the rents and profits. Subsequently certain mortgagees moved to set aside and vacate the order, on the ground that they had no notice of the application on which it was founded. An order was then made vacating the first order in so far as was necessary to enable the mortgagees to be heard, and subsequently an order was made vacating the first order in so far as it affected or prejudiced the mortgagees' right to collect the rents and profits of the lands covered by their mortgage, and restraining the municipality from further proceeding as to the rents and profits of such lands and requiring it to repay to the mortgagees any rents and profits collected by it.

Held, on appeal, affirming the decision of MORRISON, J., that there was jurisdiction, and the order was properly made.

Statement

APPEAL by plaintiff from an order of MORRISON, J., of the 23rd of December, 1920, vacating an order made by him of the 23rd of September, 1920, at the instance of the plaintiff, under section 229 of the Municipal Act, as amended by section 9 of Cap. 63, B.C. Stats. 1919, that the Corporation be empowered to collect the rents and profits due or hereafter accruing due from the tenants of said lands. The defendant, holding a mortgage on a portion of the property affected by said order, obtained an order on the 3rd of November, 1920, that it be allowed in as a party. On motion by the defendant, an order was then made vacating the order of the 23rd of September.

Housser, for the motion.

F. A. McDiarmid, contra.

23rd December, 1920.

MORRISON, J.: Were it not for section 229 as amended by section 9 of Cap. 63, B.C. Stats. 1919, it could not be contended successfully that taxes would have priority over a mortgagee in possession collecting rents. The question submitted to me herein is as to whether that section has created a special lien on the rents separate and apart from that on the lands and improvements. In my opinion the section in question does not create a lien of that sort. It seems to me that the key to a proper interpretation of the provision lies in the reference to the Creditors' Relief Act, which, taken compendiously destroys priorities between creditors and has no reference to rents. The section specifically refers to lands and improvements. These terms are exclusive and do not carry with them rents and profits as concomitant elements.

The order, therefore, in so far as it affects the Canadian Mortgage Investment Company is vacated. On the main application this Company had no notice thereof, and I, therefore, reopened the matter to let them in to appear, with the above result.

From this decision the plaintiff appealed. The appeal was argued at Vancouver on the 30th and 31st of March, 1921, before MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

F. A. McDiarmid, for appellant: There are two questions to be considered, first, as to the effect of section 229 of the Municipal Act as amended by section 9 of Cap. 63, B.C. Stats. 1919, that is as to whether a lien can be given in respect of rents and profits prior to a sale of the land for taxes; and secondly, as to the authority of the learned judge to vacate his own order. It was an *ex parte* order, first, that was substituted by an order made on motion to the Court. A judge has no jurisdiction to review his own order: see *Bright's Trustee* v. *Sellar* (1904), 1 Ch. 369; *In re St. Nazaire Company* (1879), 12 Ch. D. 88. Taxation takes precedence over all claimants except the Crown. There is precedence over a mortgagee whether in or out of possession: see *Town of Sturgeon Falls* v. *Imperial Land Co.*

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(1914), 31 O.L.R. 62. We always had the remedy of sale under the Act and the question is whether the section gives us precedence over the mortgage.

D. A. McDonald, K.C., for respondent: He gets nothing under the statute except what the statute actually and clearly gives him, and under the Act he only has a right against land and improvements. The Ontario Act gives further power. The apt language is there, so that the Ontario case referred to does not apply. He has the right to sell the lands but the Act gives him no preferential lien for rents and profits. The nearest to this is a mechanic's lien: see Wallace on Mechanic's Liens, 3rd Ed., 10. The word "privilege" would not include the right to rents and profits.

McDiarmid, in reply.

Cur. adv. vult.

7th June, 1921.

MARTIN, J.A.

MARTIN, J.A.: Two questions were raised in this appeal, one as to the jurisdiction of the learned judge to reopen his order of September 23rd, 1920, which we decided at the hearing in favour of the respondent, and the other as to the right of the plaintiff under section 229 (1) of the Municipal Act, B.C. Stats. 1914, Cap. 52, as amended by section 9 of Cap. 63 of 1919, to enforce the preferential special lien for taxes on the land and improvements thereby conferred by means of an order to appropriate to itself the rents of the land due to the mortgagee in possession who was collecting them. Subsection (2) goes on to say that

> "If it shall be necessary or advisable to protect or enforce the said lien by any action or proceedings, the same may be done by order of the Court, upon application therefor, and upon such notice thereof as to a Court or a judge shall seem meet."

The respondent submits that there is nothing therein which would authorize the realization of a lien in so unusual a manner and that all the Court can do is to direct a sale in the usual way, the section conferring nothing more than a special lien enforceable by action or other proceedings sanctioned "by order of the Court," which means a sale, but such action or proceedings can only be commenced after application therefor and such notice as the Court may direct, which conditions prevent,

in the interest of the defaulting owner, or others, any precipitate or unfair prejudicial steps being taken. That, I think, is the correct view of the section, and as no apt authority has been cited to the contrary, the appeal should be dismissed.

GALLIHER, J.A.: By petition dated the 23rd of August, 1920, the Corporation of Greenwood applied to the Supreme Court for an order that the rents and profits derived from certain properties described in the petition should be paid to the Corporation on account of arrears of taxes. This proceeding was taken under section 229 of the Municipal Act as amended by section 9 of Cap. 63, B.C. Stats. 1919, which is headed, "Special Lien for Taxes." On the 1st of September, 1920, Mr. Justice MORRISON directed copies of the petition to be served on certain persons interested in the properties and on the matter again coming before him on the 23rd of September, an order was made that the special lien of the Corporation be enforced as against the properties in the petition described and that the Corporation be empowered to collect the rents and profits due and hereafter accruing due from the tenants of the said lands and requiring the tenants to attorn and pay rents to the Corporation.

Notice of motion was given by the Canadian Mortgage Investment Company, the respondent herein, dated the 1st of November, 1920, and returnable on the 4th, asking that the order of the 23rd of September, 1920, be set aside and vacated on the ground that they, as mortgagees of certain of the properties affected by said order, had no notice of the application on which said order was founded. The motion came on for hearing before the same learned judge and an order was made vacating the said order of the 23rd of September, 1920, in so far as is necessary to enable the Mortgage Company to be heard. This order does not seem to have been taken out but after one or two adjournments the matter was dealt with and on the 23rd of December, 1920, the same learned judge made an order vacating the order of the 23rd of September, 1920, in so far as it affected or prejudiced the right of the Mortgage Company to receive and collect the rents and profits of the lands and premises covered by their mortgage and restraining the Corpora-

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tion from further proceeding as to the rents and profits of these lands under said order of 23rd of September, 1920, and required the Corporation to repay to the Mortgage Company any rents and profits collected by them under said last-mentioned order. The Corporation appealed from this order.

Mr. *McDiarmid,* for the Corporation, submits, first, that the learned judge has no power to set aside or vacate his order of the 23rd of September, 1920. I agree, if what has been done here amounts to a vacating and setting aside of an order dealing with this claim. When the order was pronounced the position was this: The Mortgage Company at the time was in possession and in receipt of the rents and profits of certain of the lands included in the said petition. They received no notice and were not parties at the hearing; they had no right of appeal. They took the only course open to them and applied to be let in to be heard. What then happened was this: The order of the 23rd of September was opened up to permit their claim being heard; a claim which was not adjudicated upon and which they had no opportunity of presenting at the hearing of the petition. This seems to me a proper proceeding. It is not by way of review of any claim passed upon or of any order made dealing with such claim. They should have received notice of the original petition and not having received such notice and their claim not having been dealt with, it was an original hearing of that claim and the order of 23rd September is varied so as to give effect to a claim which should have been but was not dealt with in the first instance. It is true the subject-matter was dealt with originally, but not the question of the Company's rights and in such a case I am satisfied the learned judge below had jurisdiction to make the order appealed from.

GALLIHER, J.A.

The only other question is as to the meaning of section 229, and I agree with the learned judge below in his interpretation of that section.

I would dismiss the appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I am of the like opinion as my brother MARTIN and would dismiss the appeal.

EBERTS, J.A. would dismiss the appeal.

Appeal dismissed.

Solicitors for appellant: *McDiarmid, Shoebotham & Co.*

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

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AGHION v. T. M. STEVENS & COMPANY INCORPORATED.

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AGHION *v.* T. M. STEVENS & CO.

Costs — Payment into Court — Denial of liability — Action dismissed — Appeal—Plaintiff allowed sum less than amount paid in—Issues.

In an action for money had and received the defendant paid into Court a sum he considered sufficient to satisfy the plaintiff's claim but denied any liability. The action was dismissed but on appeal the plaintiff recovered a sum less than the amount paid in.

Held, that the plaintiff is entitled to the costs of the issue as to liability and the defendant to the costs of the issue as to the amount recoverable.

Held, further, that the same rule applies if at the time of payment in there was no denial of liability but subsequently by amendment defendant denies liability.

MOTION to the Court of Appeal to define the issues upon which depends the rights of the parties as to the costs of the action. The action was to recover $5,081.80 being moneys had and received by the defendant for the plaintiff. The defendant denied liability but paid into Court the sum of $2,692, as being sufficient to satisfy the plaintiff's claim. The learned trial judge dismissed the action. On appeal to the Court of Appeal the plaintiff was allowed a sum less than the amount paid into Court.

Statement

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The motion was heard at Vancouver on the 18th of March, 1921, by MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Alfred Bull, for the motion: We are entitled to the costs on the issue as to liability. Marginal rule 976 is the same as in England but marginal rule 260(*c.*) as to payment in was changed in England in 1913. Until the amendment there were two issues, first one as to *quantum* and second as to liability: see *Davies* v. *Edinburgh Life Assurance Company* (1916), 2 K.B. 852; *Wagstaffe* v. *Bentley* (1902), 1 K.B. 124; Holmested's Judicature Act, 4th Ed., 257; *Powell* v. *Vickers, Sons & Maxim, Limited* (1907), 1 K.B. 71.

Argument

A. H. MacNeill, K.C., contra: The defendant should have all the costs after payment in and that was acceded to. $2,500 was paid in and the defence was then amended. The contention upon which he succeeded was not raised in the pleadings: see *The Blanche* (1908), P. 259 at p. 267. The submission is that there are not separate issues.

Bull, in reply.

Cur. adv. vult.

7th June, 1921.

MACDONALD, C.J.A.: The defendant paid into Court a sum of money as sufficient to satisfy the plaintiff's claim. At the time of payment in there was no denial of liability but subsequently defendant was allowed to deny liability and the action proceeding to trial the plaintiff recovered less than the amount paid into Court.

MACDONALD, C.J.A.

The Court is now asked to define the issues upon which depend the rights of the parties to the costs of the action under the statute, which enacts that the costs shall follow the event. It has been decided in England by the Court of Appeal in *Wagstaffe* v. *Bentley* (1902), 1 K.B. 124, that the question of liability and the *quantum* of damages are distinct issues and that when the amount recovered is less than that paid into Court, the defendant is entitled to judgment carrying the costs

of the action subsequent to payment in, but not including the costs occasioned by the issue of liability, which latter costs should, with those incurred before payment in, go to the plaintiff.

The rule which was then similar to our rule 260 was afterwards amended in England but not here, to enable the Court to deprive the plaintiff of his said costs. The later case of *Davies* v. *Edinburgh Life Assurance Company* (1916), 2 K.B. 852, is not in point, since it merely decides that the amended rule while giving power to deprive, gave the judge no power to order the plaintiff to pay to defendant the costs of the issue as to which the plaintiff had succeeded.

MACDONALD, C.J.A.

The fact that the defendant did not in the first instance deny liability, in no way affects the disposition of this motion.

The costs, therefore, should follow the respective events, as in *Wagstaffe* v. *Bentley, supra,* and there should be no costs of this motion.

MARTIN, J.A. concurred in the result.

MARTIN, J.A.

GALLIHER, J.A.: In this case there were two events to be tried out under the amended pleadings: First, liability; and second, *quantum* of damages. The plaintiff has succeeded on the first and is entitled to the costs of that event. As to the second, he obtained judgment for less than the amount paid into Court. The English rule, which was then the same as our rule 260, was interpreted in *Wagstaffe* v. *Bentley* (1902), 1 K.B. 124, a case in the Court of Appeal, in which it was held *per* Collins, M.R. and Stirling and Mathew, L.JJ., that as the plaintiff had recovered less than the amount paid in there should be judgment for the defendant with the general costs of the action, with costs to the plaintiff upon the issue upon which he succeeded. We have not in our rule 260, the amendment made to the English rule in August, 1913, under which the case of *Davies* v. *Edinburgh Life Assurance Company* (1916), 2 K.B. 852, was decided.

GALLIHER, J.A.

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I do not think that the fact that the money paid in at first inadvertently or otherwise, was without denial of liability, should alter the case in view of the fact that the defendant amended denying liability and the trial proceeded on that basis. The plaintiff is, of course, entitled to the costs of appeal.

McPHILLIPS, J.A. concurred in the result.

Solicitors for appellant: *Tupper & Bull.*
Solicitor for respondent: *A. H. MacNeill.*

McKAY v. DRYSDALE.

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McKAY v. DRYSDALE

Pleading—Master and servant—Automobile collision—Master's liability—Negligence of servant—Scope of employment—Burden of proof—Presumption.

If, in an action for damages owing to the negligence of the defendant's servant, the plaintiff alleges and proves facts from which an inference may be drawn that the servant was upon his master's business, it is sufficient to make out a *prima facie* case.

The plaintiff alleged that he "has suffered damage to his automobile caused by the defendant's servant negligently driving an automobile belonging to the defendant . . . . so that the said automobiles . . . . came into collision," etc. He proved that the driver was the defendant's servant and at the time of the accident was driving the defendant's car. The defendant did not allege or shew, and there was nothing in the circumstances to indicate, that the servant was not acting within the scope of his employment.

Held, that the Court will presume, without further allegation or proof, that the servant, at the time of the accident, was acting within the scope of his employment.

APPEAL by plaintiff from the decision of LAMPMAN, Co. J., of the 3rd of December, 1920, in an action for damages for negligence resulting in a collision between two automobiles. The defendant's automobile was driven by his servant. The learned trial judge found that the accident was due to the negligence of the servant, but dismissed the action on the ground that there was no evidence from which he could properly infer that the driver was engaged in his employer's business at the time of the accident. Statement

The appeal was argued at Vancouver on the 2nd and 3rd of March, 1921, before MACDONALD, C.J.A., MARTIN and GALLIHER, JJ.A.

Aikman, for appellant: The driver was found negligent, but the learned judge dismissed the action because we failed to prove the driver was engaged in his employer's business. He misdirected himself. The defendant does not deny specifically that the driver was not his servant: see *Hogg* v. *Farrell* (1895), Argument

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6 B.C. 387 at p. 392; *Page* v. *Page* (1915), 22 B.C. 185 at p. 191. As to escaping from the servant's acts, the burden is shifted: see Halsbury's Laws of England, Vol. 20, p. 249, par. 597; Beven on Negligence, 3rd Ed., 582; Labatt's Master and Servant, Vol. 6, p. 6884, par. 2281a; *O'Reilly* v. *McCall* (1910), 2 I.R. 42.

Argument

Hankey, for respondent: We admit the defendant was master, but that is not enough: see Bullen & Leake's Precedents of Pleadings, 7th Ed., 363. It is essential that he was in the course of his employment: see *Shamp* v. *Lambert* (1909), 121 S.W. 770 at p. 773; *Lotz* v. *Hanlon* (1907), 66 Atl. 525; *M'Laughlin* v. *Pryor* (1842), 4 Man. & G. 48; *Chandler* v. *Broughton* (1832), 1 C. & M. 29. The plaint shews no cause of action: see Pollock on Torts, 5th Ed., 80-5. On the question of onus of proof see *Powell* v. *M'Glynn & Bradlaw* (1902), 2 I.R. 154; *Beard* v. *London General Omnibus Company* (1900), 2 Q.B. 530; *O'Reilly* v. *McCall* (1910), 2 I.R. 42; *Boyle* v. *Ferguson* (1911), 2 I.R. 489 at p. 496; *Farry* v. *Great Northern Railway Co.* (1898), 2 I.R. 352 at p. 355; *Dyer* v. *Munday* (1895), 1 Q.B. 742.

Aikman, in reply.

Cur. adv. vult.

7th June, 1921.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: To entitle the plaintiff to the relief which he claims he must make it appear that the driver of the defendant's motor-car was, at the time of the alleged wrongful act, on his master's business. It is not necessary, however, that he should allege and prove affirmatively that which the law will presume. If he allege and prove facts from which an inference may be drawn that the servant was upon his master's business, that is sufficient to make out a *prima facie* case. In this case the plaintiff alleged and proved that the driver was the servant of the defendant and that he was driving the defendant's car at the time of the accident. There was no denial of these allegations and no suggestion in the defence that the servant was not acting within the scope of his employment. There was nothing in the time and circumstances of the collision to rebut the inference which I think may fairly be drawn from

these facts, which is, that the driver was on his master's business at the time of the collision.

The judgment below should be set aside and a new trial ordered.

MARTIN, J.A.: It is alleged in the plaint that the "plaintiff has suffered damage to his automobile caused by the defendant's servant negligently driving an automobile belonging to the defendant at . . . . so that the said automobiles . . . . came into collision . . . ."

This averment is in essentials the same as the count against a master for the negligent driving of a servant under the old practice, which is to be found set out in those very high authorities, Bullen & Leake's Precedents of Pleadings, 3rd Ed., 361, and Chitty's Precedents on Pleadings (7th Ed., 16th Am.), Vol. 2, 574, wherein (Chitty) it is alleged:

"That the defendant by his servant so negligently drove his horse and carriage that the same struck against the horse and carriage of the plaintiff whereby the plaintiff was hurt," etc., "and incurred expense," etc.

In later editions of Bullen & Leake, *viz.*, the 6th, at p. 440, and the 7th, at p. 363, the form is in substance preserved and given as hereinbefore alleged, though inartistically and needlessly expanded in the 7th edition.

After carefully examining a large number of cases on the subject (with necessary special regard to the pleadings in each case), I find it is clear under the old practice, as well as the new, that such a count carries with it the implication that the negligent driving of the servant took place in the course of his employment as such, it being presumed that such employment continued until negatived, once the entrustment of the vehicle to the servant is proved, and the two most instructive and apt cases on the point, *Mitchell* v. *Crassweller* (1853), 13 C.B. 237; 22 L.J., C.P. 100, and *Patten* v. *Rea* (1857), 2 C.B. (N.S.) 606; 26 L.J., C.P. 235, shew: (1) That the plea of "not guilty" puts in issue the question "whether at the time of the accident the driver of the cart was the servant of the defendants"—*per* Jervis, C.J. in *Mitchell's* case, at p. 245 (13 C.B.) —in other words, was he in the employ of the master at the time of committing the grievance? and, (2) That the question of

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such employment, if raised, must be left to the jury, Williams, J. observing in the latter case, at p. 237 (26 L.J., C.P.):

"In cases of this kind the real question for the jury is, whether the servant when doing the act complained of was acting as the agent of the defendant. The plaintiff has his option to allege in the declaration that the act was done by the servant, or that it was done by the defendant himself."

Here it was alleged that the act was done by the servant, and the plea to that is contained in these two paragraphs of the dispute note:

"1. With reference to paragraph 1 of the plaint the defendant denies that the plaintiff has suffered damage to his automobile or otherwise by reason of the negligence of the defendant's servant.

"2. With reference to paragraph 2 of the plaint the defendant denies that his servant was negligent in any one of the particulars therein specified, or at all."

These pleas do not go further than to deny that "the defendant's servant was negligent in any one of the particulars specified": they do not deny the relationship, but merely the committal of negligent acts during its existence. This falls very far short of the plea of "not guilty," and it is unfortunate that if the fact of relationship (agency) at the time of the alleged negligence was intended to be denied that it was not done (especially in these days when material facts alone must be pleaded, rule 200) in the unequivocal way adopted in *Patten* v. *Rea, supra,* where the defences (the second of which is irrelevant here) were as follows:

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"Pleas—First, not guilty; secondly, that the horse and carriage were not the property of the defendant as alleged; thirdly, that the horse and carriage were not under the care of William Taylor as servant of the defendant as alleged."

This same defence was set up in *Storey* v. *Ashton* (1869), L.R. 4 Q.B. 476; 38 L.J., Q.B. 223, which followed *Mitchell* v. *Crassweller, supra.* A form of the corresponding defence today is given in Bullen & Leake, 7th Ed., 795, thus:

"The said carriage was not the defendants', or under their management, nor was it driven or managed by any servant of theirs."

It follows that, in my opinion, upon the pleadings the question of agency (course of employment) was not raised, and therefore the plaintiff was entitled to judgment, seeing that the only question in issue, negligence, was determined in his favour,

and so the appeal should be allowed, and the case remitted to the learned judge below to assess damages.

GALLIHER, J.A.: The plaintiff claims for damages, alleging in his plaint that the defendant's servant, while driving the defendant's motor-car, negligently drove it so as to collide with the plaintiff's motor-car, causing damage.

The defendant, in his dispute note, does not deny that the driver was his servant, or that it was his motor-car. He simply denies the negligence of his servant, and pleads in the alternative that if his servant was negligent, the plaintiff could have avoided the result of such negligence, and by way of counterclaim repeats the denial of his driver's negligence and claims damages from the plaintiff by reason of his (the plaintiff's) negligence.

The plaintiff, on the one hand, does not allege nor seek to prove that the accident occurred when the driver was acting in the course of his employment. Nor does the defendant, on the other hand, allege that the driver was not so acting, and although the driver was called by the defendant, no evidence was adduced either one way or the other. The whole course of the trial seems to have been as to who was negligent in the premises, and it was only at the close of the evidence that Mr. *Hankey* raised the point in argument that plaintiff should have alleged and proved that the driver was acting on his master's business when the accident occurred.

The learned trial judge held with Mr. *Hankey* and non-suited the plaintiff and dismissed the counterclaim. The neat point before us is, was the learned judge right in so doing in the circumstances of this case?

The authorities are not all reconcilable and some of them are in direct conflict, but given, as we have here, these facts, either admitted in pleadings or proved, first, that the driver was the servant of the defendant; second, that the car which was being driven was the car of the defendant; and third, evidence to go to a jury as to negligence, it certainly seems to me that it cannot be urged that there was no case to go to a jury. The fact that the defendant's servant was driving the defendant's car

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raises the presumption that it was being driven in the master's service, and, in my opinion, the onus shifts and it is incumbent on the defendant to adduce evidence to destroy that presumption, and not having done so, and the learned trial judge having found in favour of the plaintiff on the question of negligence, he should have given judgment for the plaintiff.

In *O'Reilly* v. *McCall* (1910), 2 I.R., FitzGibbon, L.J. says at pp. 68-9:

"At the close of the plaintiff's case, the evidence that the chauffeur was at the time of the accident acting within the scope of his employment was merely presumptive, the presumption arising from the facts—(1) that the car which did the damage was proved or admitted to be the defendant's car; and (2) that the person who was driving it was employed by the defendant as a chauffeur. The presumption arising from these facts ceased when, or if, sufficient and uncontradicted evidence was given to prove that what brought Whittaker [the owner] to Wood Quay was not the defendant's business."

GALLIHER, J.A.

It was urged that there was a distinction where a person was employed as a chauffeur, and some American authorities seem to support that.

I would answer that by saying that while in the case of a chauffeur the presumption may be stronger (I do not say it is), that does not detract from the fact that the presumption may arise on the particular facts and circumstances of a case, even though it may be a question of degree. See also the remarks of Romer and Smith, L.JJ. in *Beard* v. *London General Omnibus Company* (1900), 2 Q.B. 530.

The appeal should be allowed.

Appeal allowed.

Solicitors for appellant: *Aikman & Shaw.*

Solicitors for respondent: *Wootton & Hankey.*

HALES v. CORPORATION OF THE TOWNSHIP OF SPALLUMCHEEN.

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Municipal law—Local improvement—Work begun prior to Act of 1913—Defect in assessment by-law—New by-law under Local Improvement Act—Defects—Action attacking—Barred by section 180 of Municipal Act—R.S.B.C. 1911, Cap. 170, Sec. 82—B.C. Stats. 1913, Cap. 49, Secs. 31, 33 and 44; 1914, Cap. 52, Secs. 180 and 181.

The installing of a waterworks system was begun by a municipality prior to the Local Improvement Act of 1913. The rates could not be levied owing to defects in the assessment by-law for the work and in 1919, the Municipality passed a by-law for the levying of the moneys for the work. An action to have the by-law declared invalid was held to be barred by section 180 of the Municipal Act, B.C. Stats. 1914.

Held, on appeal, affirming the decision of MURPHY, J., that section 44 of the Local Improvement Act, B.C. Stats. 1913, gave authority to pass the by-law; that by virtue of section 55(2) of said Act the Municipality might complete the work under the Municipal Act, R.S.B.C. 1911, under section 82 of which it had been begun; that even if the new by-law were invalid through failure to provide for proper steps in the assessment in accordance with said Municipal Act, the by-law having been registered, the action to quash was barred by section 180 of the Municipal Act of 1914 and the Municipality was entitled to recover on its counterclaim for the taxes.

APPEAL from the decision of MURPHY, J., in an action tried by him at Vancouver on the 14th of January, 1921, to declare illegal and void by-law No. 224 of the defendant Municipality and on a counterclaim for payment of taxes levied. On the 10th of December, 1919, the Corporation passed a by-law, No. 224, which was as follows:

Statement

"A by-law for assessing, levying and collecting upon and from the real property and from and upon fifty per cent. of the assessed value of the improvements within the area prescribed by By-law No. 170 . . . . . a special rate sufficient to provide the money required to be raised up to and including the year 1918 to discharge the debt incurred under said By-law No. 170.

"WHEREAS prior to the first day of March, A.D. 1913, proceedings were begun for the construction of the Hutchinson Water Works system . . . . and the work has since been completed and a debt thereby incurred, and

"WHEREAS by said by-law 170 provision is made . . . . for raising by way of loan . . . . and for a special rate . . . . to be assessed, levied and collected annually . . . . and

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"WHEREAS the Corporation . . . . during the years 1913 to 1918, both inclusive, ... under assessments made in each of said years received moneys as follows . . . . and

"WHEREAS in an action . . . . wherein the Corporation was plaintiff and . . . . Hales was defendant the assessments in the last preceding recital mentioned were adjudged invalid by reason of irregularity, and

"WHEREAS the Corporation is directed by section 44, subsection (1) of the Local Improvement Act being chapter 49 of the statutes of 1913 to cause a new assessment to be made when and so often as may be necessary to provide the money required to be raised to discharge a debt incurred by the Corporation for or in respect of a work undertaken before the passing of said Act where after the incurring of the debt the special assessment for the work is found or adjudged to be invalid by reason of any irregularity or illegality in making such assessment, and

"WHEREAS . . . . the following moneys require to be raised . . . . and

"WHEREAS [reciting value of property as shewn on last revised assessment roll].

"BE IT THEREFORE . . . . enacted . . . .

"(1) There shall be and is hereby assessed, settled, imposed and levied . . . . a special rate or tax of 146¼ mills on the dollar . . . . to provide the money required to be raised for the years 1913, 1914, 1915, 1916, 1917 and 1918, to discharge the debt incurred under By-law No. 170 as hereinbefore mentioned.

"(2) The said rate . . . . shall be considered to be assessed and imposed on and from the 15th of December, 1919.

"(3) On the collection of said rate allowances by way of rebate shall be made . . . . for money heretofore received as mentioned in the recitals hereto, under the assessments adjudged to be invalid.

"(4) [Title for citation of by-law]."

Statement

The plaintiff claims first, that the by-law was illegal as prior to its passing no Court of Revision was held under section 33 of the Local Improvement Act (Cap. 49, 1913); secondly, that it was also illegal in that no special assessment roll was made as required by section 31 of the Local Improvement Act, and thirdly that the by-law is illegal in that the provisions of section 239 of Cap. 170, R.S.B.C. 1911, was not complied with (a) no assessment schedules were made up; (b) no notice published; (c) no Court of Revision organized; (d) no Court of Revision held; (e) no opportunity given to appeal against assessment.

It was held by the trial judge that section 180 of the Municipal Act, Cap. 52, B.C. Stats. 1914, bars a right of action and it was dismissed.

F. A. McDiarmid, and *H. C. DeBeck,* for plaintiff.
A. H. MacNeill, K.C., Haviland, and *Perry,* for defendant.

17th January, 1921.

MURPHY, J.: I have already expressed the opinion that section 44 of Cap. 49, B.C. Stats. 1913, gives authority to pass the impugned by-law and that the effect of section 55 of the same Act is to make section 82 of Cap. 170, R.S.B.C. 1911, govern such re-enactment under the facts of this case.

Holding this view, I am strongly impressed with the force of Mr. *McDiarmid's* argument, that this by-law 224 is invalid since it proceeds without more to levy a tax on plaintiff's land. Subsection (*b*) of section 82 of Cap. 170, R.S.B.C. 1911, expressly states such by-law is to assess and levy the necessary taxes in the same manner as municipal taxes are assessed and levied. Municipal taxes can only be legally assessed and levied, as is clear from the provisions of the Municipal Acts, past and present, by making proper provision for a notice of assessment and for the holding of a Court of Revision to which the owner can appeal if he so desires. The proviso, at the end of said subsection (*b*), relied upon by Mr. *MacNeill,* applies only, in my opinion, after the initial assessment has been legally made, otherwise the real meaning of the word "re-adjusted" would receive no effect. A re-adjustment presupposes something already adjusted or settled. Support to the view that such taxes, as those in question here, can only be assessed and levied when proper provision for notice thereof, and for the holding of a Court of Revision in connection therewith, has been made is found, I think, in section 259 of Cap. 170, R.S.B.C. 1911, which modifies *pro tanto* the provision of subsection (*b*) of section 82 *supra* as to levying and assessing taxes in the same manner as municipal taxes are assessed and levied by making special provision as to Courts of Revision to be held in connection with all local improvement taxes.

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But I am of opinion that section 180 of Cap. 52, B.C. Stats. 1914, bars this action. It was argued that this section was relied upon by respondent in *Bishop of Vancouver Island* v. *City of Victoria* (1920), [28 B.C. 533] 3 W.W.R. 493, and was not given effect to by the Court of Appeal. But a clear

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distinction exists between attempting to tax property not within the ambit of the taxing power at all and failing to comply with statutory requirements in attempting to tax property within such ambit, as the property in question here admittedly is. This distinction is clearly implied, if I read the judgments aright, in the language used by MARTIN, J.A. at p. 503, and of MCPHILLIPS, J.A. at p. 505. To decide that the true construction of said section 180 is, that it can only be invoked by way of defence in an action to recover taxes, but cannot be relied upon to prevent an injunction going against the collection of such taxes, would, I think, be to defeat the real object of the section. That object, to my mind, is to prevent what might well be interminable complications in municipal finance by fixing a method and a time limit by which, and within which, only taxes levied upon property within the ambit of the taxing power of the Municipality can be questioned by persons liable to pay such taxes. The action is dismissed. Judgment for the defendant on counterclaim for amount of taxes claimed and interest from date when notice of assessment was marked as an exhibit in other proceedings.

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From this decision the plaintiff appealed. The appeal was argued at Vancouver on the 29th and 30th of March, 1921, before MACDONALD, C.J.A., MARTIN, GALLIHER and EBERTS, JJ.A.

Argument

F. A. McDiarmid, for appellant: There is an assessment as of $1,400. On the petition being received for water works the Council should have passed a by-law under section 82 of the Municipal Act, but instead they proceeded by resolution, which is nugatory. Subsection (2)(*b*) of said section 82 gives the method of the assessment by-law. The principal ground of appeal is that we had no opportunity of being heard as to the amount of assessments as the Township held no Court of Revision: see *Cooper* v. *Wandsworth Board of Works* (1863), 14 C.B. (N.S.) 180. By-law 224 is invalid as a Court of Revision must be held under sections 31 and 33 of the Local Improvement Act, 1913. It is a condition precedent to the passing of the by-law: see *City of Victoria* v. *Mackay* (1918),

56 S.C.R. 524. This is not a defect in the by-law but a defect in the assessment and section 180 of the Municipal Act, B.C. Stats. 1914, cannot go beyond its plain reading. There is no jurisdiction in the Council to do what the preface and section 44 of the Local Improvement Act, 1913, do not provide. The next ground is they never had any authority at all to pass by-law 224. In a matter of jurisdiction a curative section does not apply: see *O'Brien* v. *Cogswell* (1890), 17 S.C.R. 420. In the next place the amount we are assessed is beyond the amount required to discharge the debt. There is the invasion of the right of audience which is denied. As to the effect of section 181 of the Municipal Act of 1914 see *Traves* v. *City of Nelson* (1899), 7 B.C. 48; Biggar's Municipal Manual, 11th Ed., 379; Meredith's Canadian Municipal Manual, 421. As to the construction to be placed on the statute see *Inland Revenue Commissioners* v. *Gribble* (1913), 82 L.J., K.B. 900 at p. 904.

Argument

A. H. MacNeill, K.C., for respondent: The assessment under the by-law is valid independently of section 180 of the Act, which only cures some minor matters. By-law 170 clearly provides for raising loans for debentures and assessment. The Council met in 1918, and passed by-law 224. They had to be governed by the last assessment roll. The revised assessment roll shews Hales's land, the value of the land, and of the improvements, and it was before the Council when by-law 224 was passed. On the general question of the effect of section 180 of the Municipal Act of 1914 see *Municipality of Delta* v. *Wilson* (1911), 17 W.L.R. 680; (1913), A.C. 181. The wording is clear that he cannot use the defects to attack the Municipality.

McDiarmid, in reply.

Cur. adv. vult.

7th June, 1921.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: It is admitted that the local improvement was commenced before the passing of the Local Improvement Act, 1913, prior to which the legislation concerning local improvements was embodied in the Municipal Act, R.S.B.C. 1911, Cap. 170. By section 55 (2) of the Local Improvement

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Act, a municipality was given the option to complete the undertaking under either Act where it was commenced before the passing of the Local Improvement Act. It is quite manifest that the defendant elected to complete under the Municipal Act, since its by-law No. 170 was passed in conformity with section 82 of the Municipal Act.

In proceedings prior to this action by-law No. 170 was held to have been so defective that payment of the rates levied under it was successfully resisted by the plaintiff. The defendant then passed by-law No. 224, relying upon the power conferred upon municipalities by section 44 of the Local Improvement Act, which enacts that when a debt has been incurred by a municipality for work undertaken before the passage of the Act and the by-law or the assessment under it is found to be defective, a new by-law may be passed or a new assessment may be made. The present action was brought to quash by-law No. 224. The argument for the appellant (plaintiff) hinged mainly on the failure of the defendant to follow the procedure laid down in the Local Improvement Act or alternatively in the Municipal Act in respect of special assessment rolls and revision thereof by a Court of Revision.

MACDONALD, C.J.A.

The Local Improvement Act has, in my opinion, nothing to do with this case, except so far as it authorized a new assessment to take the place of the defective one. It is apparent to me that it authorizes a new by-law or assessment not only when the proceedings are under the Act itself but when they are being carried on under the Municipal Act. The methods set forth of raising the costs of improvements when they are being carried out under the Local Improvement Act are quite different from those provided by the Municipal Act. Under section 82 of the latter the cost of the work is to be levied upon the lands and upon 50 per cent. of the assessed value of the improvements, while under the Local Improvement Act the rates are levied on the frontage plan. No doubt had the undertaking in question been proceeded with under the Local Improvement Act, as I think it might have been by virtue of section 50, then the procedure of that Act would be applicable. There is nothing anomalous, as is shewn by the context of the

Act, in applying the foot frontage rule to undertakings of the character of the one in question, but while this may be true the fact remains that the undertaking in question was proceeded with under said section 82 and I think the new by-law was passed in professed conformity with it. It could not well be otherwise, since the work had been carried to completion under a scheme which, while authorized by section 82, had no apt counterpart in the Local Improvement Act. To make the new by-law one on the frontage basis would, therefore, overturn the scheme of payment of the costs of the work prayed for by the petitioners and adopted and acted upon by the Municipality throughout.

Now, while section 82 was repealed it remained, by virtue of said section 55 (2), in force as to all undertakings which were being carried to completion under it, and is, I think, in force today for all purposes essential to the final completion, not only of the actual work of construction but of all other matters incidental thereto. It was right therefore that the new by-law should embody the essential features of the old without its defects.

This disposes of the appellant's complaint that by-law No. 224 was not passed in accordance with the provisions of the Local Improvement Act or that the assessments were not made in the manner there specified. The alternative ground of attack on the by-law and the assessments is founded on the assumption that it had been passed under said section 82 and was governed by the procedure of the Municipal Act applicable thereto and counsel relied upon section 259 of that Act as shewing that a special assessment roll or special schedules in the general roll should have been made up and revised under the same procedure as is applicable to the annual assessment roll of the Municipality. By said section 44 the Council is to "cause a new assessment to be made," and said section 82 authorizes the passing of by-laws for "assessing, levying and collecting in the same manner as the municipal taxes are assessed, levied and collected." The manner in which municipal taxes are assessed is the preparation of an assessment roll by the assessor, specified notice to the ratepayers, the hold-

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ing of a Court of Revision to which appeals, if any, may be taken, resulting in the final revision and confirmation of the roll.

The contention of the appellant's counsel, as I understand it, is that because this formality was not gone through in respect of this assessment, the by-law ought to be quashed or if that relief cannot be had, owing to the fact that this action was brought too late to permit the Court to quash the by-law, then it is a good defence to the defendant's counterclaim for the recovery of the rates.

It is conceded that the by-law in question was duly registered and therefore I think section 180 of the Municipal Act, B.C. Stats. 1914, is a bar to the application to quash.

Then with regard to the counterclaim, said section 180 prohibiting the quashing of a by-law except within the specified time, proceeds:

"Nor shall any person assessed under or subject to a rate under such by-law be entitled to plead any defect in such by-law as a valid defence against a claim for payment of such rate except by application to quash the by-law within the time aforesaid."

It is contended on behalf of the appellant that the irregularities, if any, in connection with the assessment roll and its revision were not mere defects, but render the assessment illegal and void. In my opinion the procedure provided by

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section 259 is directory and the assessment is merely defective by non-compliance therewith. In fact I am not sure that it could, upon a reasonable construction of the different statutes and sections of statutes, which have come under consideration in this case, be said that what was done by the Municipality was not a sufficient compliance with the Acts. Section 259 is easy to understand in its application to frontage assessments to which it was originally applicable, but when the rate is to be levied on the assessed value of land and improvements and those values have already been ascertained and entered upon the general assessment roll of the Municipality, it would seem to be a work of supererogation to go over the same ground twice when the valuations must, of necessity, coincide. Technically, perhaps, the provisions of section 259 might be said to have been violated, or rather not complied with, but whatever may

be the true construction of this section as applicable to the facts of this case, I am satisfied that the omissions in procedure, if any, created only a defect and cannot be pleaded as an answer to the counterclaim.

The appeal should be dismissed.

MARTIN, J.A.: If the view taken by the learned judge below of section 180 of 1914 be correct, it is unnecessary to consider the other questions raised. That section provides:

"In case a by-law by which an assessment is made or a rate is imposed has been registered in the manner hereinbefore specified, no application to quash the by-law shall be entertained after the expiration of one month from the registration, nor shall any person assessed under or subject to a rate under such by-law be entitled to plead any defect in such by-law as a valid defence against a claim for payment of such rate except by application to quash the by-law made within the time aforesaid."

The expression "entitled to plead any defect in such by-law as a valid defence against a claim for payment of such rate," is inartistic, but when considered in relation to the manifest object of the section it should not, in my opinon, receive the narrow construction that would confine it only to defences formally spread upon the record of an action. To "plead any defect" means, in the broad and proper sense, to allege a defect as an objection to the validity of the by-law, whether it is averred in a statement of claim, a defence or a reply. The expression "valid defence against a claim for payment," is not restricted to the claim set up in a writ, for if it had been so intended some such expression as "defence to an action" would have been used. Here there has been a claim for payment of a rate imposed after an assessment, because the statement of claim formally so states and complains that a levy of taxes has been made on the property after an assessment which, it is alleged, is invalid. And to defend himself from this "claim for payment," which stands as a lien upon the property, the assessed owner "pleads," *i.e.*, avers certain defects in the by-law. It is none the less a "valid defence" because he chooses to anticipate further adverse consequences (such as sale for taxes, or personal action therefor) by taking the offensive. This is well illustrated by the present case in which there is a counterclaim praying judgment against the plaintiff for the said rates

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and taxes, which counterclaim by rule 199, has "the same effect as a cross-action" and for which the defendant could have maintained an independent action, which is the basis of a counterclaim, and to that counterclaim the plaintiff sets up as a defence a repetition of his allegations in his claim and avers that the by-law in question "is an illegal and invalid by-law," thus coming back to where he started after having precipitated an adjudication of the whole question, which tends to shew, to my mind, that the pleading of the defect means an attack upon the validity of the by-law whenever a "claim for payment of such rate" imposed has been made, which at least would be upon the rate being struck upon the lands affected.

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Being in accord with the observations of the learned judge below upon the question, I shall adopt them, and only add that, in my opinion, the fair inference from what took place below is that it was intended by the Court and both counsel that if the by-law were sustained judgment would go against the plaintiff for the taxes, and if there has been any misunderstanding on that point, the defendant should have leave to adduce further evidence to prove their accrual.

GALLIHER, J.A.

GALLIHER, J.A.: I agree with the learned trial judge.

EBERTS, J.A.

EBERTS, J.A. would dismiss the appeal.

Appeal dismissed.

Solicitors for appellant: *Heggie & De Beck.*
Solicitor for respondent: *R. R. Perry.*

PATTERSON, CHANDLER & STEPHEN, LIMITED v. THE "SENATOR JANSEN."

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PATTERSON, CHANDLER & STEPHEN, LTD. v. THE "SENATOR JANSEN"

Negligence—Shipping—Liability of tug for loss of scow.

A tug, in taking a scow on a river, is bound to meet such requirements of her service as will enable her to render it with safety to the scow and to exercise adequate skill and care. Tug held liable for loss of scow and cargo through collision of scow with corner boom stick in going through a drawbridge passage, because, although in sliding through with the drift of the tide the tug was doing what had been customary and unobjectionable in ordinary circumstances, a portion of the permanent approach structure had been carried away and a temporary arrangement provided which in its structure left a situation of danger in the then set of the tide, known to the master of the tug, and which could have been avoided by lashing the scow to the other side of the tug.

ACTION to recover the value of a scow, loss of certain granite blocks laden thereon, and cost of salving other blocks. Tried by MARTIN, Lo. J.A. at Vancouver on the 21st and 22nd of June, 1919. Statement

W. E. Burns, and *H. B. Robinson,* for plaintiff.
C. B. Macneill, K.C., and *Pugh,* for defendant.

22nd August, 1919.

MARTIN, Lo. J.A.: In this action the plaintiff Company sues to recover the value of a scow, $2,000, and the loss of certain granite blocks laden thereon, and the cost of salving other blocks from the bed of the Fraser River. The claim arises out of the fact that on July 9th, 1918, about 6.30 p.m., the said scow laden with 225 tons of granite blocks was being taken by the stern wheel steam tug "Senator Jansen" (registered tons 93.27; length 125 feet; R. B. Tipping, Master) through the north passage of the drawbridge across the Fraser River, connecting the City of New Westminster with Lulu Island, and in so doing the scow (length 66 feet 8 inches, width 26 feet, depth 6-7 feet), which was lashed diagonally across the port bow of the tug struck a corner boom stick of the west approach to the Judgment

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drawbridge and one of her stern planks was knocked out, which caused her to quickly fill with water and take such a list that the cargo slid overboard and the scow was with some difficulty beached, and eventually became a total loss.

The said northern passage of the drawbridge is 85 feet in width and there was formerly along the whole of the south side of it a permanent approach structure of piles with planks, along which tugs with scows would slide with the drift of the tide, which method of going through the passage in the state of tide in question, two and one-half to three knots, is clearly open to no objection and no fault could be found with that course in ordinary circumstances. It appears, however, that at some time in the month preceding the accident, the down stream, *i.e.*, western portion of the said approach had been carried away and a temporary arrangement provided of four boom sticks and three groups of piles as shewn in Exhibit 10, which gives a fair representation of the situation. Of these boom sticks only two need be considered, one of them, the long sheer boom marked A on Exhibit 10 being 40 to 50 feet long and running out to the pile marked X, and a shorter one marked B fastened to the end of A and connecting at an angle with the second group of piles at the apex of the boom structure. This short corner boom B which the bridge-keeper described as being from 14 to 16 feet long and about the thickness of a telephone pole (though the defendant's witness, the tug-master, described it as heavier) projected out an appreciable distance beyond the line of sheer boom A, as well shewn on Exhibit 10, and the effect of this was that when the scow, after scraping along the sheer boom, came to the projecting corner boom, the end of it (which the master of the tug describes as being square) struck a stern plank (which I have no reason to doubt was a sound one) in the scow at its spiked end and knocked it out, causing the scow to quickly fill as aforesaid.

Judgment

Two grounds of complaint are set forward against the tug, the first being that she was badly navigated, but in the true sense of that expression I have no difficulty in finding that such was not the case, for no fault can be found with the manner in which she approached the bridge or took advantage

of the tide to stop her engines and drift through the passage, and in ordinary circumstances all would have gone well. But the second ground of complaint is that it was negligent, in the circumstances of the projecting corner boom stick and set of the tide thereupon, for the master to have gone through the passage with the scow lashed on the port bow of the tug, which was next to that corner boom which, it is submitted, obviously created a dangerous situation. It is clear from the evidence of the defence that at the season of the year, with freshets, tugs drifting as here with said tide would expect to hit the sheer boom and also that since the solid approach had been broken the tide sets move strongly towards and under the boom sticks; the tug's master says he knows the locality very well, having taken scows through it, the bridge, "a couple of hundred times," and he knew of the change since the damage to the approach ("sometime before that" and, "weeks anyway," as he expresses it) and the position of the temporary booms at the time as set out in Exhibit 10, so he was as he admits "quite familiar" with the situation and the boom sticks, and their being fastened together by a five-eighths wire.

He thus describes the accident:

"As I was passing through, the corner of the scow hooked on to this boom stick that was sticking out there.

"Now which boom stick? Look at Exhibit 10, that photograph, and state which boom stick. That there one.

"That is the one marked B? Yes.

"Well what part of the scow? This point there.

"Yes. What part of the scow hit the end of that boom stick? The side of her touched it and went along it as she got to the stern of it, and she pulled a plank out of the stern."

Judgment

And as to the boom stick B which did the damage:

"Have you looked at it since? Yes.

"What kind of end is there on it? Square end, cut off square.

"Cut off square? Yes.

"It is not tapered like? No.

"Like ordinary piles? No."

And again:

"This boom stick that is marked B always stuck out like that, did it? Sometimes it did and sometimes it didn't.

"You knew that? Yes.

"So you knew that sometimes—at some times the end of that boom stick was sticking out like that? Yes.

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"Sometimes not much, I suppose, all depending upon the current? Depending upon the way the current hit it.

"THE COURT: Dependent on which? Speak up. Depending the way the current hit it.

"Mr. *Burns*: It might change one way or the other? Yes.

"But at any rate you knew it was quite possible and probable for that to be out like that? Yes."

And:

"You could see the boom stick perfectly plain, could you not? Yes.

"You saw it? Yes, sir.

"Saw how it projected out? Well, I couldn't say that it just projected out then. The current might have dragged it out.

"Well, but you saw at the time? Yes.

"How it projected out? Yes, it projected out.

"Did it not strike you at all that if you struck it on edge it might do you some damage? Well, it might have struck me that way, but I couldn't very well help touching it.

"You couldn't very well help touching it? Not very well, no, the tide pulls that way.

"And what happened, take this as the stern board, what happened, as I understand you is that that boom stick B. hit that just about there? Yes, sir.

"Just where it was nailed on or spiked on to the sides? Yes.

"And the whole weight of the scow and its cargo and that boat was centred or concentrated at that point? Yes."

He thus describes the corner boom stick B:

"Yes, but that is a small pile—a small boom stick. I don't know it is so small, it is anywhere between—

"Well the evidence is to that effect. Well, I say it is anywhere between 16 and 22 inches.

"In depth? Yes.

Judgment

"Do you swear that? Yes.

"Did you measure it? No, I never measured it but I seen it was floating there, it was floating eight inches out of the water at that time, and there would be over half of it in the water, that would make it 16 inches, then you have got to allow for what you lose, the balance that was in the water would be about 22 inches.

"Well, the evidence here, by Gregory, I think it was, was that it was a small boom stick. Well——

"About like a telephone pole? Yes, well a telephone pole wouldn't hold nothing there.

"Well but that is the evidence. Yes, but I seen——

"And the only reason you would have for denying that would be your inference. He has sworn it. I have seen it, seen the end of it where it was swung in, and I figured it was altogether between 16 and 22 inches.

"Sixteen to 22 inches? Yes.

"Half of it is above the water? No, not half of it is above the water.

"Well, how much was above the water? Well, it is just according to how much it was waterlogged. It might have been three inches.

"Well, I mean at the time you saw it. Well, six inches."

And he admits that he knew of the opening between the ends of the two boom sticks and gives that as a reason why a fender could not have been used to protect the scow from contact with the projecting stick B. So it really comes to this, that from his own evidence the master of the tug knew of the set of the tide which would inevitably bring the scow against the corner of the boom stick, obviously creating a situation of danger, because though he might be fortunate enough to slide by, yet the probability of a contact between the end of it and the end of a plank in the scow could not prudently be left out of consideration, despite which he continued on his course thereby courting a danger which might easily have been avoided by the simple expedient of lashing the scow to the other, starboard, side away from the boom, where it would be in a perfectly safe position. I am quite unable to see, after a lengthy and careful consideration of the whole matter, how the master can be exonerated from a lack of that degree of negligence which should be used by a reasonably prudent man. I find it, indeed, difficult to account for his conduct which, the more one considers the case, appears to be rash. A number of authorities were cited, all of which I have carefully examined and many others, and those which are of most service are the Federal decisions in similar cases in the United States, where the general circumstances of navigation of this class more closely approach those in our country than do those in England. I shall only refer to a few of them which are in point. Thus, in *The T. J. Schuyler* v. *The Isaac H. Tillyer* (1889), 41 Fed. 477 at pp. 478-9, it is said:

Judgment

"While the tug did not stipulate for the absolute safety of the schooner, yet she was bound to meet such requirements of her service as would enable her to render it with safety to the schooner. She must know the depth of the water in the channel; the obstructions which exist in it; the state of the tides; the proper time of entering upon her service; and, generally, all conditions which are essential to the safe performance of her undertaking. If she failed in any of these requirements, or in the exercise of adequate skill or care, she is justly subject to an imputation of negligence. Was the tug derelict in any of these respects? She might have started when the tide was at a higher stage than it was when she began her movement up the river, and thus, with deeper water, have insured the safety of her tow. When she approached the pier of the

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bridge she might and rightly ought to have kept further away from it, for which there was ample room, and thus have avoided the risk of collision with it, or with the obstruction under the surface of the water."

And in *The Italian* (1904), 127 Fed. 480 at p. 481, it is said:

"This accident can not properly be deemed to have been caused by an unknown obstruction but must be regarded as due to a failure on the tug's part to guide her tow properly, so that collision of the barge's bow with the spiles would be avoided."

And in *The Westerly* (1918), 249 Fed. 938 at p. 940, it is said:

"The tug had the burden of excusing the failure in performance of her undertaking to tow the canal boat safely through a presumably safe and well-marked channel. *Boston, Cape Cod, etc., Co.* v. *Staples, etc., Co.* [(1917)], 246 Fed. 549, 552,—C.C.A. It would be a sufficient excuse if the grounding was in fact caused by an obstruction in the channel over which there was not water enough for the canal boat, because her master would have been justified in believing that no such obstruction was to be found there; but it was for the tug to shew the existence of such an obstruction, and therefore to shew that she had the canal boat in the middle of the dredged channel when she grounded, and not outside of it or on its edge."

And in *Lake Drummond Canal & W. Co.* v. *John L. Roper L. Co.* (1918), 252 Fed. 796 at p. 799, a very similar case to this respecting a vessel attached to a tug and passing along the side of a lock and a projecting snag, the Court said:

"It should be remembered, as we have stated, that the captain of the tug saw or could have seen that the gate had not fully entered the recess prepared for it, but that it was jutting out, so as to obstruct the passage intended for vessels entering the lock. With this projection staring him in the face, the captain of the tug did not take the precaution to stop his engines until after the barge had come in violent contact with the gate."

Judgment

And on the question of presumption in the case of *The Alleghany* in the same report, 6 at p. 8, it was said:

"This collision could not have occurred without the fault of some one, and, the lighters being without fault, it follows the fault is presumptively that of the tug, which was in exclusive control, unless she has shewn the collision was the result of inevitable accident, or was caused by some agency other than the tug or tow. *The W. G. Mason* [(1905)], 142 Fed. 915; 74 C.C.A. 83, and cases there cited."

Applying the foregoing principles to the facts before me, I can only come to the conclusion that a case of negligence has been established against the tug, and therefore the plaintiff is entitled to judgment. From the evidence so far adduced on damages, the fair value of the scow would, I think, be $2,000,

and the cost of the missing granite and of salving the balance could well be allowed at the sum claimed, $703.75, making a total of $2,703.75, and there is no reason why interest should not be charged from the date of damage at the legal rate, but bearing in mind that it is the established practice of this Court to refer questions of damage to the registrar, assisted by merchants if necessary, I should be prepared to adopt that course if the defendants wish it, because, relying upon that practice, they may have wished to produce more evidence of the amount of loss than was given before me, although their counsel did not so state. They will be given, therefore, one week within which to apply for a reference if desired.

A question arose as to the unseaworthiness of the scow, but I am satisfied that she was in a fair condition to perform the work undertaken, though it is not strictly necessary to pass upon this point, because even if she had been wholly sound, the direct consequences of the knocked-off plank could not have been avoided.

Judgment

Judgment for plaintiff.

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HALEY v. S.S. "COMOX"

HALEY *ET AL.* v. S.S. "COMOX."

Admiralty law—Jurisdiction—Claim for necessaries supplied to ship elsewhere than in its home port—Domicil of owner—24 Vict., Cap. 10, Sec. 5; 53 & 54 Vict., Cap. 27.

Contract—Construction—Installation of machinery—Furnishing material and labour.

A ship was owned by a company whose registered head office was at the Port of Vancouver, British Columbia, but all the shares in the company were owned by persons domiciled in California.

Held, the owner of the ship was not domiciled in Canada within the meaning of section 5 of the Admiralty Court Act, 1861, 24 Vict., Cap. 10, and the Colonial Courts of Admiralty Act, 53 & 54 Vict., Cap. 27, and the Admiralty Court had jurisdiction in a claim for necessaries supplied to the ship at New Westminster, British Columbia.

A contract for refitting a ship provided for the propelling machinery to be "installed" by the contractors.

Held, this meant to place or set up in a position for use, and it must have been in the contemplation of the parties that the new engine was to be placed in position upon a bed sufficient for that purpose already in "place" in the ship; and the contractors having supplied the engine bed, which under their contract they were not required to do, were allowed the cost thereof.

Under a contract to purchase the materials and supply the labour and do the work for certain refittings for a ship on a percentage of the cost, the contractors were not allowed to charge, as for cost of labour, for the time occupied in purchasing materials.

ACTION claiming a sum of money for necessaries in the shape of material and labour supplied to a ship. Tried by MARTIN, Lo. J.A. at Vancouver on the 19th to the 21st of July, 1920.

Statement

By The Admiralty Court Act, 1861, being 24 Vict., Cap. 10, Sec. 5, the High Court of Admiralty shall have jurisdiction over any claim for necessaries supplied to any ship elsewhere than in the port to which the ship belongs, unless it is shewn to the satisfaction of the Court that at the time of the institution of the cause, any owner or part owner of the ship is domiciled in England or Wales.

By the Colonial Courts of Admiralty Act, 1890, 53 & 54 Vict.,

Cap. 27, the word "Canada" is substituted for "England or Wales."

The plaintiffs sued for necessaries supplied in the shape of material and labour in refitting the defendants' ship at New Westminster in the Province of British Columbia. The defendants objected to the jurisdiction of the Court and alleged that the ship belonged to the Port of Vancouver, on the ground that she was owned by the Henrietta Ship Company having its head office at the Port of Vancouver. But the evidence shewed that of 1,000 shares of stock which comprised the capital stock of the Henrietta Ship Company, 995 shares were owned by Captain Woodside, who lived and was domiciled in San Francisco, in the State of California, and his wife and son. The other directors of the Company lived and were domiciled at San Francisco. It was argued for the plaintiffs that therefore the ship was really owned in San Francisco, and was a foreign ship and that, in consequence, section 5 of the Admiralty Courts Act, 1861, applied. The following cases were cited in support of the contention that the Court should look behind the register of the ship to ascertain the true ownership: *The Polzeath* (1916), P. 241; 85 L.J., P. 241; *The St. Tudno* (1916), P. 291; 86 L.J., P. 1; *The Proton* (1918), A.C. 578; 87 L.J., P.C. 114; *The Hamborn* (1917), 87 L.J., P. 64; (1918), P. 19.

Statement

There were certain disputes with regard to the fulfilment of the contract, as appear in the judgment.

Mayers, and *G. L. Fraser,* for plaintiffs.
C. B. Macneill, K.C., for defendant.

9th August, 1920.

MARTIN, LO. J.A.: This is an action claiming $19,258.29, for necessaries supplied in the shape of material and labour in refitting the defendant ship at New Westminster, in this Province. An objection is taken to the jurisdiction, founded on the submission that the ship belongs to the Port of Vancouver and that she is owned by the Henrietta Ship Company, Limited, a Canadian company with head office at that port, but I have no hesitation whatever in finding upon the evidence that whatever

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the documents may pretend to shew her home port is in San Francisco and her true owner is Alexander Woodside, domiciled there.

Part of the work was done under a written contract, dated February 12th, 1920, for $13,100, and the balance under a later verbal one: the submission that the plaintiffs' right to recover was dependent upon the owner being able to obtain classification from the British corporation or otherwise is not supported. I find as a whole that the work done under both contracts was a fair job of its class, and the prices charged are reasonable, which leaves only a few items that require particular notice. The main one relates to the engine, etc., under this clause of the written contract:

"All propelling machinery to be installed complete with auxiliaries and pumps also cargo winches. The above items to be supplied by the owners ready to install. It is assumed that the present tail shaft and propeller will be used."

It is submitted that under this clause the plaintiffs were required to supply the engine bed, and therefore a large number of items in their bill covering the considerable cost of that work, about $5,000, should be disallowed. In the Oxford Dictionary I find these definitions:

"Install (2). To place (an apparatus, a system of ventilation, lighting, heating, or the like) in position for service or use."

"Installation (2). The action of setting up or fixing in position for service or use (machinery, apparatus, or the like); a mechanical apparatus set up or put in position for use; *spec.* used to include all the necessary plant, materials and work required to equip rooms or buildings with electric light."

Judgment

The main idea of "installing" thus conveyed is to place or set up in position for use, and though in certain circumstances and some trades it may have a special or wider meaning, yet there is nothing in the circumstances of this case to so enlarge it. I am of the opinion that it was and must have been in the contemplation of the parties that the new engine was to be placed in position upon a bed sufficient for that purpose already in "place" in the ship. The statement of the witness Lockhart, marine engineer, on cross-examination, that it meant the plaintiffs were to get the engine, auxiliaries and pumps from the owner "ready to install" and then couple them up for sea

in the ship's engine room, seems the reasonable view to take of the situation, and it is, moreover, supported by the correspondence between the parties, even if the blueprint, Exhibit 38, is to be discarded in this connection, as is rightly, I think, submitted by defendant's counsel, it being merely an over-all dimension plan, as explained by the witness Akhurst. Therefore said items covering the cost of the engine bed will be allowed.

As to certain "hardwood" items, it is clear from the evidence that unless otherwise specified by name, local shipwrights include Douglas fir under that category, and that wood was, in fact, used, therefore the items are allowed.

With respect to the two wing tanks for oil: That question has occasioned me the most difficulty, but after a careful consideration of the evidence and the circumstances I have reached the conclusion that the owner, Woodside, has so acted that he must be held to have accepted them after full knowledge of the result of the test, and their capacity, if the plaintiff Christian's evidence is to be believed, and I prefer it to Woodside's, the latter did not insist upon larger tanks being substituted, as the plaintiffs offered to do, because they would reduce the cargo space, and, consequently, earning power, and it is difficult to understand, if his objection were so serious as now put forward, why he nevertheless put to sea without any further alterations to them; as they are now, with a capacity of 3,800 gallons, instead of the 5,000 as specified for, they still give a 19-day voyage range on the engine consumption of 200 gallons per day, which he doubtless agreed to regard as sufficient; furthermore, his representative, Wallace, agreed to test them though he knew their capacity was short and that they were not quarter-inch plate, and did not order them to be taken out after the test, though he had the power to do so, simply because it would have delayed the vessel in sailing. I am of the opinion, on the whole aspect of this item, that it is too late for the owner to successfully contest it.

Judgment

There are five items, however, which the owner is entitled to have disallowed, *viz.*, those charged for the time occupied in purchasing materials, under these headings in the monthly "Statement of Wages":

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J. F. Haley, looking after extra materials (work)	$125.00
Overhead (April)	83.33
" (May)	83.22
" (June, 1st half)	125.00
" (" 2nd ")	125.00
	$541.55

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The verbal contract was that the plaintiffs were to purchase the material and supply the labour and do the work on a percentage of 20 per cent. of the cost, and it is submitted that the time occupied in purchasing is part of the overhead cost of labour, and that as in this case the plaintiffs did not include their office expenses in "overhead" they are entitled to exclude non-productive work outside the office, that is, instead of including in "overhead" the office administrative expenses they excluded them and therefore should be allowed for them as time occupied in "the labour of purchasing." But I am of opinion that while it may be the plaintiffs made an error in excluding their general expenses from "overhead" and estimated too low, as pointed out by the witness Lockhart, yet nevertheless that was the contract they made, and if they made a mistake in it they must bear the loss, so consequently the said five items will be disallowed: judgment will be entered in favour of the plaintiffs for all the other items.

Judgment

With respect to the counterclaim, it has not been supported by evidence and must fail. While the telegram of May 26th from the plaintiffs to Woodside concerning the arrival of the engine, beginning, "expect engine," etc., was an unfortunate one, yet an ordinarily prudent man would not treat such expectation of the arrival of an engine, especially in these days of delayed transportation, with much confidence; the engine as a matter of fact did not arrive in the plaintiffs' yard until June 8th, and after that time I am unable to find that there was any undue delay, bearing in mind the fact that under the verbal contract additional and collateral work was being continually ordered by the owner's agent Wallace, even up to July 3rd, two days before sailing. It is, therefore, impossible to hold that the owner really suffered any loss or damage on this head.

The whole result is that judgment should be entered for

the plaintiffs as above indicated, and the costs will follow the event.

Judgment for plaintiffs.

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THE "FREIYA" v. THE "R.S."

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1921

April 26.

THE "FREIYA" v. THE "R.S."

Admiralty law—Salvage—Fisheries—Usage—Custom of gratuitous assistance between vessels in fishing industry.

It was found on the evidence and given effect to by the Court, in dismissing a claim for alleged salvage services, that there is a custom in the waters of the Pacific coast of British Columbia that all vessels engaged in the fishing industry afford to each other in the common interest and for their joint benefit voluntary and gratuitous assistance in case of accident, and that this mutual assistance is not confined to the vessels attached to or employed in connection with the various canneries, but extends to those which carry on independently the fishing business in its various aspects; that such custom is a reasonable one and sufficiently established as being so notorious and generally acquiesced in that it may be presumed to have been known to all persons engaged in that industry who sought to inform themselves, as it was incumbent upon them to do in working under local conditions.

ACTION for salvage, tried by MARTIN, Lo. J.A. at Vancouver on the 9th of April, 1921. Statement

Hossie, for plaintiff.
Mayers, for defendant.

26th April, 1921.

MARTIN, Lo. J.A.: This is an action for the salvage of the gas fishing boat "R.S." in Knight Inlet on July 29th last. The boat was chartered by the Glendale Cove Cannery Company and engaged at the time in catching fish for that cannery. The power boat "Freiya" is owned by one Carson and she was engaged at the time in buying fish from the Glendale Cannery and others and taking it to market at Seattle, or as might be. She had been at the cannery in question for some days before Judgment

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and after the accident to the "R.S.," buying and loading fish from the company, and she claims an award for alleged salvage services rendered to the "R.S." when adrift in Knight Inlet as aforesaid.

The first defence set up is one of much importance to those engaged in the fishing industry on this Pacific coast of British Columbia, and it is that there is a long-established custom in these waters that all vessels engaged in the fishing industry afford to each other in the common interest and for their joint benefit voluntary and gratuitous assistance to crews and vessels in distress in any of the frequent accidents which are incidental to vessels of various descriptions engaged in that industry, and that this mutual assistance is not confined to the vessels attached to or employed in connection with the various canneries, but extends to those which carry on independently the fishing business in its various aspects. Obviously there cannot be anything unreasonable in such a custom, as it is both in the interests of humanity and industry, but on the contrary, everything is in favour of it to one at all familiar with the waters of this Province and the conditions in general under which fishing operations are carried on, and so the only other aspect of the question is: Has the custom been sufficiently established with reasonable certainty as being so notorious and generally acquiesced in that it may be presumed to have been known to all persons engaged in that industry who sought to inform themselves on so important a matter, as it was incumbent upon them to do in working under local conditions?

Judgment

After careful consideration of the evidence I am satisfied that the defendant vessel has discharged the burden imposed upon it in that respect and, indeed, it is confirmed in its submission by the evidence of Carson, the owner of the plaintiff ship, whose cross-examination upon this point was unsatisfactory, and he attempted to evade it by saying that he was not sufficiently interested to inquire into the existence of such a custom, though the evidence shews that there were special reasons why he should have done so.

In *Wright* v. *Western Canada Accident and Guarantee Ins. Co.* (1914), 20 B.C. 321 at p. 328; 6 W.W.R. 1409; 29

W.L.R. 153, I decided there was a custom in Victoria in the building trade to make allowance for the extra cost occasioned by the discovery of unexpected rock encountered in excavation work, and there is a noteworthy case in connection with the fishing industry which supports my view. I refer to *Noble* v. *Kennoway* (1780), 2 Dougl. 510, a decision of Lord Mansfield relating to the Labrador fishery, wherein it was decided that though a policy on fishing vessels in terms expressed only 24 hours after their safe arrival for the discharge of cargo, yet by the custom of the Labrador fishery the liability of the under-writers was extended to cover a period of several months within which the cargo or part thereof was kept on board, which custom was alleged to be in accordance with the trade on that coast. The custom there was proved by witnesses who had never been in Labrador, and it was supported by evidence given as to the similar custom in Newfoundland, where the fishing trade had long been established, though the new trade of Labrador had only been opened up since the Treaty of Paris, for a period of three years. Lord Mansfield said, p. 513:

"Every under-writer is presumed to be acquainted with the practice of the trade he insures, and that whether it is recently established, or not. If he does not know it, he ought to inform himself. It is no matter if the usage has only been for a year. This trade has existed, and has been conducted in the same manner for three years. It is well known that the fishery is the object of the voyage, and the same sort of fishing is carried on in the same way at Newfoundland. I still think the evidence on that subject was properly admitted, to shew the nature of the trade. The point is not analogous to a question concerning a common-law custom."

Judgment

The other Justices concurred with Lord Mansfield, Mr. Justice Buller adding, that there was sufficient evidence to support the custom "without calling in aid the usage in the Newfoundland trade," although he was of opinion that such evidence was admissible in order to prove the reasonableness of the custom in Labrador.

In the case at bar I have before me evidence of reputable persons on the ground, who speak with reasonable certainty from their personal experience and knowledge of these waters for many years, and I have no doubt that if it had been the "Freiya" which had the misfortune to be the victim of an accident at the time in question, she would have invoked (and

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successfully) in her own favour the benefit of the custom which I now decide exists in favour of the "R.S."

Such being the view I have taken of the case it is not, strictly speaking, necessary to go into the question of the alleged salvage service or decide the nice point as to whether it should, in the most favourable light, be regarded as anything more than towage, and I think it only now desirable to say that if the services could be regarded as salvage* it would only be so in a technical sense, and the amount awarded would be so small that it would be difficult in the circumstances and in the absence of necessary evidence as to the set of the tide, to distinguish it in practice from what would be allowed as towage, in which service the "Fir Leaf" was of the greater assistance; upon the evidence I could not find that the loss of the fish on the "Freiya" was due to the services rendered, whatever they were.

I make these observations because of the objection that has been taken to the extravagant amount of the claim, *viz.*, $6,000, for which the ship was arrested, and though the plaintiff's solicitor subsequently agreed to bail being given for half that amount, yet it was so extravagant and oppressive that I call attention to my observations in *Vermont Steamship Co.* v. *Abby Palmer* (1904), [10 B.C. 383] 8 Ex. C.R. 462, and *Grand Trunk Pacific Coast S.S. Co.* v. *The "B.B."* (1914), Mayers's Admiralty Law and Practice 544, on the impropriety of that course, *i.e.*, forcing upon the owners the always onerous, and sometimes impossible, burden of furnishing large bail: see also *The Freedom* (1871), L.R. 3 A. & E. 495 at p. 499; 25 L.T. 392, wherein it was said: "The Court has always discouraged the institution of a suit for an excessive amount."

Judgment

It follows that the action should be dismissed with costs.

Action dismissed.

* JUDGE'S NOTE—As to which *Cf. Clayoquot Sound Canning Co.* v. *S.S. "Princess Adelaide"* (1919), [27 B.C. 526] 3 W.W.R. 241; 19 Ex. C.R. 128.

STONE *ET AL.* v. S.S. "ROCHEPOINT."

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STONE *v.* S.S. "ROCHEPOINT"

Admiralty law—Lien for wages—Priority to mortgage—Circumstances defeating priority.

The lien of the mate of a vessel for wages cannot be preferred against the claim of a mortgagee where the payment of the mortgage has been guaranteed by the mate; there is no distinction to be made between the position of a master and mate in this respect.

A lien claimed by an engineer of a vessel for wages in priority to the claim of a mortgagee was not allowed, the Court holding that, on all the evidence, although the registered owner of the vessel was a company, the engineer and two others were the true owners thereof.

ACTION for wages by the master, mate and other seamen of a fishing vessel, tried by MARTIN, Lo. J.A. at Vancouver on the 26th of April, 1921.

The S.S. "Rochepoint" was owned by the West Coast Transportation Company, Limited, of Alberni, British Columbia, who were the registered owners of the said vessel. Fifty per cent. of the stock of this company was owned by the plaintiffs, S. S. Stone, C. R. Stone and W. J. Stone, the other plaintiffs, McKee, Rhodes and Knudson, having no interest in the said company. On December 9th, 1919, the West Coast Transportation Company, Limited, mortgaged the "Rochepoint" for the sum of $4,000 to the Columbia Salmon Company. The plaintiffs S. S. Stone and W. J. Stone signed the mortgage on behalf of the company and also personally guaranteed the payment of the mortgage moneys. In February, 1921, the mortgagees took possession of the "Rochepoint," and while the ship was technically in the possession of the mortgagees a writ was issued on behalf of all the plaintiffs against the "Rochepoint" for arrears of wages and claiming condemnation of the ship for wages and costs of the action. Statement

H. B. Robinson, for plaintiff.

Mayers, for defendant.

13th June, 1921.

MARTIN, Lo. J.A.: This is an action for wages by the master, mate and other seamen of the "Rochepoint," a gaso- Judgment

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line fishing vessel of about 76 tons gross, and the preferential lien that they claim is resisted by the mortgagees, the Columbia Salmon Company, which holds a mortgage on the vessel for $4,000 for moneys advanced, dated December 9th, 1919, given by the registered owner, the West Coast Transportation Company, Limited, and the payment of which is also personally guaranteed by W. J. Stone and S. S. Stone, her master and mate respectively, at that time, who signed a promissory note as collateral security for the mortgage, which they have not paid.

It was decided in *The Bangor Castle* (1896), 8 Asp. M.C. 156; 74 L.T. 768, that the lien of a master for wages cannot be preferred against the claim of a mortgagee where the payment of the mortgage has been guaranteed by the master (and see *The Edward Oliver* (1867), L.R. 1 A. & E. 379; 36 L.J., Adm. 13), and so it was admitted that the master's claim here must give way to the mortgagee's. But it is submitted that the claim of the mate is in a different position, because he is a seaman and the master is not in theory (though I note he describes himself as such in his statement of claim), and hence the rule should not be extended to include seamen, who are specially protected or favoured as to exemption from attachments and the revocability of assignments of wages or salvage made "prior to the accruing thereof" by sections 236-7 of The Canada Shipping Act, Cap. 113, R.S.C. 1906. The position of the master as to his lien for wages and disbursements was considered by me in *Beck* v. *The "Kobe"* (1915), 22 B.C. 169; 9 W.W.R. 89; 32 W.L.R. 351; 17 Ex. C.R. 215, and he is now upon the same basis in that respect as any seaman, though not a seaman in the technical use of that word (though he is a "mariner"—*The Jonathan Goodhue* (1859), Swabey 524 at p. 527), and I am unable to see why a distinction should be drawn between two classes holding a lien of the same description simply because special protection in other respects is given to a seaman. It does not at all follow that because he may properly claim that specified statutory protection or privilege there is any principle which would otherwise entitle him to act less honestly than any other lienholder

Judgment

towards his creditor, and Dr. Lushington said in *The Edward Oliver* case, p. 383 (L.R. 1 A. & E.) that in the case of a master

"it would be manifestly wrong that in defeasance of his own contract he should not only pay the bond himself, but obtain out of the proceeds of ship and freight payment of his own claims against the owners, leaving the bottomry bondholder unpaid. Hence the rule by which the master's claim is liable, under those circumstances, to be postponed."

And so I see no reason why the mate should be less honest than the master in discharging his legal obligations. I am of opinion that the claim of the mate is within the same rule as that of the master, and should likewise be postponed to that of their common creditor, the mortgagee.

As to the claim of Chester R. Stone as engineer: Having regard to all the unusual circumstances it is obviously open to grave suspicion as a lien in conflict with the unquestioned claim of the mortgagees, who, I am satisfied, were designedly kept in ignorance of these wage claims. After an examination, in the light of other evidence, of the books (if they can be dignified by that description) of the West Coast Transportation Company, Limited, I can only reach the conclusion that at times material at least the name of that company as the registered owner was being made use of as a cloak to carry on the operation of the vessel by the three Stone plaintiffs as partners behind the screen of registration. But to determine the question of the true ownership the Court will not allow itself to be misled by the pretence of documents but will resort to all the evidence to extract the truth, as I did recently in *Haley* v. *S.S. "Comox"* (1920), [*ante,* p. 104] 3 W.W.R. 325; 20 Ex. C.R. 86. Therefore I am of opinion that this alleged lien is not *bona fide,* and is consequently rejected.

Judgment

With respect to the claims of the three seamen, McKee, Rhodes and Knudson, I am of the opinion that they are *bona fide* and the delay in asserting their lien has been satisfactorily explained, and therefore judgment should be entered in their favour for the respective amounts due them of $301.15, $480.85 and $816.20.

Judgment accordingly.

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June 9.

CASKIE v. THE PREMIER MINES LIMITED.

Practice—Right of appeal—Judgment below appealable amount—R.S.B.C. 1911, Cap. 53, Sec. 116(a)—Contract—Condition precedent—Condition not complied with—Remedy.

CASKIE v. PREMIER MINES

Under subsection (*a*) of section 116 of the County Courts Act the determining factor as to whether an appeal may be taken is the amount "claimed" by the complainant, and not the amount "recovered" by the judgment (GALLIHER, J.A. dissenting).

The workmen (including the plaintiff) at the defendant Company's mines went on strike, being dissatisfied with a Chinese cook who the Company refused to discharge. Later the plaintiff and other workmen entered into a contract at Prince Rupert with the Company's agent to return to work at the mines at Stewart upon the agent agreeing "to settle the trouble to the satisfaction of the men affected." The men returned to Stewart, but on arriving at the mine the Company refused to discharge the cook and the men refused to go to work. In an action to recover wages lost, or in the alternative damages for breach of contract, the plaintiff recovered $77.

Held, on appeal, affirming the decision of YOUNG, Co. J., that the agent having agreed to "settle the trouble to the satisfaction of the men affected" and not having done so, this constituted a breach of contract upon which the plaintiff was entitled to recover, and the sum arrived at by the judge below was reasonable in the circumstances.

APPEAL by defendant from the decision of YOUNG, Co. J., of the 9th of February, 1921, allowing the plaintiff $77 and costs in an action to recover $298, being wages at $5.50 per day for 52 days and steamer fare from Prince Rupert to Stewart, or in the alternative for damages for breach of contract. Prior to January 7th, 1920, a strike existed among the men employed by the defendant Company at its mines near Stewart, the men being dissatisfied with the Chinese cook engaged by the defendant Company at its mines. The plaintiff claimed that the Company's agent at Prince Rupert then entered into an agreement with the plaintiff and other men that if they would go back to Stewart and go to work the grievance complained of would be adjusted to their satisfaction. The plaintiff and the other men then went to Stewart on the 8th of January, but on going to the mine the manager

Statement

refused to carry out the agreement as to the work and the men refused to go to work. The plaintiff had to stay in Stewart without work for 52 days before he could get back to Prince Rupert. Upon judgment being entered for the plaintiff for $77, the defendant Company appealed. The plaintiff raised the preliminary objection that there was no appeal under section 116 of the County Courts Act as the judgment was for less than $100.

Statement

The appeal was argued at Victoria on the 9th of June, 1921, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

C. B. Macneill, K.C., for appellant.

Ernest Miller, for respondent, moved to quash on the ground that there was no appeal under section 116(*a*) of the County Courts Act. The claim was for $298, but the plaintiff only recovered $77. The interpretation of the word "claim" does not depend on the amount claimed in the plaint but on the amount actually recovered: see *Cox* v. *Begg Motor Company Limited* (1921), 29 B.C. 531; *Allan* v. *Pratt* (1888), 13 App. Cas. 780. The correct course is to look at the judgment as it affects the interests of the parties: see *Macfarlane* v. *Leclaire* (1862), 15 Moore, P.C. 181 at p. 187. Thirty-one dollars only was paid into Court with a denial of liability.

Argument

Macneill, contra: The amount claimed in the plaint is in question only: see *Beauvais* v. *Genge* (1916), 53 S.C.R. 353. I also have a right of appeal under section 117 of the Act.

MACDONALD, C.J.A.: We are dealing now with the preliminary objection to the appeal taken under section 116 of the County Courts Act. That section 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 where the plaintiff shall claim a sum of, or a counterclaim shall be set up of one hundred dollars or over."

MACDONALD, C.J.A.

Plainly enough on the wording of that section the plaintiff has claimed a sum in excess of $100 and would be entitled to appeal against a judgment for less than that amount. This is practically conceded by Mr. *Miller*, whose contention is that

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when the defendant has to pay less than $100 he has no right of appeal. There is no doubt in my mind that the section makes no distinction between the right of the plaintiff and the right of the defendant. By the plain language of the subsection the factor fixing the amount is the amount claimed and not the amount recovered, and there is no distinction made in favour of the defendant where the amount recovered is less than the amount claimed. There is no provision made for such a case, as there is, for example, in the Mechanics' Lien Act.

MACDONALD, C.J.A.

I think, therefore, that the preliminary objection should be overruled.

MARTIN, J.A.: I think we should follow the decision of the Supreme Court of Canada in the case of *Beauvais* v. *Genge* (1916), 53 S.C.R. 353, wherein it was decided upon a very similar statute, which at the time it was in force was almost identical with our own, that the sum claimed was the determining factor and not the sum recovered by the judgment. Reliance was placed by their Lordships of the Privy Council in the case of *Allan* v. *Pratt* (1888), 13 App. Cas. 780 on article 68 of the Quebec Code, but the Supreme Court of Canada points out that their Lordships were in error in regard to the construction of that article in the Quebec Code. Therefore I think we should not follow that decision, but rely upon that of the Supreme Court of Canada.

MARTIN, J.A.

GALLIHER, J.A.: I unhesitatingly adhere to the judgment I gave in the case of *Cox* v. *Begg Motor Co.* (1921), [29 B.C. 531] 2 W.W.R. 150, and as I understand the Privy Council cases I am entitled to take that view. I do not think the decision of the Supreme Court of Canada really can be considered an authority on the wording of our own Act, and for this reason—that in the cases decided by the Supreme Court of Canada the governing point was the wording of the article in the Quebec Code, wherein the right to appeal is dependent on the amount in dispute, "and such amount shall be understood to be that demanded and not that recovered if they are different." There is something expressed in plain language.

GALLIHER, J.A.

It seems to me in reading the judgment of the Supreme Court of Canada, the majority of that Court gave considerable attention to the fact that, in their opinion, the particular wording of the Quebec section could not have been drawn to the attention of the Privy Council. Now, in the *Allan* v. *Pratt* case (1888), 13 App. Cas. 780 at p. 781, this is what the Judicial Committee said:

"Their Lordships are of the opinion that . . . . the proper measure of value in determining 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."

GALLIHER, J.A.

I say, with every respect to the different opinions expressed, that the case seems absolutely clear and I would give effect to the preliminary objection.

MCPHILLIPS, J.A.: In my opinion the motion to quash should be overruled. MCPHILLIPS, J.A.

Preliminary objection overruled.

Macneill, on the merits: There was error in finding there was any agreement between the plaintiff and the defendant. The plaintiff was offered work but he refused to accept until the Chinese cook was discharged. This was unreasonable and unlawful and against public policy. Although denying liability, we paid into Court $31.35. Argument

Miller: They knew what the trouble was and agreed to abate it, but on getting the men to Stewart refused to carry out the arrangement and the men then refused to go to work. They were justified in so acting.

Macneill, in reply.

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

MARTIN, J.A.: I agree. MARTIN, J.A.

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

MCPHILLIPS, J.A.: I agree. I think the case presents some difficulties which seem rather formidable. There are two cases MCPHILLIPS, J.A.

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I have in mind at the present time by which this case may be supported, that is, the case of *Mackay* v. *Dick* (1881), 6 App. Cas. 251, and that of the *Nicola Valley Lumber Co.* v. *Meeker* (1916), 31 D.L.R. 607, and this same case on appeal to the Supreme Court of Canada (1917), 55 S.C.R. 494, when the judgment of the learned trial judge was sustained. Lord Blackburn, in *Mackay* v. *Dick, supra,* at p. 263 said:

"Where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect."

Caskie is entitled to say, "You agreed to settle the trouble to the satisfaction of the men affected," and he did not settle the trouble, therefore Harris did not do that which he agreed to do, and that would constitute a breach of contract. It is with some hesitancy that I come to the conclusion that the plaintiff can invoke this warranty, as I might term it, but when I consider the amount at stake here, the sum of $77, claimed for wages, I really do not think I can do otherwise. Certainly Harris did not do that which he said he would do, and on the principle dealt with by Lord Blackburn he must do all that is necessary to be done for the proper carrying out of the contract, even where there are no express words. Here we have the express words that he agreed to settle the trouble to the satisfaction of the men affected. He did not do it. I suppose damages would flow from that, and would be consequent upon this, that the plaintiff, being a member of the Union, would lose his card of membership if he went to work when the strike was still existent. I suppose from one point of view if a party agrees to remove an obstacle, why it should not be upheld? Apparently Harris did agree. He did not remove that obstacle, but notwithstanding that he wanted to compel Caskie to work and lose his membership. I think there was an agreement and evidently that has been broken. Damages would naturally flow from that breach, and would be the wages that otherwise might have been earned.

MCPHILLIPS, J.A.

Appeal dismissed.

Solicitors for appellant: *Patmore & Fulton.*
Solicitors for respondent: *Fisher & Oughton.*

REX *EX REL.* RENNER v. HARWOOD.

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June 17.

REX v. HARWOOD

Criminal law—Prohibition—Liquor in root-house six feet from main house —"Dwelling-house," meaning of—B.C. Stats. 1916, Cap. 49, Sec. 11.

The police found a quantity of liquor in a root-house situate about six feet away from the accused's house. The root-house was well banked for cooling purposes and all food and other supplies for daily use and consumption by himself and family were kept there. He was convicted of unlawfully having intoxicating liquor elsewhere than in his private dwelling-house. A case stated, heard by MORRISON, J., was dismissed.

Held, on appeal, *per* MACDONALD, C.J.A. and GALLIHER, J.A., that the term "private dwelling-house" includes all that is essential and usually found in a dwelling-house; a place for the storage of staples is necessary and found in every dwelling, and although a few feet away from what is called the "house," the root-house should be included as part of the "private dwelling-house" within the Act.

Per MARTIN and MCPHILLIPS, JJ.A.: That the section excludes the broader and general definition of "private dwelling-house" and restricts it to the separate building as distinguished from a collection of buildings, and the appeal should be dismissed.

The Court being equally divided, the appeal was dismissed.

APPEAL by the accused from an order of MORRISON, J., of the 5th of May, 1921, dismissing a case stated and affirming a conviction by two justices of the peace made on the 17th of March, 1921, whereby the accused was convicted of unlawfully having a quantity of intoxicating liquor elsewhere than in his private dwelling-house in which he resides. The defendant resided near Huntingdon and his premises consisted of his house, a root-house six feet away from his house and a wood-shed some distance away. The root-house was well banked with earth in order to keep it cool and all the provisions for the house were kept there for daily use and consumption by the family. The police in making a search found nine cases and forty-five bottles of intoxicating liquor. The accused was convicted and fined $50 and costs. The question stated for the opinion of the Court was: Statement

"Was the keeping of intoxicating liquor in the root-house of the defendant under the circumstances hereinbefore set out a violation of section 11 of the British Columbia Prohibition Act?"

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The appeal was argued at Victoria on the 17th of June, 1921, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Argument

Maitland, for appellant: The root-house in question was six feet from the back door of Harwood's dwelling and was in daily use. It was banked up in order to keep it cool for storing provisions. It is a necessary and *bona fide* part of his house, and should be considered part of a dwelling-house within the interpretation of section 3 of the Act: see *Rex* v. *Telford* (1921), 29 B.C. 452; *Rex* v. *Obernesser* (1917), 40 O.L.R. 264; *Rex* v. *Sit Quin* (1918), 25 B.C. 362. The root-house is an adjunct of the dwelling-house and a necessary one. As to the meaning of the word "house" see *Bishop of Vancouver Island* v. *City of Victoria* (1920), 28 B.C. 533 at p. 542.

Wood, for respondent: The liquor must be kept in the private dwelling-house and not outside: see *Rex* v. *Martel* (1920), 48 O.L.R. 347; *Rex* v. *Kennedy* (1921), 2 W.W.R. 88. It was decided below that a dwelling-house must all be under one roof.

Maitland, in reply.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I think the appeal should be allowed. The definition in the Act, "private dwelling-house," must be given some elasticity. The Legislature has taken care to say that certain buildings shall not be construed to be private dwelling-houses, in other words, words of exclusion are used. I do not propose to hold that that list of exclusions is exhaustive. I mean to say there are other buildings which are not specified, which it might be said were not private dwelling-houses within the definition, but it is useful in considering what the Legislature meant by dwelling-houses, to consider that it did mention a large number of buildings and declared that these shall not be regarded as private dwelling-houses. The word dwelling-house is a somewhat indefinite term; it may, under the Act, consist of one room in a large house, of 20 rooms—it may consist of one room, or a suite of rooms. It may be a private dwelling-house if one room is occupied as a kitchen, store-room and pantry, and so on, all through, until you have covered every

room in the house and would include, as I think the Ontario case cited indicates, the cellar. The term private dwelling-house includes all that is essential and usually found in a private dwelling-house. Now, a place for the storage of milk, butter, meat, and, if you like, liquor, is necessary and found in every private dwelling-house; it is necessary and if it be a few feet from what may be called the "house," it is in the same position. As an illustration, it is not an uncommon thing to find the kitchen of a summer cottage within a few feet of the main part of the house. Would any person pretend that that kitchen was not part of the dwelling-house, although not under the same roof? One has to give a reasonable construction, and not too hard a construction, to the statute; and look at the popular and not at the technical meaning. The object was to prevent the consumption of liquor in any place that cannot be said to be the home. Can it be said that this root-house was not part of the home? I think it cannot.

MACDONALD, C.J.A.

MARTIN, J.A.: To my mind the intention of this Act was to provide with certainty for the place wherein liquor should be kept in a private dwelling-house, and there is nothing to indicate that the Legislature, in using that expression, wished to give it the wide construction which is used in the terms of conveyancers. On the contrary, I look at the section, and I find from it what, to me, at least, is clear, that what it wished to do was to carry out the idea of a building as distinguished from a collection of buildings; that is to say, that there should be one separate building called in the statute a separate dwelling, in which that liquor could be kept, and in that place alone. To my mind it is quite clear that what the Legislature was endeavouring to provide against was the fact that there should be a collection of buildings on the property, which might be a convenient adjunct to the dwelling, but yet not actually part of the building, the consequence of which would be that drinking could take place in any one of this collection of buildings, instead of having it restricted to the actual dwelling-house itself, which would be presumably under the eye of the master or mistress of the house. The section, I

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think, clearly excludes the broader and general definition of conveyances, and restricts it to the separate building, to use the statutory word, and distinguish from the collection of buildings, which might constitute a private dwelling-house in the wider and popular, or conveyancer's expression of the term.

I therefore think that the magistrate convicted properly and that the learned judge was right in affirming this conviction, and that the appeal should be dismissed.

GALLIHER, J.A.: The point is a very close one, but I think we should look at the wording of the Act and the surrounding circumstances, as they appear, the situation being that of a farmer or, at all events, some person living in the country. Now we all know that in the country very often, in fact almost invariably, excepting wealthy people who build fine residences with cellars and store-rooms, very frequently in the country we find houses just of this description, with an adjunct to them—a root-house—and that is the name they have gone under ever since I knew anything about them. Now, in this particular case, the root-house is situated only six feet from the dwelling and is in constant use for the purpose of storing the necessaries for consumption in the house, just in the same way as you store them in your cellar, or you store them in your pantries, or your store-room in the house. It is daily in use, and in use for something directly connected with one of the most necessary things in any dwelling-house, and that is the food that is consumed in the house. If we applied the strictest interpretation of the Act, it certainly might be very difficult to get away from the conviction. I quite see that, and I see the force of what has been said in regard to that. But to my mind, considering the peculiar circumstances of this case, and considering the use of this building, and the uses to which the products stored in this building are applied, it may very well be said to be, and in the absence of any other convenience of that kind within the four walls of the house, a part of that dwelling-house applying to places in the country, such as this is. If it were in a barn or in a garage, I would, in my mind, draw a distinction between that and where it is now, because neither a barn nor

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a garage would be used for the purpose for which this is used. The garage particularly is for a separate purpose altogether, it has nothing to do with the immediate wants of the people in the house at all, other than your stable would have, if you had horses and a carriage; it is merely for their pleasure and convenience. This is not; under conditions like this, it is a necessity.

Now, taking this perhaps broader view of the matter, it seems to me that we should not give a narrow or strict construction to it. The section in the Act is open to be viewed in this way: Was it the intention of the Legislature that a man, *bona fide,* and there is no suggestion that this man was not *bona fide,* keeping his liquor for his private use, stored in this root-house, should be prevented from doing this? My opinion is that it was not the intention of the Legislature to prevent him from so doing, or to make it an offence against the Act to do so, under the peculiar circumstances of this case.

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I am inclined to take the broader and more liberal view in consideration of the circumstances and in consideration of the apparent *bona fides* of the whole matter, and say that the conviction should be quashed and the order of the judge be reversed.

McPHILLIPS, J.A.: In my opinion the appeal should be dismissed. In all matters arising under the British Columbia Prohibition Act, it must be remembered that the plain intention of the Legislature was to pass legislation that would be corrective in its nature and for the purpose of having good order and good government in the country. The preamble is: "Whereas it is expedient to suppress the liquor traffic in British Columbia." The whole preamble would indicate that the sale, as well as the indulgence in liquor is something to be deprecated, in the idea of the Legislature, that is, there can only be the use of liquor under the restrictive provisions as contained in the Act. You can only have liquor under the restrictive provisions contained in the Act.

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The conviction in this case took place under section 11, which reads as follows:

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"Except as provided by this Act, no person, by himself, his clerk, servant, or agent, shall have or keep or give liquor in any place whatsoever, other than in the private dwelling-house in which he resides."

Now this liquor, and a very considerable amount of liquor too, 9 cases and 45 bottles, was in a root-house said to be six feet from the main structure of the dwelling-house. I do not see that distance has any particular bearing. If I were to take the terminology alone, I think the appeal would be dismissed on the terminology, because a root-house is not a dwelling-house, in my opinion, within the purview of the Prohibition Act, because it says: "Dwelling-house in which he resides," and in section 3 says:

"The expression 'private dwelling-house' in this Act means a separate dwelling, with a separate door for ingress and egress, and actually and exclusively occupied and used as a private residence."

Now, when we keep that language in mind we get at what was in the mind of the Legislature, and that was this, that there would be some protection to society in having the liquor absolutely within the precincts of the dwelling-house, that is, that the domestic atmosphere of protection and oversight of the parents or the heads of the house would be present there all the time, and it would be known what was going on. Now, if you were to allow it to go outside the eaves of that house, outside the roof, outside that dwelling-house, and allow it in a root-house, even six feet away, it might just as well be 600 feet or one mile away, because there is only a little more inconvenience. If you were to take the logical terminology, a root-house is generally found in the fields, where they take the roots out of the ground and store them for the winter. So we are absolutely, by the decision we are asked to give here, destroying the virtue of this statute, the whole fabric would be destroyed, the scheme of the statute would not be followed, the aim of the Legislature would not be carried out, and we have two justices of the peace determining the question of fact that this is not a dwelling-house, and that has been agreed in by Mr. Justice MORRISON, and that is a very considerable factor in this matter and in this appeal, and we have to say the magistrates and the learned judge in the Court below went wrong, that is, went clearly wrong, before we are entitled to disturb their judgment.

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I have no hesitation whatever in arriving at that conclusion that a root-house does not come under the logical terminology of a dwelling-house, and in my opinion to hold that it does so come under the logical terminology would not be to carry out the purview of the statute, and would be destructive of the intention; and the duty of the Court is to carry out the intention of the Legislature. We are not to do violence to the ordinary meaning of the language which we speak and write, but I see nothing of that nature here. The protection the Act affords does not in this particular case protect the root-house.

The Court being equally divided the appeal was dismissed.

Solicitor for appellant: *R. L. Maitland.*

Solicitors for respondent: *Lane, Wood & Company.*

THE ROYAL BANK OF CANADA v. SKENE & CHRISTIE.

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Costs—Trial—Taxation of successful plaintiff's costs—Subsequent new tariff—Judgment of Supreme Court of Canada varying Court below—New tariff then in force—Effect of on original taxation.

The plaintiff having brought action to recover extras on two distinct items in connection with a construction contract, was successful as to both on the trial, and taxed his costs, which were paid after the taxation, but before the disposition of the appeal a new tariff of costs came into force. The Supreme Court of Canada, in finally disposing of the action, disallowed the extras as to one of the items and directed that the plaintiff receive the general costs of the action and that the defendant recover the costs of the issue on which he is successful. The taxing officer again taxed the plaintiff's costs under the new tariff and the defendants' costs on the issue on which they were successful. On appeal to the Supreme Court, the taxation was set aside.

Held, on appeal, affirming the decision of GREGORY, J. (MCPHILLIPS, J.A. dissenting), that there should not be another taxation of the plaintiff's costs of the trial under the new tariff, but that he should refund what

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was taxed on the original taxation with respect to the item upon which he finally failed.

APPEAL by plaintiff from the order of GREGORY, J., of the 10th of May, 1921, setting aside the taxation of the plaintiff's costs of the trial and allocatur of the 2nd of May, 1921, that the plaintiff refund to the defendants the portion of the trial costs that were taxed on the 18th of December, 1917, which as a result of the judgment of the Supreme Court of Canada the plaintiff is not entitled to retain and that in ascertaining the amount of the refund the registrar be guided by the scale of costs in force in December, 1917. The action was for the recovery of certain extras in connection with the contract for supplying and installing skylights, louvres, roofs and plashings on the Vancouver Hotel. There were two main items in issue: (1) As to six skylights in the main roof, and (2) as to skylights in the roof of the tea-room. The plaintiff was successful as to both items on the trial and this judgment was sustained by the Court of Appeal (see 28 B.C. 401). The plaintiff's costs were taxed on the 18th of December, 1917, and paid by the defendants, the usual undertaking being given to refund in case of the appellants' success on appeal. The new tariff of costs came into force on the 2nd of August, 1920. The judgment of the Supreme Court of Canada was delivered on the 2nd of November, 1920, varying the judgment below by disallowing the plaintiff's extras as to the first item above-mentioned, *i.e.*, the six skylights in the main roof. The order as to costs was that "the plaintiff respondent do recover from the defendants appellants the general costs of the action, and the defendants appellants do recover from the plaintiff respondent the costs of the issues on which the plaintiff fails," also, "that the defendants appellants do recover from the plaintiff respondent the general costs of both appeals, the plaintiff respondent to have the costs of those issues upon which the defendants appellants fail." On the 2nd of May, 1921, the registrar in pursuance of the judgment of the Supreme Court of Canada retaxed the bill on behalf of the plaintiff under the new tariff of the costs of the trial and the defendants' costs of issues upon which the plaintiff failed at the trial. The

Statement

defendants appealed from the registrar's decision to retax the bill for the plaintiff, that an order be made setting aside the taxation and that the plaintiff be directed to refund to the defendants the costs of the issues upon which the plaintiff failed.

The appeal was argued at Victoria on the 14th of June, 1921, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Alfred Bull, for appellant: The judgment of the Supreme Court varied the judgment of the Court of Appeal by not allowing us extras on the six skylights. The principle of taxation in these circumstances is laid down in *Sparrow* v. *Hill* (1881), 7 Q.B.D. 362. The new tariff of costs came into force in the meantime: see *Rodger* v. *The Comptoir D'Escompte de Paris* (1871), L.R. 3 P.C. 465; *Davies* v. *McMillan* (1893), 3 B.C. 72. We contend we have a new judgment and are entitled to tax the costs under the new tariff: see *In re Geipel's Patent* (1904), 1 Ch. 239; *Harris* v. *Dunsmuir* (1902), 9 B.C. 317.

Argument

McMullen, for respondents: The taxing officer is a purely ministerial officer of the Court. *Geipel's* case shews it is a question of the intention of the Court and there was no intention of interfering with the taxation except in so far as the varied judgment required.

MACDONALD, C.J.A.: I think the appeal should be dismissed. The question is a somewhat difficult one. The difficulty arises in actual practice from the effect of the new tariff upon transactions which are past; but it seems to me that in effect what the Supreme Court did in allowing an appeal in part was simply to vary the judgment in words, so as to give, as far as the costs are concerned, the costs of one issue to the defendants. Now then, the plaintiff having taxed the costs pending the appeal, as he had the right to do, under the tariff then in force, and having got payment of the costs, and having been paid in excess for that one issue, the excess over what he is entitled to must be refunded. How is the refund to be ascertained? By a new taxation? By setting aside the

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first taxation and the allocatur made upon it, and retaxing those costs? Or, as found by the learned judge from whose judgment this appeal is taken, by simply deducting the amounts recoverable back? There is, I think, no case in point upon the practice since this is the first time in this Province that the question has arisen. Therefore it seems to me that the proper and right order has been made by the learned judge and that it should be sustained.

MARTIN, J.A.: I have some doubt about the matter. It all depends upon the view to be taken of the Supreme Court order, whether it is to be regarded as an adjudication *de novo* on the question of costs, or whether it is to be regarded as a repetition of the disposition with a modification in favour of the respondents. It is with some hesitation that I come to the conclusion that the latter is the view to be taken, and therefore I would dismiss the appeal.

MARTIN, J.A.

GALLIHER, J.A.: In approaching this matter for determination in my mind, I do so leaving aside for the moment the new tariff, and I take the order of the Supreme Court, which decreed that the plaintiff should recover the general costs of the action and the defendants the costs of the issue on which they succeeded. Now that surely does not suggest to one's mind that the general costs of the action, which have already in connection with the other issue been taxed, would be retaxed. That is, that the registrar should proceed on that order of the Supreme Court and would set down and deduct, for instance, "Instructions for Writ," etc., and tax them over again, and tax all the different separate items that could only refer to the general costs of the action. To my mind what the Supreme Court says in effect is this: "As to the general costs of the action, you are entitled to recover those. You have recovered them and you are entitled to keep them. As to the costs of the issue on which the defendants succeeded, you are not entitled to retain those; the defendants are entitled to tax those as against you." That is the interpretation I believe of that section of the Act. I quite see the unfortunate position in which Mr. *Bull* is placed, but while my sympathy is with him,

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and I do think it seems unfair, yet I cannot see any escape from coming to the conclusion I have, and whether rightly or wrongly I come to that conclusion without hesitation. The appeal of course, in my opinion, should be dismissed.

McPHILLIPS, J.A.: In my opinion the appeal should succeed. I am of the view that the learned judge before whom the appeal was taken erred in law. The Supreme Court of Canada judgment, in my opinion, is the determinative judgment in this action. It is complete in form in regard to the costs and is quite separate from the variation of the judgment of the Court of Appeal. The variation of the judgment of the Court of Appeal was with respect to the debt sued for, which the plaintiff was hoping to recover. When we have language in this form, "This Court doth further order and adjudge that the plaintiff respondent do recover from the defendants appellants the general costs of the action, and the defendants appellants do recover from the plaintiff respondent the costs of the issues on which the plaintiff fails," we have a new adjudication on the question of costs, because the first adjudication was not that the plaintiff should have the general costs of the action. The previous judgment in favour of the plaintiff did not say, "and the plaintiff shall have the general costs of the action." I would further remark that the Supreme Court of Canada did not direct that there should be any deduction from the costs that the plaintiff respondent is to recover. The costs are dealt with just like separate actions. There is a statement of claim and a counterclaim. If the costs of the respondent in the case are the general costs of the action, then defendants appellants are to have nothing by way of deduction or anything of that kind, but "the costs of the issues on which the plaintiff fails." Therefore this judgment is the one that must be looked to, in my opinion, to work out the question of costs. I cannot follow how the question of costs can be worked out except in accordance with this judgment of the Supreme Court of Canada.

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitors for appellant: *Tupper & Bull.*
Solicitor for respondents: *J. E. McMullen.*

MARTIN, LO. J.A. (At Chambers)

1921

June 18.

THE "FREIYA" v. THE "R.S."

THE "FREIYA" v. THE "R.S." (No. 2.)

Admiralty law—Dismissal of claim for salvage—Appeal—Re-arrest of ship.

Where a claim for salvage against a ship has been dismissed, there is no general right, in case of appeal, to hold the bail bond, or after its cancellation to re-arrest the ship, nor will such right be granted without good reason therefor, such as that it appears to the Court that the ship will not be within the jurisdiction to answer the appeal should it go against it.

Statement

MOTION in Chambers, heard by MARTIN, Lo. J.A. at Victoria on the 16th of June, 1921, to re-arrest a ship after judgment had been delivered dismissing a claim of salvage against her (reported *ante* p. 109) and an appeal taken to the Exchequer Court of Canada.

Argument

Clearihue, for the motion: The vessel is owned by foreigners, Japanese, and should be held to answer the result of the appeal: *The Miriam* (1874), 2 Asp. M.C. 259; 43 L.J., Adm. 35; *The Freir* (1875), 2 Asp. M.C. 589; 44 L.J., Adm. 49; *The Dictator* (1892), P. 304 at pp. 321-2; 61 L.J., Adm. 73.

Mayers: Though the owners may be foreigners the vessel is within the jurisdiction and is still being operated as a fishing-vessel as she was when she was arrested, and later bailed. There must be special circumstances, but none are shewn here, to justify the re-arrest of a ship as there must be to hold the bail bond upon appeal: *Vermont Steamship Co.* v. *Abby Palmer* (1904), 10 B.C. 383; 8 Ex. C.R. 462.

18th June, 1921.

Judgment

MARTIN, Lo. J.A.: On the 16th instant a motion was made to cancel the bail bond since judgment had been pronounced in favour of the ship, and I acceded to that motion in accordance with the principle embodied in my decision in *Vermont Steamship Co.* v. *Abby Palmer* (1904), 10 B.C. 383; 8 Ex. C.R. 462, as no special circumstances were shewn in opposition to that motion, and in the absence of them the bail, which takes the place of the *res,* should not be held in Court pending the result of the appeal.

After the motion was granted the present motion was made upon the same material, by special leave and consent, and the cases of *The Miriam* (1874), 2 Asp. M.C. 259; 43 L.J., Adm. 35, and *The Freir* (1875), 2 Asp. M.C. 589; 44 L.J., Adm. 49, were cited as authorities in support of a general right to re-arrest in the case of appeal, which upon the face of it is not consistent with reason, because if the bail which represents the *res* should not be so held by the Court, why should the *res* itself be held? The same thing cannot be regarded in different ways for the purposes of appeal. But when the cases relied upon are carefully examined, they do not support the application, because in the former it was stated by counsel that the ship would "go at once" (*i.e.*, out of the jurisdiction) if notice of the application were given, and in the latter the vessel was a foreign one, Danish, and would leave the country and the plaintiff without security unless arrested without notice, which was ordered.

Though the former case is not as fully reported as one would wish, and has to be explained by counsel's statement in the latter, yet it is clear that the principle upon which the respective ships were re-arrested, even though the former was British, is that it appeared to the Court that they would not be within the jurisdiction to answer the appeal if it went against them. This view is supported by the following statement of the practice in Williams & Bruce's Admiralty Practice, 3rd Ed., 521, based upon the said cases:

Judgment

> "Where the effect of the decision appealed against is that property which has been proceeded against at the instance of the appellant is released from the arrest of the Court below, the appellant, if he apprehends that the property will be removed out of the jurisdiction, may, after instituting an appeal, obtain a warrant of arrest out of the principal registry, under which the property may be kept under arrest until the appeal has been decided."

As there is no evidence of removal from the jurisdiction or "other good reason" (*Vermont Steamship Co.* v. *Abby Palmer, supra,* at p. 386), I see no ground for ordering the re-arrest of the vessel in question: though her owners may be foreigners, yet they reside here and carry on their business in these waters.

The motion, therefore, will be dismissed with costs.

Motion dismissed.

CLEMENT, J. (At Chambers)

1921

June 29.

IN RE POWELL, DECEASED

IN RE ANNE ELIZABETH POWELL, DECEASED.

Administration—Intestacy—Distribution of personal estate—Next of kindred and legal representatives—Interpretation—B.C. Stats. 1919, Cap. 1, Sec. 3.

Where one who dies intestate is survived by a mother and five brothers and sisters, the mother takes one-half of the personalty and the brothers and sisters the other half.

PETITION by the official administrator for directions as to the distribution of the surplusage of the personal estate of Anne Elizabeth Powell, who died at Victoria, B.C., on the 14th of August, 1920, unmarried, intestate. Heard by CLEMENT, J. at Chambers in Victoria on the 29th of June, 1921.

Statement

Monteith, for the Official Administrator.

CLEMENT, J.: The deceased, Anne Elizabeth Powell was survived by a mother and five brothers and sisters, the father having predeceased her. The official administrator has been appointed administrator of the estate of the deceased. If the distribution section of the Administration Act, R.S.B.C. 1911, applied in the present case, clearly the mother, brothers and sisters of the deceased would take share and share alike by virtue of subsection (5) thereof, but by Cap. 1 of 1919, subsections (3), (4) and (5) of section 95 of the 1911 Act were repealed, and the following enacted in lieu thereof:

Judgment

"(3.) If there be no children of the intestate, or legal representatives of them, the whole of the surplusage shall be allotted to the wife of the intestate:

"(4.) If there be no wife, the whole of the surplusage shall be distributed equally among the children; and if there be neither wife nor children, to the next of kindred in equal degree to the intestate and their legal representatives as aforesaid; and the mother shall take equally with the father, but in no case shall representatives be admitted among collaterals after the intestate's brothers' and sisters' children."

As a result of this re-enactment, two questions are raised in dealing with this estate: (1) Who are the "next of kindred in equal

degree to the intestate," and (2) who are the "legal representatives" of such next of kin? The next of kin of the deceased are to be ascertained by the same rules of consanguinity as those which determine who are entitled to letters of administration: *Lloyd* v. *Tench* (1751), 2 Ves. Sen. 213. Prior to the enactment of 1919, the father would have been entitled as the next of kin in the first degree to the whole of the personal estate of the deceased: *Blackborough* v. *Davis* (1701), 1 P. Wms. 41 at p. 48. The effect of subsection (4) as re-enacted in 1919 is to place the mother on an equal footing with the father as one of the next of kin in the first degree of the deceased, and she takes equally with him. As to who are the legal representatives of the father, these are the descendants of the father, *viz.*, the brothers and sisters of the deceased: *Bridge* v. *Abbot* (1791), 3 Bro. C.C. 224. The mother of the deceased, the surviving member of the class being next of kin of the deceased, is entitled to one moiety of the personalty, while the remaining moiety devolves on the legal representatives of the deceased father.

Judgment

Order accordingly.

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July 4.

SHANNON v. CORPORATION OF POINT GREY

SHANNON AND SHANNON v. CORPORATION OF POINT GREY.

Municipal law—Taxation—Assessment—Land used for agricultural purposes only—Court of Revision—Power—Whether imperative or discretionary—B.C. Stats. 1914, Cap. 52, Sec. 219, Subsec. (3)(c); 1919, Cap 63, Sec. 7.

Subsection (3)(*c*) of section 219 of the Municipal Act, B.C. Stats. 1914, Cap. 52, as enacted by section 7, B.C. Stats. 1919, Cap. 63, provides that the powers, *inter alia*, of the Court of Revision shall be "to fix the assessment upon such land as is held in blocks of three or more acres and used solely for agricultural or horticultural purposes, and during such use only at the value which the same has for such purposes without regard to its value for any other purpose or purposes." On appeal from an assessment by the Court of Revision of certain lands used for agricultural purposes only at their actual value, it was held that the Legislature intended to make the power of the Court clear and distinct, and it was bound to carry out the provisions of the subsection if the facts warranted.

Held, on appeal, *per* MACDONALD, C.J.A. and GALLIHER, J.A., that the power conferred upon the Court of Revision being for conferring a benefit, was discretionary and not obligatory. The Legislature intended to leave with the local authority full discretion to deal with cases of apparent hardship in the application of the "actual value" rule of assessment.

Per MARTIN and MCPHILLIPS, JJ.A.: That the subsection is imperative in its nature and does not admit of any discretionary power in the Court, but requires it to fix at its agricultural value the assessment of all land held in blocks of three or more acres and used for agricultural purposes only.

The Court being equally divided, the appeal was dismissed.

Statement

APPEAL by defendant from the decision of MACDONALD, J. on appeal from the Court of Revision of Point Grey to reduce the assessment on two blocks of land, being 12.74 acres and 31.32 acres respectively, south of 57th Avenue and abutting on Granville Street, argued before him at Vancouver on the 14th and 15th of March, 1921. The said lands had been used for some years for agricultural purposes only. The smaller area was assessed at $2,700 an acre, and the larger at $2,250 per acre. The owner claimed that he was entitled to the benefit of subsection (3)(*c*) of section 219 of the Municipal Act as

amended in 1919, and that both areas should be assessed at their value for agricultural purposes only.

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D. Donaghy, for appellants.
Craig, K. C., and *Harvey,* for respondent.

15th March, 1921.

MACDONALD, J.: This appeal is sought to reduce the assessment on a certain property, abutting on Granville Street, in the Municipality of Point Grey.

It is contended that the Court of Revision should, under its powers, fix the assessment on these lands on the basis, that they were used solely for agricultural or horticultural purposes, and should place the value accordingly. It is submitted on behalf of the Municipality that the power in this respect vested in the Court of Revision is discretionary. The section conferring the power reads as follows:

"To fix the assessment upon such land as is held in blocks of three or more acres and used solely for agricultural or horticultural purposes, and during such use only at the value which the same has for such purposes without regard to its value for any other purpose or purposes."

This provision was an amendment of a similar power of the Court of Revision, in dealing with lands of this nature, contained in the statutes of 1917, known as the Municipal Act Amendment Act, 1917, as follows (section 46):

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"The Court of Revision shall have power to reduce the assessed value of lands held and used solely for agricultural or horticultural purposes to such amount as may seem just and equitable, notwithstanding that the same may be fixed thereby at an amount equal to its actual value for agricultural purposes. This section shall not apply to any lands the area of which is less than three acres."

It appears to me that the amendment in 1919 was intended to make the power of the Court of Revision clear and distinct. In my opinion it was bound to carry out such provisions, if the facts warranted. They come within the principles referred to by Lord Cairns in *Julius* v. *Lord Bishop of Oxford* (1880), 5 App. Cas. 214, as follows (p. 225):

"Where a power is deposited with a public officer for the purpose of being used for the benefit of persons [1] who are specifically pointed out, and [2] with regard to whom a definition is supplied by the Legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised, and the Court will require it to be exercised."

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As to the facts, I find no difficulty in arriving at the conclusion, that this piece of property, owned by the appellants was acquired in 1890 and has ever since been used, solely for agricultural purposes. There is no suggestion even that they are simply utilizing this property in this manner for the purpose of coming within the provisions of the statute. The further contention is made that the Act is inapplicable, on account of its terms being only applied to lands, held in blocks of three or more acres. An attempt is made to control the property, to which the section applied, on the ground that the area thus owned by the appellants is not a block of land within the Municipal Act, and that it does not come within the interpretation of a block of land in that Act. In my opinion the use of the term "blocks" in the section under discussion is similar to terms such as "area" and "district." The object sought to be gained by this section would be totally destroyed, in many cases, were such a restricted meaning to be applied. It is true that if the land be assessed, simply on a valuation based upon its use for agricultural purposes, it would be at much less than the real or actual value of the property. I consider, however, that the assessor should be controlled by the Court of Revision, and while he in making up his roll might consider the actual value of the property, still any parties complaining, as in this instance, had a right to appeal to the Court of Revision and have the land assessed in accordance with the section under discussion.

MACDONALD, J.

I may say that I consider the property in actual value worth far more than it could be so considered for agricultural purposes. It is in the centre of a beautiful residential district. The whole locality might be termed a suburb of the City of Vancouver, and, if this land were subdivided, it would claim a ready market, at a value far exceeding that for which it is now being utilized. However, it is not for me to consider what might be obtained in the way of a price for the property, but simply to determine, as best I can, the effect of the statute controlling the taxation. It is not within my province to discuss the policy of the legislation in question. It is my duty only to exercise it, when the Court of Revision has failed to do

so. It is a point of law and the Municipality has its remedy, if it considers I have erred in the conclusion to which I have arrived, namely, that land, so utilized, should be assessed upon the designated basis, and that there should be a reduction in the assessment accordingly. As to all the lands lying to the west of Granville Street, I consider that area, as coming within the section of the statute, and, in being used for agricultural purposes, it should be assessed at an amount not exceeding $250 per acre. As to the land lying to the east of Granville Street, the assessment should stand at the amount of $2,250 per acre.

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From this decision the Corporation of Point Grey appealed. The appeal was argued at Victoria on the 8th of June, 1921, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Martin, K.C., for appellant: The question is the construction of subsection (3) (*c*) of section 219 as enacted by section 7 of 1919, Cap. 63. My submission is that it is an option given to the Court to exercise if they wish and the owner of land has no right to demand the exercise of the Act by the Court. If the Court must act the Legislature would say so: see *In re Baker* (1890), 44 Ch. D. 262 at p. 270; *Julius* v. *Lord Bishop of Oxford* (1880), 5 App. Cas. 214.

Argument

D. Donaghy, for respondents, referred to *Regina* v. *Tithe Commissioners* (1849), 14 Q.B. 459, and *Rex* v. *Mitchell. Ex parte Livesey* (1913), 1 K.B. 561.

Cur. adv. vult.

4h July, 1921.

MACDONALD, C.J.A.: A passage from the speech of Lord Chancellor Cairns, in *Julius* v. *Lord Bishop of Oxford* (1880), 5 App. Cas. 214 at p. 225, was relied upon by the learned judge, from whose judgment this appeal is taken, as supporting his conclusion that the statute in question here makes it obligatory upon the Court of Revision to fix the assessment of respondents' lands on the basis of their values as agricultural or horticultural lands.

MACDONALD, C.J.A.

The statute enacts that the Court of Revision shall have

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power to fix the assessment of blocks of land of three or more acres when used for agricultural or horticultural purposes at their values for such purposes without regard to their values for other purposes.

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Prima facie the language imports discretionary power and the burden lies on the person seeking to have it held obligatory to shew why that force should be attributed to it. According to the law as it stands, apart from the above enactment, the respondents had no right to have their land assessed below its actual value, which admittedly was much greater than its value as agricultural or horticultural land. The section, therefore, empowers the Court of Revision to displace the general standard of value fixed by the Legislature, namely, the actual value, by fixing the value of land of the character of that of the respondents' at a lower figure. While no doubt intended for the benefit of such landowners, yet it is a power to make a concession, and the question is, whether the Legislature intended to compel such concession or merely to enable the Court of Revision to make it. The language of Lord Cairns already referred to, will, it is true, bear the construction put upon it by the learned judge, but I do not think, after reading the whole of Lord Cairns's speech, that that passage was intended to be anything more than a generalization. His reference to the authorities relied upon in argument and his comments thereon, indicate that he, like Lord Penzance and Lord Blackburn, thought that enabling words were to be given their *prima facie* meaning unless the person for whose benefit the power was conferred was one who could claim the exercise of the power in furtherance of a legal right, such a right as was shewn to exist in the several cases which he reviewed.

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Speaking in the same case, Lord Penzance said that if the matter were to be decided by previous definitions, he should prefer to that of Mr. Justice Coleridge in *Regina* v. *Tithe Commissioners* (1849), 14 Q.B. 474, that of Lord Chief Justice Jervis in *York, &c., Railway Co.* v. *The Queen* (1853), 1 El. & Bl. 858 at p. 861, who said that enabling words were to be understood as enabling only, unless some "absurdity or injustice" would follow if given their natural meaning. Lord Penzance,

however, brushes aside all previous definitions which he mistrusted, and said at p. 231:

"I think it far more satisfactory that your Lordships should look at what the Courts in previous cases have done rather than what the learned judges may have said, and I invite your Lordships' attention to the cases cited in argument."

After reviewing these he said that regard must be had "above all, to the position and rights of the person, or class of persons, for whose benefit the power was conferred."

Lord Blackburn at p. 241 said:

"If the object for which the power is conferred is for the purpose of enforcing a right, there may be a duty cast on the donee of the power, to exercise it."

And he illustrates the character of such right by reference to the cases above alluded to. They are such as (p. 244),

"The personal liberty of the person arrested by the sheriff, the rights of the creditors of the bankrupt to their debts, the rights of the plaintiff who had recovered judgment to his costs, the right of the constable out of pocket to be paid by the parish, the right of the creditor of the bank or of the local board to be paid,"

which right in every case was possessed by the person applying for relief independently altogether of the power invoked to effectuate the right.

It is therefore apparent to me that when the case of *Julius* v. *Lord Bishop of Oxford, supra,* is examined, it will be found to be an authority against the judgment appealed from and in favour of the construction which I think must be placed upon the statute, namely, that the power conferred upon a Court of Revision, being one not for the purpose of effectuating a right the respondents already possess, but for conferring a benefit upon them and others in a like situation, was a discretionary and not an obligatory one.

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In my opinion, apart altogether from the authorities above referred to, it is altogether reasonable in this case to suppose that the Legislature intended to leave with the local authority full discretion to deal with cases of apparent hardship in the application of the "actual value" rule of assessment. I can see very good reason why a discretion, which the Legislature itself could not exercise, should be conferred upon some person or body of persons to relieve, in a proper case, owners of lands used for agricultural purposes from the burden of an assess-

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ment upon the basis of actual value. When lands of the actual value of $2,250 per acre are used for a purpose which will bear taxation on a value of 10 per cent. only of their actual value, the Court of Revision might well scrutinize the reason why the owner withholds such land from use for other purposes more beneficial to him and to other ratepayers whose lands are assessed at their actual values. On the other hand, the taxpayer may long have pursued his avocation of cultivator of the soil, a circumstance which, coupled with other matters, might induce a Court of Revision to reduce his taxation to fit his condition.

Moreover, the object of the power is to enable a class of landowners to obtain an exemption from the full burden of taxation imposed upon landowners generally. The respondents claim such exemption as of right. The burden therefore lies upon them to shew that the exemption was granted in unmistakable terms, whereas they are driven to contend that a meaning must be given to words the opposite of their *prima facie* meaning.

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The appeal should, in my opinion, be allowed.

MARTIN, J.A.: It is submitted that the power in question conferred upon the Court of Revision by section 219 (3)(c) is one of discretion merely, and not of obligation, and it is argued in support of that submission that the said Court exercises only appellate powers and that the assessor rightly assessed the land under sections 207 (1) and 211. But this overlooks the fact that the assessor's assessment and roll are only provisional and inoperative till they have been "considered and dealt with" (section 219 (1)) and "confirmed and authenticated" (section 222 (1)) by the Court of Revision, which is directed by section 219, subsections (3) (*a*) and (*b*) to meet and try complaints and also "to investigate the said roll and the various assessments therein made, whether complained against or not, and so adjudicate upon the same that the same shall be fair and equitable," etc., and "on the eighth day of February in each year the Court . . . . . shall hold its first annual meeting . . . . . [and] complete and authenticate the roll not later than the twenty-eighth day of February following . . . . .": [subsection (8)].

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So we have here a tribunal directed by the Legislature in the most imperative and precise way to sit and perform certain most important, indeed vital, functions in municipal life, not only concerning the particular individuals assessed but the public at large. Of the seven specified powers conferred upon the Court some of them are admittedly obligatory, such as (*a*), (*b*), (*d*) and (*e*), but it is submitted that it has an uncontrolled discretion in regard to the power conferred by (*c*). With every respect, I find myself quite unable to take that view. By subsection (*c*) is conferred the original power, not possessed by the assessor, to "fix the assessment" upon certain blocks of land "used solely for agricultural or horticultural purposes," upon a special basis which greatly benefits the owners thereof during its use for such purposes, and in my opinon the section clearly and imperatively requires the Court for the first and only time, to "fix" the assessment upon that special and beneficial basis when it is proved to it by the owners intended to be benefited that the land is being used in such a way as to bring it within the contemplated benefits of the statute. In other words, just as soon as that fact is made to appear and the owner is brought within the Act, the duty arises for the Court to exercise this power for the benefit of that owner and "fix the assessment upon such land . . . . . at the value which the same has for such purposes without regard to its value for any other purpose," whatever that special value may be, which is a question of fact for the Court to "fix" upon the evidence adduced before it.

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In *Julius* v. *Lord Bishop of Oxford* (1880), 5 App. Cas. 214; 49 L.J., Q.B. 577, Lord Selborne said, p. 235, respecting the construction of the words "'it shall be lawful,' and the like, when used in public statutes":

> "I agree with my noble and learned friends who have preceded me, that the meaning of such words is the same, whether there is or is not a duty or obligation to use the power which they confer. They are potential, and never (in themselves) significant of any obligation. The question whether a judge, or a public officer, to whom a power is given by such words, is bound to use it upon any particular occasion, or in any particular manner, must be solved *aliunde*, and, in general, it is to be solved from the context, from the particular provisions, or from the general scope and objects, of the enactment conferring the power."

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Applying this valuable guide to the present case, I have no hesitation in coming to the conclusion that the words in question are "significant of an obligation" upon the part of the Court of Revision to use its power in the manner hereinbefore indicated and for the benefit of the interested owners of the land, and it follows therefore that the appeal should be dismissed.

In addition to the cases cited, I wish to refer to *Regina* v. *Tithe Commissioners* (1849), 14 Q.B. 459; 19 L.J., Q.B. 177 (80 R.R. 271).

GALLIHER, J.A.: I would allow the appeal for the reasons given by MACDONALD, C.J.A.

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McPHILLIPS, J.A.: In my opinion the appeal fails. Mr. Justice MACDONALD arrived at the right conclusion. The case is one of construction of statute law simply, and with deference to all contrary opinion, presents no matter of difficulty. The statute is clear and positive and is mandatory in its tone. If the Court of Revision is to be admitted to ignore the plain direction of the Legislature with regard to section 219, subsection (3) (*c*), as enacted by section 7 of the Municipal Act Amendment Act, 1919, Cap. 63, it might equally as well ignore and refuse to do any of the things that are set forth and defined by the Legislature—as the duty of the Court of Revision.

The legislation which is pertinent to the question which calls for consideration upon this appeal is that which appears under the heading "Jurisdiction and Proceedings," being the jurisdiction to be exercised and the proceedings to be had before the Court of Revision. The sections are from 219 to 222 inclusive, and read as follows: [The learned judge quoted the sections and continued].

The Court of Revision in plain disregard of section 219 (3)(*c*) assessed the lands of the respondents in this appeal without considering or giving effect to the plain intention of the Legislature, *i.e.*, where the land is held in blocks of three or more acres (which is the fact in the case of the lands of the respondents), and used solely for agricultural purposes, the assessment is to be adjusted "at the value which the same has

for such purposes without regard to its value for any other purpose or purposes" (section 219 (3)(*c*)).

It cannot be gainsaid that the Legislature has spoken in no uncertain terms, and at this Bar it was not attempted to be argued that there was any doubt of the plain intention of the Legislature, but reliance was placed wholly upon the submission that it was a matter of discretion and not mandatory.

Again, with deference to all contrary opinion, this would seem to me idle contention. The Legislature, if effect is to be given to this submission, solemnly applies its mind to a condition known to be existent and provides a method for the remedy of what otherwise it may fairly be assumed would be the imposition of an injustice, and the Court of Revision in defiance of the statutory duty imposed upon it fails to give the relief plainly intended. It is not the province of a Court of Law to deal with the policy of Parliament in enacting legislation, when enacted it is to be construed in accordance with its plain and ordinary meaning, and as I have already pointed out, there can be no question of meaning here, and if one were to be admitted to speculate as to what actuated the passage of this particular provision, it is not difficult to surmise and to understand that in these days of real-estate booms coming in cycles, lands are subdivided into blocks and city lots at such absurd distances from any reasonable use as business or residential sites, that large areas which should rightly be put to agricultural purposes are, in many cases, lying idle to the detriment of the locality and the Province at large. It is evident that the Legislature by way of inducement to cultivate these lands, made it possible to have the assessment based upon the agricultural value, not upon the city or town-lot value, which may be, as it often is, a most fictitious value.

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However, with this aspect, the Court has nothing to do. In *Cooke* v. *Charles A. Vogeler Company* (1901), A.C. 102 at p. 107, Lord Halsbury said:

"But a court of law has nothing to do with the reasonableness or unreasonableness of a provision, except so far as it may help them in interpreting what the Legislature has said."

Can it be said for a moment that the Legislature, in enacting this provision, meant that it should be at the will of the

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Court of Revision to fix or not to fix the assessment at the agricultural value, when the land is solely used as the land in question is, for agricultural purposes, and in plain defiance of the statute, assess or admit of the assessment, not at its agricultural value, but its value for other purposes, which is the present case? Reason and common sense impel a negative answer.

An appeal from the Court of Revision is expressly given by section 223 of the Municipal Act, as enacted by section 7 of Cap. 63 of 1919, otherwise the proceedings would have been by way of a *mandamus*. The authorities dealing with when and under what circumstances a *mandamus* will lie, may usefully be turned to. A *mandamus* will always be granted where it is apparent upon the facts that there has been failure to exercise the conferred jurisdiction, unless, of course, it is clear that it is a matter left to the absolute discretion of the body upon which the jurisdiction has been conferred to hear or not to hear the application; if not so left, the jurisdiction conferred must be discharged. Here there has been a failure to discharge it, a jurisdiction unquestionably mandatory in its nature. That it is mandatory is clear. The language of the statute is in apt words:

"Every assessment roll shall be considered and dealt with by a Court of Revision . . . .":

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see section 219 (1).

"Every member of the Court of Revision, before entering upon his duties, shall take and subscribe before the clerk of the municipality the following oath or affirmation:—

"I, , do solemnly swear [or affirm] that I will, to the best of my judgment and ability, and without fear, favour, or partiality, honestly decide the complaints to the Court of Revision which may be brought before me for trial as a member of said Court":

see section 219 (2)(*c*).

Then we have the particular subsection that imposes the duty upon the Court of Revision to fix the assessment when, as in the present case, it is land held in blocks of three or more acres, and used solely for agricultural purposes (see section 219 (3)(*c*)), yet we have the Court of Revision flagrantly refusing to exercise the conferred jurisdiction which has been statutorily imposed, a more glaring case could not be conceived

of the denial to the respondents of the benefit of legislation passed in the way of relief, and it can be reasonably said as well for the public benefit. It is plainly legislation remedial in its nature, and the principles which govern in such cases may also be invoked. I would, in this connection, refer to what Farwell, L.J., said in *Rex* v. *Board of Education* (1910), 2 K.B. 165 at p. 181:

"Further, if the Board did not proceed on a mistaken assumption of the law, but deliberately disregarded it either on the question of the construction of the Act or on the entire want of evidence, then I should be of the opinion that they have been guilty of misconduct so flagrant as to make it impossible for their decision to stand."

The above case went to the House of Lords, and Lord Loreburn, L.C. in (1911), A.C. 179 at p. 182 (*Board of Education* v. *Rice*) said:

"But if the Court is satisfied either that the Board have not acted judicially in the way I have described, or have not determined the question which they are required by the Act to determine, then there is a remedy by *mandamus* and *certiorari*."

Here the remedy is, as already stated, by way of appeal, and the Court of Revision "have not determined the question which they are required by the Act to determine."

In *The Queen* v. *Vestry of St. Pancras* (1890), 24 Q.B.D. 371, Fry, L.J. at p. 378 said:

"There was a duty in the vestry to consider that proposal properly and fairly; Mr. Westbrook had an actual and personal interest in the performance by the vestry of that public duty, therefore if it has not been performed a *mandamus* should go."

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And here, admittedly, the public and statutory duty has not been performed—the fact is that it has been flouted and ignored (also see *Rex* v. *Stepney Borough Council* (1901), 71 L.J., K.B. 238).

Mr. Justice MACDONALD referred to that passage in the speech of Earl Cairns, L.C. in *Julius* v. *Lord Bishop of Oxford* (1880), 5 App. Cas. 214 at p. 225, where he said:

"That where a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out, and with regard to whom a definition is supplied by the Legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised, and the Court will require it to be exercised."

This quotation is most apposite and pertinent to the facts of the present case. Here we have in the language of the statute, the imperative word "shall" (see section 219 (3)(*c*)):

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"The powers of such Court [the Court of Revision] shall be."

And Lord Blackburn in his speech in the *Julius* case, said at p. 242:

"In the judgment of the Common Pleas Chief Justice Jervis says that 'may' was, 'as we think, aptly and properly used to confer on the Court an authority,' and later states the rule to be 'that when a statute confers an authority to do a judicial act in a certain case, it is imperative on those so authorized to exercise the authority when the case arises, and its exercise is duly applied for by a party interested, and having the right to make the application.' And in *Crake* v. *Powell* [(1852)], 2 El. & Bl. 210, Lord Campbell says: 'If the plaintiff be entitled to costs, and the Court or judge is empowered to make a rule or order for that purpose *ex debito justitiæ*, he may call upon the Court or judge to do so.' *Morisse* v. *The Royal British Bank* [(1856)], 1 C.B. (N.S.) 67; 26 L.J., C.P. 62 was decided on the same principle."

The present case is exactly within the reasoning of the last-quoted principles of law. Here the respondents had the right to have the Court of Revision "fix the assessment" of the land "used solely for agricultural . . . . . purposes, and during such use only at the value which the same has for such purposes without regard to its value for any other purpose or purposes" (see section 219 (3)(*c*)), and that authority the Court of Revision in the present case refused to exercise and proceeded in complete defiance of the statutory mandate, imperative in its terms.

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The appeal was rested solely upon the point that there was an absolute discretion in the Court of Revision to fix or not to fix the assessment in the manner provided by the statute, and that the Court of Revision were competent within the purview of the statute to ignore the statutory provision. This action of the Court of Revision, in my opinion, is clearly unsupportable upon the authorities—the statutory mandate is imperative in its nature, and does not admit of any discretionary power in the Court of Revision.

I am therefore of the opinion that the appeal should be dismissed.

The Court being equally divided the appeal was dismissed.

Solicitor for appellant: *A. G. Harvey.*
Solicitor for respondents: *Dugald Donaghy.*

CAMPBELL v. SUN PRINTING AND PUBLISHING COMPANY.

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CAMPBELL v. SUN PRINTING AND PUBLISHING CO.

Libel—Newspaper company—Articles discussing subject-matter during trial—Injunction to restrain—Costs.

During the progress of an action for libel contained in newspaper articles an injunction was granted against the newspaper publisher restraining the continuance of articles discussing the transaction which had been the subject of the articles in question, as tending to interfere with a fair trial of the action.

The Court having required the plaintiff to file an affidavit pledging his oath to the untruthfulness of the alleged libellous statements before granting the injunction, such affidavit was accepted only as sufficient for the purposes of the application, and not affecting the trial of the action.

As the application finally disposed of the matter under consideration, the plaintiff was given the costs of the application in any event.

APPLICATION for an injunction to restrain the defendant Company from publishing matter alleged to be prejudicial to a fair trial of an action for libel against said newspaper. Heard by MACDONALD, J., at Chambers in Vancouver on the 9th and 13th of July, 1921. Statement

Davis, K.C., and *Hossie,* for plaintiff.
A. H. MacNeill, K.C., and *F. R. Anderson,* for defendant.

20th July, 1921.

MACDONALD, J.: In this action for libel, plaintiff complains that he was defamed in two articles, appearing in the Sun newspaper on the 26th and 27th of May last. It is alleged that these articles were falsely and maliciously published, and meant that the plaintiff had improperly and corruptly procured $67,500 of the public money of the Province through the sale of a certain warehouse to the Government at an excessive price of $150,000. Further, that such sale was consummated as a reward to the plaintiff for political services rendered the Government. Judgment

The action was commenced on the 6th of June, and on the

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day following, according to the material filed by plaintiff, the Sun newspaper outlined its policy in a statement signed by the defendant Cromie, as its publisher. He referred to the alleged negotiations for the purpose of purchasing a controlling interest in such newspaper, and that the plaintiff had stated that the local Government party had decided to buy a newspaper and were prepared to purchase a controlling interest in the Sun, and would pay $150,000 cash for the paper, as it stood. It was stated that this offer was refused, and the same afternoon the evening papers announced the purchase of the World by the plaintiff and his associates. Mr. Cromie also referred to libel actions either by the plaintiff or the Government not affecting the course pursued by his paper. Objection is taken to the course that has been pursued, as tending to prejudice a fair trial of this action. It is quite evident that the defendants have ventilated this transaction, which may be termed "The Campbell Warehouse Purchase," at great length. It is contended that, in subsequent issues of the paper, no attack has been made on the plaintiff Campbell, but that it has been confined to the Government. It is a fair assumption that such criticism would continue. At any rate, there has been no statement on the part of the defendant that it would cease unless restrained. It is suggested by counsel for defendant that such restraint is sought when the Sun newspaper is pressing for a Royal Commission to investigate the transaction, and that the object to be obtained is, not so much to assist the plaintiff in his action, as to prevent further criticism of the Government in the matter. While such result might ensue, if the injunction were given in the broad terms of the motion, I am not concerned in this aspect of the matter. I must consider the rights of the plaintiff in this litigation as paramount. Plaintiff deems it advisable to press the application and, in his affidavit, after referring to the numerous articles, which have appeared in the Sun newspaper, since the commencement of the action, states that their publication and circulation will interfere with a fair trial of this action, in view of the jury being drawn from the locality in which such newspaper is largely circulated. I think this matter is one of public interest, and whether it

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could be more satisfactorily investigated by a Commission than at a trial is not material in considering his application. I declined to interfere, unless the plaintiff was prepared to pledge his oath to the untruthfulness of the alleged libellous statements. An affidavit to this effect has been filed. I accept it as sufficient for the purposes of this application and creating, as it were, a *prima facie* case, warranting me dealing with the matter. It is, of course, accepted only to that extent and does not amount to proof that should in any way affect the trial of the action. I emphasize this point, as I am anxious not to interfere with the functions of the jury or restrict the scope of the trial as outlined by counsel for the plaintiff in pressing his motion.

As was mentioned by Blackburn, J. in *Skipworth's Case* (1873), L.R. 9 Q.B. 230 at p. 232:

"When a case is pending, whether it be civil or criminal, in a Court it ought to be tried in the ordinary course of justice, fairly and impartially."

Then again, the same learned judge, in his judgment said (p. 234):

"We make no inquiry whether the statements [complained of] are true or false, but what we do inquire is, whether the proceedings which had been taken are such as to . . . . prejudge the question by what is called appealing to the public, so as to prejudice the minds of the jurors who may come to try the case, or perhaps to deter the jury from pursuing the course they would otherwise take."

Chitty, J. in *J. & P. Coats* v. *Chadwick* (1894), 1 Ch. 347, in an application by defendants for an injunction to restrain the issuance of a circular by the plaintiffs which might affect the fair trial of the action said at p. 350:

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"The considerations applicable to the granting or refusing an injunction on interlocutory motion in a libel action have no application in the present case. On such a motion as the present, the Court declines to go into the merits of the action . . . . plaintiffs are . . . . bound to refrain during its pendency from public discussion on the merits or demerits of the case."

Without further reference to the numerous authorities cited, I need only conclude by saying that this is not an application for an injunction to restrain the further publication of an alleged libel, but is launched by the plaintiff, in endeavouring to vindicate his character, for the purpose of preventing the defendant from publishing any matter which might prejudice him in obtaining a fair trial before an impartial jury. He

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might be so affected by the course so far pursued by the Sun newspaper, since the commencement of this action, being continued. An injunction should, therefore, be granted and an order to become effective and prevent further discussion of the transaction, prior to a speedy trial, will require to be broad in its terms.

As to costs, as the application finally disposes of this phase of the action, the plaintiff should be entitled to the costs of the application in any event, no matter what the final outcome of the action may be.

Injunction granted.

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ROTHERY v. NORTHERN CONSTRUCTION COMPANY AND CARDON.

Woodman's lien—Wages—Working with team hired by himself—Right of lien—R.S.B.C. 1911, Cap. 243.

The plaintiff, who was hired by a contractor to skid and haul timber at a certain sum per day for himself and team, hired from another a team for the purpose of performing the work. In an action to enforce a woodman's lien:—

Held, that he has a lien for services of himself and team under the Woodman's Lien for Wages Act.

Statement

ACTION to enforce a woodman's lien pursuant to the Woodman's Lien for Wages Act. The facts are set out fully in the reasons for judgment. Tried by SWANSON, Co. J., at Kamloops on the 8th of July, 1921.

P. McD. Kerr, and *R. G. Parker,* for plaintiff.
Dunbar, for defendant Company.

8th July, 1921.

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SWANSON, Co. J.: This is an action to enforce a woodman's lien pursuant to the Woodman's Lien for Wages Act. I have

perused carefully the evidence, and read the authorities cited, particularly the judgment of HOWAY, Co. J. in *Ross* v. *McLean* (1921), 1 W.W.R. 1109, and the judgment of GREGORY, J. in *Stephens* v. *Burns* (1921), [30 B.C. 60] 2 W.W.R. 513, and cases cited therein. This case seems to me exceedingly simple. Many of the legal points pressed by counsel are not relevant to the state of facts as I find them.

J. L. Cardon had a contract with defendant Company to take out 3,000 ties, and 100,000 feet board measure of logs. The timber is in the Mount Olie District, North Thompson Valley, in this County. Now Cardon undoubtedly was a "contractor" or a "bare contractor," referred to in 26 C.L.T. p. 249. He is, however, not seeking to prosecute any claim for a woodman's lien. If Cardon were the plaintiff then according to the ruling of GREGORY, J., *supra,* Cardon could have no lien. But such are not the facts. Rothery prosecutes the claim for the lien, not by virtue of his own work done on the timber but solely as assignee of two workmen, Loveway and Wolstenholme. The Act permits such procedure. By virtue of the assignments under seal signed by these two workmen in favour of Rothery, notification of which assignment under the Laws Declaratory Act having been carefully and properly given, Rothery stands in their shoes and is clothed with all the rights contractual and statutory which were Loveway's and Wolstenholme's in performing the service (labour) in question. The evidence clearly establishes that these two workmen were employed by Cardon, as workmen, as wage-earners, to assist him in fulfilling his contract with defendant Company. Their work was "skidding and hauling" timber, expressly provided for under the Act. The terms of their employment are perfectly clear. They were hired by Cardon to work on this timber. Wolstenholme was employed at the rate of $9 per day for himself and team. Loveway was to get at the rate of $7 per day for himself and one horse, or $9 for himself and team. It is clearly not the case of a "bare contractor" hiring out his team as dealt with by HOWAY, Co. J. in *Muller* v. *Shibley* (1908), 13 B.C. 343, but clearly the case of "persons" performing labour or services—true, with the aid of horses. But

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that cannot possibly alter the case, the services rendered are by the "persons" employed for that purpose, and the horses serve the purpose only in a much wider and more effective sense than is served by an implement in the hands of the logger. Indeed, how could skidding and hauling be done in our woods in a sensible and effective way without the use of horses? Cardon in the clearest terms testifies to employing these two men, on the above terms. Each of these men reiterates emphatically the same facts as to his employment. Rothery supports it and states he expressly brought the facts to the attention of the defendant Company's officers, Mr. Gorman, superintendent of construction work, and Mr. Boland, general manager, who said the arrangement was satisfactory to them. Now a great deal has been made of the fact that neither Loveway nor Wolstenholme had horses of his own, but was obliged to make some arrangements with Rothery (the owner of the horses) for their hire or use by these two men. It seems to me that we really are not concerned in fact with the business arrangement between Rothery and these two men. They naturally had to make a proper allowance to Rothery for the use of his horses, which was fixed at $4 for a team per day, and $2 for a single horse. Rothery was to feed and shoe the horses, in fact, do "everything" (as he put it) in connection with the horses except to work them. Rothery was also boarding these men when they were on this job. By an arrangement between these three parties, with the approval of the Company, the "time cheques" for these two workmen's time or labour were made directly in favour of Rothery. He then became a "trustee" to account to these two men for the proceeds of same. This Rothery has fully and completely done. Much has been made of the statement that as a working basis the arrangements between Rothery and these two men as to settlement worked out at about $85 per month when man and team were working, or $75 when man and one horse were working. That cannot alter the clear outstanding fact of this case, proved by the clearest evidence, that these two men were actually in the employ of Cardon, as he has testified. That being so, all these legal niceties disappear into thin air. These two men are clearly

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entitled to their liens and if so, their assignee Rothery must be entitled to fully enforce their statutory rights against the timber. The balance of Wolstenholme's claim is $492.75, and of Loveway's $329, admitted by Cardon as a debt due to these men in respect to labour on timber in question. No claim is included in the plaint for personal judgment against Cardon. If plaintiff desires such (which apparently is unlikely) he will have to apply to amend his plaint. Judgment will be accordingly entered in favour of the plaintiff for the full amount of these claims, and costs to be taxed, which amount will be secured by a woodman's lien upon all the timber in question. The formal terms of the judgment declaring the right to a woodman's lien, and its due enforcement will be set forth in the formal decree to be signed and entered herein.

Judgment

Judgment for plaintiff.

NEW YORK OUTFITTING COMPANY DRESSWELL ON EASY TERMS, LIMITED v. BATT.

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Contract—Option to terminate agreement and withdraw from employment—Covenant not to engage in business if option exercised—Agreement terminated but employment continued—Later discharged from employment—Restraining order under covenant refused.

B. entered into a written agreement with an outfitting company to be engaged as assistant manager and to take stock in the company, to be paid for partly in cash and partly on a certain date, B. to have the option of terminating the agreement and obtain a refund of the first payment upon the date when the second payment was due. The agreement contained a proviso that "in the event of his (B.) terminating this agreement and withdrawing from the employment of the company he should not thereafter for five years become engaged with any person in a like or similar business in Vancouver." B. terminated the agreement when the second payment came due and was paid back the amount of his first payment, but by arrangement he continued in the employ of the company as a salesman for nine months, when he was discharged. He then entered the employment

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of another outfitting establishment. A restraining order was granted under the terms of the agreement in an action for breach of contract, and an injunction.

Held, on appeal, reversing the decision of MACDONALD, J., that upon the defendant deciding not to take an interest in the business the parties terminated the "agreement" but not the "employment" and the determination of both at the will of the defendant must have taken place before he could be restrained from engaging in a like business in Vancouver.

APPEAL by defendant from the decision of MACDONALD, J., of the 4th of February, 1921, in an action for specific performance or in the alternative for damages for breach of contract, and for an injunction. The plaintiff Company conducted a business as retail cash and credit tailors and dealers in men's and women's wearing apparel on Hastings Street, Vancouver. The defendant came from England and on the 23rd of March, 1919, entered into a written agreement with the Company whereby he was to work as assistant manager in the store and take 5,000 shares of $1 each in the Company, for which he was to pay $2,000 cash, $2,000 on the 1st of July following, the $1,000 balance to be paid for from dividends. He was to have the option of terminating the agreement on the 1st of July and receiving back the $2,000 that he paid, but in the event of his doing so he was not to engage in a similar business in Vancouver for five years. He withdrew from the agreement on the 1st of July, and received a refund of the $2,000, but under arrangement he continued on as a salesman in the Company's employ until April, 1920, when he was discharged by the Company. He then entered the employment of another outfitting firm. The learned trial judge granted an injunction restraining the defendant from engaging in a similar business for five years in Vancouver.

Statement

The appeal was argued at Vancouver on the 21st and 22nd of March, 1921, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

A. H. MacNeill, K.C., for appellant: Under the terms of the agreement the defendant decided he would not put his money in the business. Then a new agreement was entered into whereby

Argument

he was to continue as a salesman. After he was engaged as a salesman for a certain period he was discharged by the plaintiff. The only change was that he decided not to take an interest in the business: see *Mason* v. *Provident Clothing and Supply Company, Limited* (1913), A.C. 724; *Herbert Morris, Limited* v. *Saxelby* (1916), 1 A.C. 688 at pp. 708-9; *Konski* v. *Peet* (1915), 1 Ch. 530. On the question of contract in restraint of trade: see *Hepworth Manufacturing Company (Limited)* v. *Wernham Ryott* (1919), 36 T.L.R. 10; *Dewes* v. *Fitch* (1920), *ib.* 585; *Clarke, Sharp, and Company, Limited* v. *Solomon* (1920), *ib.* 759; *Attwood* v. *Lamont* (1920), *ib.* 895 at p. 897. On receipt of his letter deciding to withdraw his money the plaintiffs had two courses, either to put an end to the contract or to continue him as a salesman. They decided on the latter which held out a future for him. Later they dismissed him without any charge being made against him. The wrongful dismissal was a repudiation of the whole contract: see *General Billposting Company, Limited* v. *Atkinson* (1908), 1 Ch. 537 at p. 541; (1909), A.C. 118 at p. 120.

Cassidy, K.C., for respondent: Batt's position was to all intents and purposes a partnership up to the 3rd of June when the contract was terminated by his letter. He was after that merely an employee and clause 8 of the contract was a term of his employment and is not unreasonable. As to plea that the restriction is in excess of the requirements see *Bowler and Blake* v. *Lovegrove* (1921), 37 T.L.R. 424. As to onus of proof see *White, Tomkins, and Courage* v. *Wilson* (1907), 23 T.L.R. 469; *Badische Anilin und Soda Fabrik* v. *Schott, Segner & Co.* (1892), 3 Ch. 447 at p. 450. They are taking a point not taken below: see *Edevain* v. *Cohen* (1889), 41 Ch. D. 563. It must be set up in the pleadings. No case has been cited as to reasonableness but see Labatt's Master & Servant, 2nd Ed., Vol. 1, p. 946, par. 306; *E. Underwood & Son, Limited* v. *Barker* (1899), 1 Ch. 300; *Welstead* v. *Hadley* (1904), 21 T.L.R. 165; *Rousillon* v. *Rousillon* (1880), 14 Ch. D. 351.

Argument

MacNeill, in reply.

Cur. adv. vult.

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MACDONALD, C.J.A.

MACDONALD, C.J.A.: I do not find it necessary to decide whether the agreement in question was or was not in restraint of trade. The parties have plainly said that "in the event of his [the defendant] terminating this agreement and withdrawing from the employment of the party of the first part [the plaintiff] that he shall not thereafter for a period of five years" engage in like business in Vancouver. *Inter alia,* the agreement provides for two things: the advance of money by defendant to plaintiff with an option to defendant to acquire an interest in the plaintiff's business or to have the money back if he shall so decide within a stated period, and secondly, an indefinite hiring at a weekly wage. This hiring is the "employment" mentioned above. Within the time specified, the defendant gave the plaintiff notice saying: "My agreement is now open to be terminated, and I place myself in your hands," but, as the balance of the letter shews, he did not place himself in their hands as to his advance of moneys as aforesaid, he definitely, as was his right, demanded them back and relinquished his rights to take an interest in the business. He then adverts to his services, *i.e.,* his employment and says: "You can have same if you desire." And again: "I will stay as long as you desire or quit when you wish." The fact is that he stayed until subsequently dismissed by the plaintiff without, as the learned judge has found, any fault on his part.

The parties distinctly differentiate between "agreement" and the "employment," the termination of both must, at the will of the defendant have concurred before he can be restrained from engaging in a like business in Vancouver.

I would allow the appeal.

MARTIN, J.A.

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

GALLIHER, J.A.

GALLIHER, J.A.: I would allow the appeal. Two things were necessary before the restrictive clause in the agreement was to take effect: First, the plaintiff was to put an end to the agreement, and, secondly, withdraw from the employment. The defendant terminated the agreement, but in my view of the

case (in which I, with every respect, differ from the learned trial judge) did not terminate the employment.

Reliance is placed by the plaintiff upon a letter written by defendant to plaintiff, dated June 3rd, 1919. My interpretation of that letter is that defendant terminated the agreement by deciding not to take any financial interest in the undertaking and requesting the moneys advanced to be paid back, but left himself entirely in the hands of the plaintiff as to his continuing in its service. The words, "I will stay as long as you desire or quit when you wish," do not indicate on his part an intention or even a desire to withdraw, but on the contrary, he points out in another part of his letter the necessity of plaintiff having a salesman and setting out his own qualifications. This is surely not a withdrawal and a rehiring.

GALLIHER, J.A.

The learned judge seems to have experienced some difficulty in reconciling paragraph 10 of the agreement with paragraph 8, but I think when carefully considered it can be taken to be as referring only to the termination of the agreement as to taking the financial interest and, as it says, for the enforcement of same for the return of the money. Clause 8, I think, disposes of the matter. There the termination of the agreement and the withdrawal from employment are treated separately, and it is only on the happening of both events that the restrictive clause comes into operation. The defendant continued in the employment of plaintiff and was afterwards dismissed by them.

MCPHILLIPS, J.A.

McPHILLIPS, J.A.: I would allow the appeal; the event did not happen which would entitle the covenant being invoked; that is, the respondent put the contract as to the personal services at an end not the appellant. Further, even if the covenant could be looked at it was not established that the appellant engaged "in a like or similar business" to that set forth in the agreement, and upon that point alone the appellant is entitled to succeed upon this appeal.

In *Bowler and Blake* v. *Lovegrove* (1921), 37 T.L.R. 424, Mr. Justice Lawrence said at p. 425:

"I am aware that this conclusion involves placing a very narrow and strict construction upon clause 5, but, in my opinion, the nature of the

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clause is such that it ought to be construed in the narrowest and strictest possible manner against the plaintiffs."

Further, were I wrong in this, then I am of opinion that the present case is one between employer and employee, and I would refer upon this point to what Mr. Justice Lawrence said at p. 425:

"To ascertain the principles which are applicable to this part of the case I need not travel beyond the decision of the House of Lords in *Morris* v. *Saxelby* (32 The Times L.R. 297; (1916), 1 A.C. 688) and the decision of the Court of Appeal in *Attwood* v. *Lamont* (36 The Times L.R. 895; (1920), 3 K.B. 571). These decisions shew clearly that as the present case is one between employer and employee, the clause is *prima facie* invalid, and that to establish its validity it is incumbent on the plaintiffs to prove that there existed some special circumstances which rendered it reasonably necessary for the protection of the plaintiffs' business. To ascertain whether the plaintiffs have discharged this onus it is necessary to state the relevant facts."

And at pp. 427-8 we have Mr. Justice Lawrence saying:

"In conclusion I will only add that the case of *Dewes* v. *Fitch* (*supra*), which was so strongly relied upon by the plaintiffs, is, in my opinion, distinguishable from the present case on the facts. I am of course bound by that decision in so far as it lays down any principle upon which the Court ought to act, but as was pointed out by Lord Parker in *Morris* v. *Saxelby* (see (1916), 1 A.C. at p. 708), it becomes necessary to consider in each particular case what it is for which, and what it is against which, protection is required. This I have endeavoured to do in the present case, and the action will be dismissed with costs."

MCPHILLIPS, J.A.

The covenant in the present case is, in my opinion, invalid, being in restraint of trade. This alone, of course, would dispose of the appeal.

I would, therefore, allow the appeal. The action should be dismissed with costs here and in the Court below.

EBERTS, J.A.

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

Appeal allowed.

Solicitor for appellant: *Arthur H. Fleishman.*
Solicitor for respondent: *Walter G. C. Stevenson.*

HERNANDEZ v. THE "BAMFIELD."

MARTIN, LO. J.A.

1921

July 6.

HERNANDEZ v. THE "BAMFIELD"

Admiralty law—Marshal's fee on sale by auction under order of Court.

The marshal, though not licensed as an auctioneer, is entitled to a double fee on the gross proceeds in selling a vessel at auction by order of Court; the condition of "being duly qualified" in the appropriate item in the table of fees refers to his competence, not to any requirement of a licence as auctioneer; in any case, a local municipal requirement should not intervene between the Court and its officer in disposing in any manner and by such agency as it sees fit of the property in its custody and control.

APPEAL by the marshal from disallowance by the registrar of a double fee in a sale by auction of a vessel under order of Court. Argued before MARTIN, Lo. J.A. at Victoria on the 6th of July, 1921. Statement

The Marshal, in person.
Hankey, contra.

MARTIN, Lo. J.A.: This is an appeal by the marshal in person, from the taxation by the registrar of his fees, and the question is, was he right in disallowing the auctioneer's charge made by the marshal in selling the power vessel "Bamfield" by order of the Court? The appropriate item in the Table of Fees, No. V., declares that: "If the marshal, being duly qualified, acts as auctioneer, he shall be allowed a double fee on the gross proceeds."

The registrar ruled that the expression "being duly qualified" should be construed as "duly licensed" as auctioneer by the City of Victoria, in which the sale was held, and as it was admitted that the marshal had not applied for or received an auctioneer's licence, therefore his claim to a double fee was disallowed. But with all respect to the learned registrar's view, I am of opinion that "qualified" is here used in the wider sense of competence, or standard of ability, to perform a duty which, it is conceded, has often been adequately performed by the marshal. The sense in which I think the Judgment

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expression is here employed is well illustrated in Crabb's English Synonyms, *sub. tit.* "Competent, Fitted, Qualified," wherein it is said: "Acquaintance with the business to be done and expertness in the mode of performing it, constitutes the qualification."

On this ground alone I am, therefore, of opinion that the appeal should be allowed, but it is desirable to note for further consideration, when necessary, that I am not unmindful of a further reason in favour of such a construction which might be advanced, *viz.*, that it appears to be a strange thing that any municipal requirement could intervene between the Court and its officer in disposing in any manner and by what agency it saw fit to direct, of the property in its custody and control. It would seem to be an anomaly that an officer of the Court who by experience is qualified to dispose of its property throughout its entire jurisdiction over this Province, should nevertheless be restricted in the performance of that duty by a local municipality.

Judgment

Appeal allowed.

GREGORY, J.

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REX v. FOO LOY.

Forfeiture—Criminal law—Order for forfeiture set aside—Money forfeited returned—Order setting aside forfeiture quashed—Action by Crown to recover moneys returned.

REX v. FOO LOY

Upon the conviction of the defendant for keeping a common gaming-house, certain moneys seized under a search warrant were ordered forfeited to the Crown. On appeal, the order of forfeiture was set aside by the County Court judge and the moneys directed to be returned to the defendant. The order of the County Court judge was subsequently quashed. In an action by the Crown:—

Held, that the Crown is entitled to recover the moneys so forfeited.

Statement

ACTION by the Crown to recover from the defendant $1,120 ordered forfeited to the Crown in certain proceedings had

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before the police magistrate at Prince George, wherein the defendant was convicted of keeping a common gaming-house. The facts are set out in the reasons for judgment. Tried by GREGORY, J. at Prince George on the 21st of June, 1921.

Ogilvie, for plaintiff.
P. E. Wilson, for defendant.

27th July, 1921.

GREGORY, J.: This is an action to recover from the defendant a sum of money ordered forfeited to the Crown in certain proceedings had before the police magistrate for the City of Prince George, wherein the defendant was convicted of keeping a common gaming-house. The moneys had been seized under a search warrant and were present in Court at the time of the conviction.

The order of forfeiture was, on appeal, set aside by the County Court judge and the moneys directed to be returned to the defendant. The moneys were accordingly returned but the order of the County Court judge was subsequently quashed and this action is for the recovery of those moneys so improperly returned to the defendant.

Judgment

Counsel for the defendant alleges that the proceedings before the magistrate were irregular and the magistrate was without jurisdiction and hence no action will lie. There is some evidence to support his contention that the proceedings were irregular, in respect to the issuing of a search warrant. Counsel for the Crown contends that as the conviction has been appealed from and still stands, the action will lie, the conviction cannot be set aside in this action. Neither counsel has referred me to any authority in support of his contention, and I accept that of the Crown as the most reasonable one.

There will be judgment for the plaintiff for the amount claimed, *viz.,* $1,120, with costs.

Judgment for plaintiff.

MACDONALD, J.

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Aug. 2.

IN RE ARMY AND NAVY VETERANS IN CANADA

IN RE ARMY AND NAVY VETERANS IN CANADA. *IN RE* GOVERNMENT LIQUOR ACT.

Constitutional law — Intoxicating liquors — Government Liquor Act — Validity—Prohibition proceedings—Prospective amendment to information—Effect of—B.N.A. Act (30 Vict., Cap. 3), Sec. 92, Nos. 13 and 16—B.C. Stats. 1921, Cap. 30.

An application for a writ of prohibition, sought upon defects claimed to exist upon the face of the proceedings, should not be affected by the prospect of any change being made by way of amendment, and where such a defect appears, the issuance of a writ of prohibition is a matter of right, and not merely discretionary.

The Government Liquor Act, 1921, appropriating solely to the Government the liquor trade of the Province is *intra vires*, being legislation in respect to a matter of a "merely local or private nature in the Province" within No. 16 of section 92 of the British North America Act, and supported by No. 13 of section 92, which gives the Province jurisdiction over "property and civil rights in the Province," and not being an interference with "the regulation of trade and commerce" within the meaning of the British North America Act as belonging to the Dominion.

Statement

APPLICATION for a writ of prohibition to prevent the police magistrate at Victoria from proceeding with the trial of a charge that the applicant "not being a Government vendor did unlawfully sell liquor contrary to the Government Liquor Act," the chief ground for the application being that the Act is *ultra vires* of the Province. The facts are set out in the reasons for judgment. Heard by MACDONALD, J., at Chambers in Vancouver on the 29th of July, 1921.

Sir C. H. Tupper, K.C., for the application.
Mayers, contra.

2nd August, 1921.

Judgment

MACDONALD, J.: "The Army and Navy Veterans in Canada" were, by Dominion statute (7 & 8 Geo. V., Cap. 70), incorporated as an association and became vested with certain rights, including that of establishing branches at any place in Canada. The Victoria unit of such association applies for a writ of prohibition to prevent the police magistrate of Victoria from

further proceeding with the trial of a charge that the applicant "not being a Government vendor, did unlawfully sell liquor known and described as beer, contrary to the Government Liquor Act." The particular section of such Act, which covers the offence, is as follows:

"46. No person other than a Government vendor shall sell or deal in any liquid known or described as beer or near-beer or by any name whatever commonly used to describe malt or brewed liquor."

The ground taken in support of the application is, that the Government Liquor Act (B.C. Stats. 1921, Cap. 30) is *ultra vires* of the Province, and that the magistrate is thus without jurisdiction.

Counsel, opposing the application, contends that, aside from the question of the validity of the Act, the writ should not be granted, as a portion of the description of the offence, alleged in the information, might be considered surplusage, and in any event, if the Act were held to be invalid, the British Columbia Prohibition Act, B.C. Stats. 1916, Cap. 49, would cease to be repealed and, upon its revival, the applicant might, by proper amendment, be brought within its provisions. Even if such result ensued, I do not think this contention should prevail, as the section, under which the information was laid, deals with any kind of beer, irrespective of it containing any percentage of alcohol or being simply what is called "near-beer," and there was no similar section in such Prohibition Act. Further, redress is sought upon defects claimed to now exist, upon the face of the proceedings. If this be a good objection, then the application should not be affected, by the prospect of any change being made in the future. The proper procedure has been pursued, where such a defect appears and the issuance of a writ of prohibition would, in that event be as of right and not simply discretionary. See *Rex* v. *Jack* (1915), 25 D.L.R. 700, referring at p. 702 to *Farquharson* v. *Morgan* (1894), 1 Q.B. 552, where Lord Halsbury felt bound to grant the writ, although the applicant had no merits. Compare *Rex* v. *McAuley* (1918), 3 W.W.R. 178, where Mathers, C.J.K.B. granted a writ of prohibition with respect to a charge under the criminal code. He bore in mind the prospect of amendment and reserved such right to the prosecution and further gave the

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liberty of proceeding upon the information after it had been properly amended and resworn or upon a new information being laid properly stating the offence. An information should not only contain every ingredient to properly describe an offence, but it should be an offence supported by common law or valid legislation. If neither of these exist, a party charged is entitled to seek the assistance and interference of a superior Court.

Then is the Act in question invalid? It was submitted that its prohibitory provisions, so termed, were separable from the balance of the legislation and, being clearly within the powers of the Province, might be held valid and render the applicant liable for an infraction. Can they be taken as a distinct declaration of the legislative will? To determine this point, one should consider the Act in its entirety, coupled with the trend of liquor legislation in the Province. The British Columbia Prohibition Act had been in force for a period, and in 1920 the Legislature, by British Columbia Statutes, Cap. 93, authorized the taking of a referendum at which questions were submitted, for an expression of opinion by the electorate. Following the result of such referendum, the Act in question, termed "An Act to provide for Government control and sale of alcoholic liquors," was passed. It was intended to implement the vote of the people and did not purport to be prohibitory legislation. The scope of the Act appears quite clear. It is apparent the Legislature was making a new departure in liquor legislation. It had abandoned the licence system in 1916 and adopted prohibition. This, in turn, was to be ousted and the Government authorized to control and carry on the liquor business in the Province. A board was to be appointed by the Government to accomplish this object, and, by ample and exclusive powers of purchase and sale, effectually carry out the intent of the Act. These may be called the prescribing clauses of the Act, and indicated its general purpose. It would not, however, be sufficient to simply control or regulate the sale, but was deemed necessary to prevent other persons from engaging in the business. So the Act, after providing for the establishment and conduct of Government liquor stores, and

Judgment

the issuance of permits to persons desirous of purchasing liquor from the Government, prohibited sales in the Province, except from such Government stores. I think this was the sole object, in enacting such prohibitory provisions, and that they were intended to be, and are, only effective in conjunction with the Act. In other words, they should not stand and constitute valid legislation by themselves. If the Act, as a whole, be invalid, particular clauses which, "if separately enacted would be *intra vires,* must fall unless clearly to be taken as independent substantive enactments": see Clement's Canadian Constitution, 3rd Ed., 491 and cases there cited.

Then, is the Act unconstitutional? It is stated, by counsel, that there is no concrete case which bears upon this question. In considering the matter, the validity of the impugned Act should be presumed, and such a meaning given to the statute, if possible, as will uphold its validity, "for a legislative body must be held to continue to keep within its powers": Clement, *supra,* 492. Compare *Macleod* v. *Attorney-General for New South Wales* (1891), A.C. 455. Also, I should bear in mind a portion of the judgment of Idington, J. in *In re Alberta Railway Act* (1913), 48 S.C.R. 9 at p. 24, as follows:

"Any legislative enactment under our Federal system, which partitions the entire legislative authority, ought to be approached in the spirit of assuming that the Legislature did not intend to exceed its powers; and if an interpretation can reasonably be reached which would bring it within the power assigned the Legislature in question, and given operative effect, then that meaning ought to be given it. Of course, if the plain language is such that to give it operative effect must necessarily involve doing that which is beyond the power assigned the Legislature then the Act must be declared null."

Judgment

The legislation purports to be purely local and does not in terms, apply to any matter outside the Province or between the Provinces. The applicant should, under such circumstances, in addition to overcoming the presumption, referred to, assume the onus of shewing its invalidity. It is contended, that the Province has no right to embark in the liquor business and create a monopoly for itself by restrictive and prohibitory provisions of the nature there outlined. Further, that it cannot, by such business, attempt to enhance its revenues, through prospective profits. It is submitted, that the liquor traffic is not of itself

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illegal, except as it may be regulated or prohibited by statute, so if this legislation were held valid the Province might engage in any business. It could buy and utilize property for that purpose. It might, aside from any contention that might be made, as to not being liable for customs or excise duties, pursue wholesale and retail business to such an extent as to seriously impair the revenues of the Dominion. It might successfully contend that, not only the property used in any such business, but the revenues derived therefrom, were free from taxation on the ground that, by section 125 of the B.N.A. Act, "no lands or property belonging to Canada or any Province shall be liable to taxation." This is a situation, however, with which, it is submitted, I should not be concerned, as the question to be determined is, whether the Province has exceeded its powers, in the passage of such an Act, irrespective of any result from a Dominion standpoint or otherwise. See *Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. 575:

"If . . . . on the due construction of the Act a legislative power falls within sect. 92, it would be quite wrong . . . . to deny its existence because by some possibility it might be abused, or may limit the range which otherwise would be open to the Dominion Parliament."

Judgment

The extensive power exercisable by a Province, under The B.N.A. Act, is referred to by Boyd, C. in *Re McDowell and the Town of Palmerston* (1892), 22 Ont. 563 at p. 564, as sufficient to deprive a party of his property even without compensation. In that case, a portion of the judgment of Day, J. in *Ex parte Ira Gould* (1854), 2 R.J.R.Q. 378, was quoted with approval. In such case, decided before Confederation, reference was made to the powers of the Provincial Parliament, within statutory limits, being as extensive as those of the Imperial Parliament, "even if they were to interfere with the Magna Charta." Then again, in *Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick* (1892), A.C. 437 at p. 442, the B.N.A. Act was considered and the authority of the local Legislature, within the limits of section 92 of the Act, defined as follows:

"In so far as regards those matters which, by sect. 92, are specially reserved for Provincial legislation, the legislation of each Province continues to be free from the control of the Dominion, and as supreme as it was before the passing of the Act. In *Hodge* v. *The Queen* [(1883)], 9

App. Cas. 117, Lord Fitzgerald, delivering the opinion of this Board, said: 'When the British North America Act enacted that there should be a Legislature for Ontario, and that its Legislative Assembly should have exclusive authority to make laws for the Province and for Provincial purposes in relation to the matters enumerated in sect. 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by sect. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subject and area, the local Legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion.' The Act places the constitutions of all Provinces within the Dominion on the same level."

Is the power, then, to pass this impugned Act, contained within section 92 of the B.N.A. Act? If such power is not derived from the exclusive right, "to make laws in relation to the matters coming within the class of subjects" enumerated in the section, a local Legislature cannot obtain aid to support its legislation outside its provisions. The *residuum* of legislative power, under the scheme of Confederation, has been repeatedly declared by the Privy Council to be vested in the Dominion. See *Lambe's* case, *supra,* where this point is referred to as follows:

"They adhere to the view which has always been taken by this Committee, that the Federation Act exhausts the whole range of legislative power, and that whatever is not thereby given to the Provincial Legislatures rests with the Parliament [of Canada]."

Judgment

Section 92 enumerates 16 different classes of subjects, concerning which, the Province may legislate. None of these specifically, nor inferentially, indicate that a Province would be entitled to pass laws for the purpose of itself establishing a retail trade in any commodity. The nearest approach to such an authority, might be permissible, or necessary, in a measure, under No. 5, allotting to the Province "the management and sale of the public lands belonging to the Province and of the timber and wood thereon." Counsel, for the applicant, contends that this express power of management and sale, as to Provincial lands and timber, strengthens the submission, that a like power should not be held to exist under any other portion of section 92 so as to include the subject covered by the Act in question. Further, that a decision to that effect, in favour of the Province, would conflict with the provisions of No. 2 of

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the 91st section of the B.N.A. Act, giving the Parliament of Canada exclusive legislative authority, as to the regulation of trade and commerce. It is, on the contrary, argued, that there has been no invasion of the legislative field, that may be, or has been, in any way occupied by the Dominion under any part of section 91, and that authority is given to the Province to thus legislate under Nos. 10, 13 and 16 of section 92.

Number 10 deals with "local works and undertakings." There are exceptions to this "subject" which should aid in its construction and throw light upon the power, intended to be conferred upon the Province. This number would not ordinarily be considered, as applicable to the carrying on of the liquor business. The works intended to be dealt with would seem to indicate that they were to be of a physical or tangible nature, as the exceptions refer to extra-provincial means of transportation or communication and works which "before or after their execution" might be declared to be, for the general advantage of Canada. The case of *Smith* v. *City of London* (1909), 20 O.L.R. 133 at p. 153, is cited, as an authority, that a Province may, under No. 10, support the passage of an Act, authorizing contracts by a municipality for transmission of electricity, as being a local work or undertaking. I think, on this branch, it only supports a contention, that the Provincial Legislature has power to establish "electrical works," under No. 10 of section 92, and to delegate such power to a competent municipal body. See Boyd, C. at p. 154: "The installation of an electric plant in the City of London would be *per se* a local work or undertaking."

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The case, however, is of importance and gives strength to the validity of the Act under Nos. 13 and 16 of section 92.

Number 13 deals with the subject of "property and civil rights in the Province," and it may be considered, in conjunction with No. 16, the last enumerated class of subjects, in section 92, *viz.*, "generally of matters of a merely local or private nature in the Province." In this connection, Lord Watson, in *Attorney-General for Ontario* v. *The Attorney-General for the Dominion* (1896), A.C. 348, while not referring to No. 10, expressed a decided opinion that Provincial legis-

lation for the suppression of the liquor traffic could not be supported under either Nos. 8 or 9 of section 92, and that the only enactments of that section which appeared to have any relation to such legislation, were to be found in Nos. 13 and 16. He did not deem it necessary, for the purposes of the appeal, to determine whether such legislation was authorized by the one or the other of these heads. In *Attorney-General of Manitoba* v. *Manitoba Licenceholders' Association* (1902), A.C. 73 at p. 78, Lord Macnaghten, in referring to the judgment in the case just mentioned, says:

"Although this particular question was thus left apparently undecided, a careful perusal of the judgment leads to the conclusion that, in the opinion of the Board, the case fell under No. 16 rather than under No. 13. And that seems to their Lordships to be the better opinion."

With reference to the Liquor Act here in question, both numbers might, with advantage, be utilized to support the legislation.

As I have mentioned, the power of the local Legislature, as to property, is ample, even to the extent of confiscation. The words of No. 13 are used in their largest sense. See *Citizens Insurance Company of Canada* v. *Parsons* (1881), 7 App. Cas. 96. Does No. 13, coupled with No. 16, enable a local Legislature, not only to deprive other persons of the right to engage in a particular trade, but to appropriate such trade exclusively to the Government of the Province? It was stated, by counsel, that the British Columbia Prohibition Act, containing provisions for Government sales, under certain conditions, had been attacked unsuccessfully in the Court on this ground. Assuming that the clauses in such Act, as to sale, were considered, and that it was decided that they did not affect the validity of the Act, I think there is a marked difference between the provisions, under reasonable conditions in the Prohibition Act, and those prescribed by the Act in question. In the latter Act, generally speaking, the only restrictions on the sale, and use of intoxicating liquor is, the purchase of a permit, while the Prohibition Act purported to prevent the purchase of liquor save under exceptional circumstances. In one case the provisions, as to sale, were the main feature to carry out the object of the Act, while, in the other, they were only ancillary or incidental to the prohibitory legislation.

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In pressing the argument, that the Act was an interference with trade and commerce, other situations were outlined, in addition to those to which I have referred, but Boyd, C. in *Smith* v. *City of London, supra,* at p. 153, indicates what should be considered, in determining the constitutionality of Canadian legislation as follows:

"In considering all legislation in Canada and the Provinces touching its constitutional aspect, the question is not of policy or expediency or reasonableness, but simply of competence, *i.e.*, whether the particular statute can be brought into or under the class of subjects assigned by the Imperial Act of Confederation to the enacting assembly, whether it be Legislature or Parliament."

In the Manitoba liquor case, *supra,* the effect that the Prohibition Act, passed in that Province, might have upon trade, as well as its interference with the revenue of the Dominion, were considered by the Privy Council, as substantially the ground, upon which the Manitoba Court had declared the Act unconstitutional. In discharging the judgment of that Court, Lord Macnaghten, at p. 79, refers to the previous judgment in *Attorney-General for Ontario* v. *The Attorney-General for the Dominion, supra,* deciding that a Provincial Legislature has jurisdiction to restrict the sale, in the Province, of intoxicating liquors, so long as the legislation did not conflict with any legislative provision, within the competence of the Parliament of Canada in force in the Province, and then reaffirms the opinion of the Privy Council that

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"matters which are 'substantially of local or of private interest' in a Province—matters which are of a local or private nature 'from a Provincial point of view,' to use expressions to be found in the judgment—are not excluded from the category of 'matters of a merely local or private nature,' because legislation dealing with them, however carefully it may be framed, may or must have an effect outside the limits of the Province, and may or must interfere with the sources of Dominion revenue and the industrial pursuits of persons licensed under Dominion statutes to carry on particular trades."

So that, even if prohibition had the effect indicated, it was not considered as a violation of the jurisdiction given to the Dominion to regulate trade and commerce. It is contended, that in principle it makes no difference if, instead of prohibiting the sale of liquor, the Province approves of and undertakes the sale of it, as being a matter of a merely local nature.

Similar objection was made to Provincial legislation in the case of *Smith* v. *City of London, supra.* There the validity of certain statutes was attacked. Boyd, C. at p. 153, after referring to the duty of the Court, to adjudicate, and determine, upon the validity of such statutes, states that the solid *residuum* of objection was left, at the close of the argument, within a narrow compass, as follows:

"It may be thus put: Electric current is a commodity, and as such the subject of 'trade and commerce'; this is an attempt to engage in municipal trade; and the law, rightly construed, does not permit a municipal body to interfere with the rights of individuals as to private lighting. Something also was suggested as to the undertaking savouring of monopoly and claiming exclusive rights, unfavourable to free trade and self-government. It was urged also that the electors, even by unanimous vote, could not warrant such legislation. It is admitted (perhaps reluctantly) that, so far as regards supplying light to public buildings and streets and the like, the legislation was permissible. No doubt, the statute contemplates that light, heat, and power may be supplied (at a proper charge) to individual inhabitants and families. And the evidence is that the defendant corporation intends to go into this line of business."

He held, that the supply of light was a proper function of municipal administration and that the City of London might undertake exclusive powers of trading in such commodity. Reference is also made, at p. 157, to the comment of Lord Herschell on the case of *Citizens Insurance Co.* v. *Parsons, supra, viz.,* that it

"'allowed to the Provincial Legislature a very considerable power of dealing with trade within its own limits—within its own borders.' . . . . You may give a very broad construction to 'trade and commerce,' and yet it may be that it would still leave open a very large power in dealing in such a way as to incidentally affect trade without its being a part of the regulations made within such meaning."

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The case of *Hull Electric Company* v. *Ottawa Electric Company* (1902), A.C. 237 was also referred to in *Smith* v. *City of London, supra,* at p. 151. There the validity of legislation was attacked on the ground that an electric-light contract could not be properly legalized by a statute of the Province of Quebec, "as electric light was a commercial commodity and as such fell within exclusive competence of the Dominion Parliament to regulate trade and that a monopoly had been created beyond the municipal power."

The attack, upon the by-law and statute, was abandoned

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before the Privy Council and Lord Macnaghten, in his judgment, in referring to such abandonment, said, at p. 247:

"It is obviously untenable. The scheme in favour of which the by-law . . . . was passed was a purely local undertaking. As such it came within the exclusive jurisdiction of the Provincial Legislature, and not the less so, because in such cases it is usual and probably essential for the success of the undertaking to exclude for a limited time the competition of rival traders."

I have, in the manner indicated, considered the impugned legislation and, in view of the decisions which I have shortly outlined, concluded that the passage of the Act in question was within the power of the local Legislature and is valid. I think such legislation was of the local or private nature intended by section 92 of the B.N.A. Act to be within the jurisdiction of the Province.

The application for a writ of prohibition is, therefore, dismissed.

Application dismissed.

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Negligence—Entrance to basement from street—Trap—Liability for injury from fall down stairs—Contributory negligence.

The ground floor of a building owned by the defendant was occupied by a tenant as a laundry. In the centre front, flush with the street was a plate glass show-case on the right side of which was a passage leading to the laundry premises and on the left side about three feet from the street line was a stairway, without guard or side-rail, leading to the basement. At about 9.30 in the evening when there were no lights in the building (there being an arc light about 54 feet away) the plaintiff, who had never seen the premises before, and wanted to get a parcel in the laundry, in attempting to enter went to the left of the show-case instead of the right, fell down the stairs and was injured. The jury found the defendant guilty of negligence and assessed damages, but the trial judge dismissed the action holding there was contributory negligence on the part of the plaintiff.

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

stairway was not a public nuisance, that the defendant did not owe any duty to the plaintiff in respect of the stairway and the appeal should be dismissed.

Per MARTIN and MCPHILLIPS, JJ.A.: That the plaintiff was an invitee who went on the premises to do business with a tenant, and notwithstanding the plaintiff's error in selecting the wrong passage the jury might reasonably find (as they did find) that the unlighted stairway formed a trap and the appeal should be allowed.

The Court being equally divided the appeal was dismissed.

APPEAL from the decision of MORRISON, J., of the 17th of December, 1920, in an action for damages owing to the negligence of the defendant in not providing proper protection to a stairway going to the basement of a building at 107 Broadway East near the corner of Main Street, Vancouver. The defendant owned the building in question, the ground floor being rented to one Munro as a laundry. There was a show-case in front and on the right of the show-case was an entrance to the store (laundry premises) and to the left of the show-case was a stairway to the basement, there being no protection in front or a hand-rail going down stairs (about 14 feet down). The plaintiff Mrs. Smith, not knowing precisely where the laundry was, left her house about 9.30 p.m. to get goods she had sent to be cleaned. She was given a description of the building in which the laundry was situate. There was an arc light about 54 feet away and there was slight rain on the night in question. On arriving in front of the building she concluded that was the building in which the laundry was situate but instead of going to the right of the show-case she went to the left and fell down the stairs, sustaining injury. The jury found negligence and gave a verdict for $1,500. On application of the defendant the learned trial judge dismissed the action on the ground that there was contributory negligence on the part of the plaintiff. The plaintiffs appealed.

Statement

The appeal was argued at Vancouver on the 9th and 10th of March, 1921, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

J. E. Bird, for appellant: There was no guard in front and no side rail down the steps. The learned judge in stating there

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was contributory negligence was discharging the functions of the jury and this on the evidence he should not have done: see *Daynes* v. *British Columbia Electric Rway. Co.* (1914), 49 S.C.R. 518 at p. 523; *Baldock* v. *Westminster City Council* (1918), 35 T.L.R. 188.

Argument

Symes, for respondent: At the time this building was not open for business and the plaintiff was in the position of a trespasser. The entrance to the stairway has nothing to do with the leased premises. She is not an invitee by the defendant: see Pollock on Torts, 10th Ed., p. 10; *Mason and Wife* v. *Langford* (1888), 4 T.L.R. 407; *Entick* v. *Carrington* (1765), 19 How. St. Tri. 1030 at p. 1066. As to whether in going off the street one does so at his peril see *Hardcastle* v. *South Yorkshire Railway Company* (1859), 28 L.J., Ex. 139; *Binks* v. *South Yorkshire Railway and River Dun Company* (1862), 32 L.J., Q.B. 26; *McKinlay* v. *Mutual Life Assurance Co. of Canada* (1918), 26 B.C. 5; Beven on Negligence, 3rd Ed., 364; *Rich* v. *Basterfield* (1847), 16 L.J., C.P. 273. She is a trespasser and there is no liability: see *Barnes* v. *Ward* (1850), 9 C.B. 392.

Bird, in reply: By the appearance of the building one would think there are two entrances. This staircase is a trap. As to the functions of judge and jury see *Pearson* v. *Cox* (1877), 2 C.P.D. 369 at p. 371.

Cur. adv. vult.

7th June, 1921.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The plaintiffs, husband and wife, sue for injuries to the wife resulting from her falling down a basement stairway.

The plaintiffs can succeed, if at all, upon the ground of duty owned by defendant to the plaintiff in respect of the stairway.

The alleged trap consisted of the basement stairway aforesaid, set back three feet from the street line, with a narrow passage from the street line to it. The building is on one of the principal thoroughfares of the City of Vancouver. At the opposite side of the building from the said passage and stairway is another passageway leading to the door of entrance to the first floor. Between the said passageway is a plate-glass front

coming out flush with the street line. The building is a narrow one and the said first floor was, at the time of the injuries complained of, in the occupation of one Mrs. Munro as tenant of the defendant. The stairway, however, and the passageway aforesaid leading thereto, was not included in the lease. Mrs. Munro carried on a laundry business in the premises and the plaintiff, Mrs. Smith, went to the laundry at night after the same had been closed, and mistaking the passageway to the basement for the entrance passageway, fell down the stairs. She says she had never been to the premises before and did not know which of the two passageways gave entry to the laundry.

It was argued that the maintenance of said stairway so close to the street was a public nuisance and that as the plaintiffs had suffered special damage therefrom they were entitled to redress in this action.

In *Hardcastle* v. *South Yorkshire Railway Company* (1859), 28 L.J., Ex. 139, Martin, B. delivering the judgment of the Court said (p. 141):

"When an excavation is made adjoining to a public way so that a person walking on it might by making a false step, or being affected with sudden giddiness, or, in the case of a horse or carriage, who might by the sudden starting of the horse be thrown into the excavation, it is reasonable that the person making such excavation should be liable for the consequences. But when the excavation is made at some distance from the way, and the person falling into it would be a trespasser upon the defendant's land before he reached it, the case seems to me to be different."

MACDONALD, C.J.A.

This case was followed in *Binks* v. *South Yorkshire Railway and River Dun Company* (1862), 32 L.J., Q.B. 26. These cases must be accepted as containing the correct statement of law relating to the matter with which they deal. It is therefore only a question of applying the law as so settled to the facts of the case at bar. An excavation made within three feet of a country road or pathway might well be a menace to those passing along it; a false step in the dark or sudden giddiness or the bolting of a horse might precipitate the passenger into the excavation, but such an accident could not in reason be apprehended on a city street in the circumstances in evidence here, where the passenger must deliberately turn from the sidewalk and proceed along a narrow passage, true only three feet,

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before coming upon the stairway. In my opinion it was not a public nuisance and upon that ground at all events, the plaintiffs are barred from success.

On the other branch of the appeal, *viz.*, breach by the defendant of a duty owed by him to the plaintiff, the principle is thus stated in Halsbury's Laws of England, Vol. 21, pp. 515-6:

> "When the danger from such property does not affect the public, the liability of the owner or occupier of the property for damage arising depends upon the relationship between him and the person damnified, and the duty existing between them."

Assuming that Mrs. Smith was an invitee of Mrs. Munro, the defendant's tenant, I think it cannot be said that she bore the same relationship towards the defendant. The lease to Mrs. Munro did not include the stairway; no invitee of hers had a right to go to the stairway, nor could such a one reach the stairway from Mrs. Munro's property but only from the public street. If there was any breach of duty on the part of anybody towards Mrs. Smith, it arose out of the fact that she was the invitee of Mrs. Munro. Her invitation was not to go to the stairway but to go to the laundry, which was in no way connected with the stairway, and if she made a mistake and went to the wrong place the liability by the defendant must be founded upon some other circumstance than that she was the invitee of Mrs. Munro. The defendant had no right to act as invitor to Mrs. Munro's premises and it is quite certain that he was not the invitor of Mrs. Smith to his own distinct premises, namely, the stairway.

MACDONALD, C.J.A.

This case is clearly distinguishable from those where the landlord leased offices or apartments to different persons with right to the tenants to use the common hallway which the landlord controlled and was bound to keep in a safe condition. The decision in such cases would be applicable if the laundry had been situated in the basement of the building and the stairway was the means of ingress and egress thereto. I have been unable to discover any case in which the Courts have gone so far as we are asked to go in this case and as I do not think that the principles laid down in such cases as *Indermaur* v. *Dames* (1866), L.R. 1 C.P. 274, can be applied to the facts

of this case, I am driven to the conclusion that the appeal must fail.

MARTIN, J.A.: Though the jury acquitted the plaintiff of contributory negligence and it is not, and was not, suggested by the appellant that evidence was lacking to justify that finding, yet the learned judge set aside the verdict on that ground, but as his action is not sought to be supported before us, we may respectfully pass on to consider the submission that is urged against the verdict, *viz.*, that the plaintiff was a trespasser and hence there was no duty on the defendant's part towards her. I find myself unable to accept this submission, because to me, at least, it is clear that she should be regarded as an invitee, who went upon the landlord's premises to do business with one of his tenants who occupied the whole ground floor store front and advertised it as a "Fancy Hand Laundry" as per showcard in the window, shewn in Exhibit 1. The fact that she came too late on that Saturday evening, at 9.30 she says, and which hour the jury must be presumed to have accepted as correct), to find the laundry open when she went there for the first time to get her washing which her children had taken there, does not detract from her *status* as an invitee, there being nothing before us to shew that she knew or ought to have known that the store was closed at that hour (though, parenthetically, I do not see, in any event why she should not make an attempt to get her washing, if she could, by ringing or knocking on the office door at any reasonable time), but on the contrary, she thought it was open from lights she saw within, and in her attempt to enter the store by the door at the end, as she thought, of a short passage on her left, she fell down a flight of steps; what she took for the doorway being the opening to the stair well (the first step of which was only 37½ inches from the street line), which she alleges was dark and unlighted so as to create a trap by inducing those who wished to enter the store to believe that the approach to its door was by the left passageway instead of by the right. This is not, be it noted, the case of a customer getting into a store after it is closed, but of approaching the entrance to a store.

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Now it is beyond all question that a person who comes upon premises upon lawful business is entitled to a safe approach thereto, or as it is put, to safe ingress and egress, in support of which I cite only the appropriate cases (not cited to us) of *Corby* v. *Hill* (1858), 4 C.B. (N.S.) 556 at p. 567; *Indermaur* v. *Dames* (1866), L.R. 1 C.P. 274, 35 L.J., C.P. 184; affirmed (1867), L.R. 2 C.P. 311; 36 L.J., C.P. 181; *Smith* v. *London and Saint Katharine Docks Co.* (1868), L.R. 3 C.P. 326 at p. 333; 37 L.J., C.P. 217; and *Butts* v. *Goddard* (1888), 4 T.L.R. 193, which last case is much in point because the plaintiff there sought to enter by a wrong door which she pushed open and fell down a flight of steps, and Mr. Justice Manisty instructed the special jury thus:

"The defendants ought to have their premises in such a state that people coming to transact business with them had a right to suppose those premises to be in a reasonably safe condition. The difficulty in the case was that the door here was not the usual door. No doubt the plaintiff was under the impression that she was entering in at the proper door. The jury would have to deal with the fact whether she was reasonably right in that impression. If they thought that the defendants had these premises, and had them so that a person might reasonably suppose he should go in there, then an invitation was held out to go there, and the defendants were bound to have that access reasonably safe."

That same instruction was, in effect, given the jury in this case and they found, in effect, after having had the special advantage of a view of the premises in a case of this kind (as to which see my observations in *Yukon Gold Co.* v. *Boyle Concessions* (1916), 23 B.C. 103; 10 W.W.R. 585 at p. 588; 34 W.L.R. 436), "that the defendant had . . . . set a trap for plaintiff," as Willes, J. puts it in *Corby's* case, *supra,* and I am quite unprepared to say they could not reasonably so find, because I regard the case as being one where the plaintiff had, at her worst, the choice of two apparently safe entrances to the laundry office and as the result of her non-negligent selection of the wrong one she fell into a dangerous trap. If the first step of the stairs had been only 7½ inches from the street line instead of 37½, could it have been even open to argument that it was not a trap? And so it comes to a question of degree, and for a jury according to the circumstances. In *Dobson* v. *Horsley* (1914), 84 L.J., K.B. 399; (1915), 1 K.B. 634,

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the point is well and succinctly put by Lord Justice Phillimore at p. 642:

"The tenant and his licensees have a right to say to the landlord, 'You have invited us to use this,' and therefore, if it is not that which it seems, the tenant or his licensee who suffers damage has a cause of action against the lessor. If it is what it seems, even though the consequence is so dangerous as crossing a river on a girder, nevertheless a licensee has no right of action against the landlord."

Here the jury have found that the access was not what it seemed to be, because it was obscured by or confused with another apparent one.

MARTIN, J.A.

The appeal, therefore, should be allowed.

GALLIHER, J.A.: I agree with the Chief Justice. I have been at considerable pains to search authorities bearing on the responsibility of a landlord for an accident occurring to a customer or person going on business to the premises of his tenant. Of these cases I might mention *Miller* v. *Hancock* (1893), 2 Q.B. 177, and *Dobson* v. *Horsley* (1914), 84 L.J., K.B. 399, which refers to *Miller* v. *Hancock, supra,* and distinguishes it.

On the facts of the case before us, I cannot say that any of the cases I have considered is an authority in plaintiff's favour on the facts of this case, nor have I been able to find any to that effect.

The appeal must be dismissed.

GALLIHER, J.A.

My brother MARTIN has drawn my attention to the case of *Butts* v. *Goddard* (1888), 4 T.L.R. 193, but as I view it that case is distinguishable on the facts. Here the area down which the plaintiff fell formed no part of and was entirely outside of the premises let. Moreover, the invitors in that case were the owners themselves, while to make the landlord liable here you must find him liable for something not connected with the leased premises themselves, but for something outside the premises, and by means of which there was no access to the premises—in fact, for a trap placed as affecting the proper entrance. I confess the case gives me considerable difficulty, but I am not satisfied that any of the cases go so far as we are asked to go on the facts of this case.

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MCPHILLIPS, J.A.: The appellant Erica Smith met with a very serious accident causing great personal injuries consequent upon falling down an unlighted stairway at the entrance to a large apartment building of the respondent, the appellant being on the way to the laundry in the building, never having been upon the premises before. It being in the evening and dark, the entrance to the building appeared to her to afford two ways of entrance; that is, to either side of the glassed in show-case advertising the laundry situate on the street or sidewalk level, and she proceeded upon the side which had a staircase within three feet of the street line, *i.e.*, only three feet in from the line of the sidewalk passing the building, and the staircase was unlighted at the time and without protection of any kind—no hand-rail or rail in front of same to apprise one that there was a stairway at this point. In accordance with the present-day method of construction of business premises, the show-case or store front is in the centre with entrance upon each side thereof, and it was reasonable for the appellant to assume this. There was evidence that the staircase was lighted at times when a checker club met which had rooms in the basement, but no meeting of the club taking place this night, the staircase remained unlighted.

The learned judge proceeded upon the ground that the appellant was guilty of contributory negligence and could not succeed. At this bar the learned counsel for the respondent stated that he did not rely upon or contend that there was contributory negligence upon the part of the appellant, but that he wholly relied upon the point that the appellant was a trespasser and that the respondent owed no duty to her.

The question now is, whether upon the facts of the case it can be said that there is responsibility upon the respondent for this very unfortunate accident resultant in such serious injuries to the appellant. The case is one which, in my opinion, admits of the application of the principle which was applied in *Miller* v. *Hancock* (1893), 2 Q.B. 177, *i.e.*, that the respondent in the present case knew that the premises would be frequented by persons having business with the laundry admits of no question —the show-case called special attention to this business, and

the method of construction of the premises was such as to constitute an invitation to enter the premises at either side of the show-case, and it was the duty of the respondent, the owner of the building, to his tenants as well as to all persons having business with them to keep the premises within his control in a reasonably safe condition and not maintain a trap, as it may well be said this staircase was, being within three feet of the line of the sidewalk, admitting of anyone consequent upon a slight swerve, being precipitated to the basement below, quite apart from a person doing what would appear to have been a reasonable enough proceeding, entering the premises upon the side upon which this concealed trap existed—unlighted and unprotected as it was—which the appellant did. The duty which rested upon the respondent was to keep the premises in a safe condition, and the question is, did he discharge that duty? I would refer to *Dobson* v. *Horsley* (1915), 1 K.B. 634 at p. 639. Buckley, L.J. (now Lord Wrenbury) there referred to the *Miller* v. *Hancock* case, and said:

"By allowing a stair to be defective the lessor was exposing them to a trap. He was leading them to think there was something there which was not there. The plaintiff was trapped by something which he was not bound to anticipate, and he suffered injury. That was the basis of the decision in *Miller* v. *Hancock*."

Now, was this lady, the appellant, in any way called upon to anticipate that there was not a safe way upon the side upon which she attempted to enter the premises? Everything pointed to there being an entrance at either side of the store front or show-case; that was the apparent construction of the premises and that was the plain intimation and, in fact, invitation to enter the premises upon the faith that either way was a safe way. It was not a case of obvious danger that the appellant could have seen or anticipated, in fact, it was not obvious to her at all—it was a concealed danger, a trap. The respondent may be said to be liable within the principle as laid down in *Barnes* v. *Ward* (1850), 9 C.B. 392, *i.e.*, the staircase here was in its nature a pit close to the highway and no precaution was taken for the safety of persons lawfully going to the laundry premises, which was the case of the appellant, and I would particularly refer to what Maule, J. said in *Barnes* v. *Ward*, at pp. 420-1:

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"With regard to the objection, that the deceased was a trespasser on the defendant's land at the time the injury was sustained,—it by no means follows from this circumstance that the action cannot be maintained. A trespasser is liable to an action for the injury which he does: but he does not forfeit his right of action for an injury sustained. Thus, in the case of *Bird* v. *Holbrook* [(1828)], 4 Bingh. 628, (E.C.L.R. vol. 13, 15), 1 M. & P. 607, (E.C.L.R. vol. 17), the plaintiff was a trespasser,—and indeed a voluntary one,—but he was held entitled to an action for an injury sustained in consequence of the wrongful act of the defendant, without any want of ordinary caution on the part of the plaintiff, although the injury would not have occurred if the plaintiff had not trespassed on the defendant's land. This decision was approved of in *Lynch* v. *Nurdin* [(1841)], 1 Q.B. 37, 4 P. & D. 677, and also in the case of *Jordin* v. *Crump* [(1841), 8 M. & W. 782], in which the Court, though expressing a doubt as to whether the act of the defendant in setting a spring-gun was illegal, agreed that, if it were, the fact of the plaintiff's being a trespasser would be no answer to the action."

The situation in the present case would appear to me to be one of exposing the appellant to a hidden danger of which the respondent was aware (it is to be remembered that when the checker club met the stairway was lighted). *Pritchard* v. *Peto* (1917), 2 K.B. 173 was a case where it was held that there was no liability but only because the plaintiff was not shewn to have been aware of the decay of the cornice which fell and caused injury. It is instructive, however, to refer to what Bailhache, J. said at p. 176:

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"The present case is correctly pleaded as one of negligence and not of nuisance, and, in considering whether the facts support that allegation, one has first to ascertain what duty Mrs. Peto owed to the plaintiff; for unless her duty can properly be stated in terms large enough to cover this case, she can be guilty of no breach of duty towards the plaintiff. I have come to the conclusion that the duty owed to the plaintiff was the same as the duty owed to the plaintiff in *Indermaur* v. *Dames* [(1866)], L.R. 1 C.P. 274; [(1877)], L.R. 2 C.P. 311, and that, stated in terms applicable to this case, Mrs. Peto's duty was to take reasonable care to keep her house in such a state of repair as not to expose the plaintiff to any hidden danger of which she was aware, or ought to have been aware: quite a different duty from that owed by the defendant to the plaintiff in *Tarry* v. *Ashton* [(1876)], 1 Q.B.D. 314. Now in order to make Mrs. Peto liable, if I have correctly described her duty, it must be shewn that she was aware, or ought to have been aware, of the decay of the cornice. It is admitted that she was ignorant of it. The plaintiff, if he desired to establish the fact that her ignorance was due to neglect of some reasonable precaution, should have given some evidence to shew what precautions are usual and proper for occupiers of houses with projecting cornices to take, and that she failed to take them. This he made no

attempt to do. I am sorry for the plaintiff. He was hurt through no fault of his, and, although he has tried to make two separate defendants liable, he has failed against both. I can only sympathize with him in his injuries and his disappointment."

(Also see *Maclenan* v. *Segar* (1917), 2 K.B. 325).

The fact that the staircase was lighted when the downstairs portion of the premises were being used, *i.e.,* when the checker club met, was plain indication that the respondent was aware and knew of the need to light the same, and it can reasonably be said that there should have been a light, and if there had been, the accident would not have happened (see *Baldock* v. *Westminster City Council* (1918), 35 T.L.R. 188).

Wilson, Sons & Co., Lim. v. *Barry Railway* (1916), 86 L.J., K.B. 432, was the case of a workman held not to be an invitee to the defendants' warehouse but at most a licensee and that as there was no concealed danger the defendants were not guilty of any breach of duty towards the workmen, but upon the facts of the present case the unlighted staircase was a concealed danger. Warrington, L.J., at p. 437, said:

"I think, therefore, that the duty of the defendant company, under the circumstances of the present case, was limited to giving warning of a concealed danger, and, as no such concealed danger existed, there was no liability at all attaching to them."

Kimber v. *Gas Light and Coke Company* (1918), 34 T.L.R. 260, bears some analogy to the present case. There it was a hole in an upstairs landing which was badly lighted and left unfenced. It was *"held,* that as the defendants' [the owners of the house] workmen knew that the plaintiff was lawfully on the premises by the licence of the tenant and was going to the landing where the dangerous hole was, it was their duty to warn the plaintiff of the concealed danger, and the defendants were responsible in damages." Here the respondent well knew that customers of the laundry would be going to the premises and would go *via* the entrance to the building where the shop front or show-case advertising the laundry was, and might, in making entry upon the premises, fall into the unguarded and unlighted space occupied by the stairs going into the basement, and in view of this it was the duty of the respondent to warn persons of the concealed danger, *i.e.,* the staircase should have had a rail or guard around it or, at least, the stairway should

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have been lighted. Lord Justice Pickford in his judgment in the *Kimber* case, at p. 261, said:

"The learned judge left these questions to the jury, and their answers were as follows:—

"(1) Were the defendants negligent in not protecting the hole? No.

"(2) Were the defendants negligent in not warning the plaintiff? Yes.

"(3) Was the plaintiff guilty of contributory negligence? No.

"(4) What were the damages? £275.

"No objection was taken to the direction to the jury except that it was said that the learned judge ought to have asked them whether it was negligent in the plaintiff to go into the house or upstairs at all considering the darkness. He did not think that any case was made as to darkness which required such a question, and the summing up could not be attacked. The real point made by the defendants was that as there was no negligence in making the hole and leaving it unfenced, they were under no duty to the plaintiff to warn her of its existence, as they were not occupiers of the house, and did not invite or licence her to enter it, and that therefore, the second finding of the jury could not be supported. The defendants by their servants were not in occupation of the house, but they had sufficient control of it by the licence or invitation of the owner and tenant to justify them in making a hole in the flooring for their work. He did not think that they invited or licensed the plaintiff to come upon the premises, and he attached no importance to the fact that the defendants' workmen opened the door and told the plaintiff which part of the house was to let, except that she informed them that she had come by the licence of the tenant to inspect the premises, and that she was going directly to the landing in which they had made the hole. They, of course, knew the conditions as to lights and otherwise which existed on the landing. If they had known that persons were likely to come to the premises for lawful purposes they would have been negligent in making and leaving a hole which, in the circumstances, would be a concealed danger to such persons, if it were unfenced, and there was no warning. (See *per* Mr. Justice Willes in *Corby* v. *Hill*, 4 C.B., N.S., 556, at p. 567, where the obstruction was in a private, not public road). In this case they had no reason to expect such persons to come, and therefore the making of the hole was found by the jury not to be negligent, nor was the leaving of it unfenced up to a point negligent. But when the workmen let the plaintiff in and knew that she was there lawfully by the licence of the tenant, and was going to the very landing where the dangerous hole was, he (his Lordship) thought that the same principle applied. They knew that what in the other case would have been anticipated had in fact happened in this. He thought that the same duty then arose towards the plaintiff, and that it was negligence any longer to have the hole unfenced without warning. As this was done in the ordinary course of their duty the defendants were responsible for their actions, and the appeal must be dismissed with costs."

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In the present case the respondent cannot be admitted to say that he did not invite or license the appellant to come upon

the premises; plainly the respondent must be held to have done this. It was a matter of necessary implication that the respondent, the owner of the building, would be under the obligation to keep the premises over which he retained control and in close proximity to the let premises, safe for persons having business with the tenants, and failing in this an action against the owner is maintainable (*Miller* v. *Hancock, supra*).

Lowery v. *Walker* (1910), 27 T.L.R. 83, is an authority which supports the right of the appellant in the present case to recover against the respondent. In that case it was held that the respondent owed a duty to the public crossing the field to give notice of probable danger from the horse, and that as he had failed to give such notice he was liable for the injuries caused to the appellant. In the present case it is idle to contend that the appellant was a trespasser. In the report of the *Lowery* case as set forth in the Times Law Reports we have this language (p. 84):

"The Lord Chancellor, moving to allow the appeal, said that they ought to consider the actual findings of the County Court judge. His Honour after delivering judgment made—quite legitimately—a slight alteration of phraseology, and explained not strictly in legal terms the sense in which his words had been employed. He did not find whether there was a right of way or not, and found that there was no express leave. But the effect of the finding was that the plaintiff was there with the permission of the defendant; that the way had been used habitually as a short cut, and that he knew it to be dangerous. In such a case it was not necessary to refine. It might be admitted that the plaintiff was not in the field as of right. But the defendant ought not, without notice of the danger to the public, to have allowed a vicious animal to be in the field. The law was not free from difficulties, but there was no need to enter upon them.

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"Lord Halsbury entirely concurred. The County Court judge had used an ambiguous term—trespasser—but seeing that there might be misapprehension, he explained what he meant. There was no necessity to discuss that question. People who habitually went by this route were entitled to notice of any probable danger. The defendant, however, declined to take any steps, but still acquiesced in the practice which had grown up.

"Lord Atkinson thought that the defendant owed a duty to the public in the matter which he had not discharged.

"Lord Shaw held that the County Court judge was entitled to explain and correct the language he had used."

In the present case it must be held that the appellant came

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upon the premises as of right and the respondent was under an obligation to the appellant to guard or light the premises so that the staircase and the open space could be observed, or give some notice of the danger. Failing this, it was a trap, a concealed danger known to the respondent and maintained by him and unknown to the appellant; it was in no way an obvious danger or capable of being seen by the appellant.

In my opinion, it was the duty of the owner of the building to exercise all reasonable care and skill to make the premises as safe as they could be for all persons doing business with the tenants of the building, and upon the facts the respondent failed in this; he is shewn to have had premises decidedly unsafe, with a concealed danger known to him and unknown to the appellant upon a portion of the premises retained and under his control, and in such close proximity to the way that the appellant was entitled to take in entering upon the premises, the condition of the premises amounted to a trap, a concealed danger, and one not obvious to the appellant or capable of being seen by the appellant or capable of being reasonably avoided.

I have not been able to turn to the report of the case in *Baikie* v. *Glasgow Corporation* (1919), S.C. 13, but the following appears in Mew's Annual Digest, 1920, as indicative of the extreme nicety of cases that arise and exhibiting the extreme care that must be exercised in determining responsibility:

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"A woman brought an action against a lighting authority for damages for personal injury caused to her by falling on a common stair of a tenement, which, as she alleged, had been left unlighted through the fault of the defenders. She averred that, after dark, she was returning to her house on the second storey of the tenement, and found the stair unlighted; that she proceeded to ascend the stair 'with the greatest caution,' but in the darkness got too far over to the right hand side of the stair where, owing to a turn, the steps were narrow; and that her foot slipped off a step and she fell and was injured. The First Division dismissed the action, on the ground that the pursuer's averments disclosed a case of contributory negligence. *Held*, reversing that judgment, that, although the pursuer's averments disclosed facts which would have to be left to the jury as evidence of contributory negligence, they did not conclusively establish such negligence; and cause remitted for trial by jury. *Driscoll* v. *Commissioners of Burgh Patrick* (1900), 2 F. 368, commented on, *per* Lord Shaw of Dunfermline."

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In the present case the appellant met with the accident in the reasonable and proper attempt to go to the premises of the laundry, and it is admitted that there was no contributory negligence in anything that she did. Contributory negligence never was contended for in the present case; in fact, was disavowed expressly by the learned counsel for the respondent at this bar.

I would allow the appeal and failing an agreement as to what should be the proper measure of damages, there should be a new trial for the purpose of assessing the damages, the appellant to have the costs here and in the Court below.

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The Court being equally divided the appeal was dismissed.

Solicitors for appellants: *Bird, Macdonald & Co.*
Solicitor for respondent: *A. Whealler.*

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Vendor and purchaser—Sale of land—Repudiation by vendor and sale to another—Measure of damages—Registrar's certificate upon reference—Right of review—R.S.B.C. 1911, Cap. 11, Secs. 15, 16 and 17; Cap. 58, Sec. 56—B.C. Stats. 1913, Cap. 15, Sec. 5.

In an action by a purchaser of land for breach of contract of sale by the vendor a stated case was agreed to by the parties as to whether there was a binding contract and repudiation by the defendant and that in the event of the Court so finding that there be a reference to the registrar to assess damages. The Court held that the vendor was liable and directed "that it be referred to the district registrar to ascertain the amount of damages and that judgment be entered for the plaintiff for the amount of damages ascertained." An application to vary the registrar's certificate was dismissed.

Held, on appeal, affirming the decision of MACDONALD, J. that a judge of the Supreme Court had jurisdiction to review the registrar's certificate fixing the damages.

Held, further, that where a vendor refuses to carry out an executory contract for the sale of land and later sells the land to another the

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measure of damages recoverable is not limited to the difference between the contract price and the value of the land at the date of repudiation; the purchaser may recover the difference between the contract price and the value at the time of the resale, or if the resale is unknown to him the value at the time of his discovery thereof. He may also recover the net profits that have been realized from the land since the time that he should have had possession under his contract.

APPEAL from the decision of MACDONALD, J. dismissing an application to vary the registrar's report upon a reference as to damages for breach by the defendant (vendor) of a contract for the sale of land. Heard by him at Vancouver on the 31st of March and 1st of April, 1921. In June, 1918, the defendant agreed to sell a bearing orchard at Penticton in the Yale district to the plaintiff. On the 13th of July following the defendant repudiated the sale and on the 18th of July he sold to one Baskin at an advance of $500. The conveyance to Baskin was acknowledged on the 18th of September, 1918, and registered on the 5th of October following. The writ in this action was issued on the 23rd of August, the indorsement thereon being for specific performance of the contract. On the 11th of March, 1919, the plaintiff amended his statement of claim and sought in the alternative to obtain damages for breach of contract, and in August, 1919, he formally abandoned his claim for specific performance. The parties then submitted a special case for the opinion of the Court, first as to whether there was a binding agreement for sale within the Statute of Frauds, and secondly, if there was, whether the defendant repudiated it, and in the event of the plaintiff succeeding in both, judgment should be entered for the plaintiff and damages assessed by the registrar. The action was tried by MURPHY, J. who decided in favour of the plaintiff, his decision being affirmed by the Court of Appeal (see 27 B.C. 474). On the reference the district registrar fixed the amount of the damages at $2,283.97. An application to vary the registrar's certificate was dismissed.

Statement

Griffin, for plaintiff.

R. H. Tupper, for defendant.

25th April, 1921.

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MACDONALD, J.: Plaintiff, on the 23rd of August, 1918, commenced an action for specific performance of an alleged agreement for sale of land, at Penticton, in the District of Yale, B.C. He subsequently, on the 11th of March, 1919, amended his statement of claim and sought, in the alternative, to obtain damages for breach of such agreement. The parties then submitted a special case for the opinion of the Court, as to whether there was a binding agreement for sale, within the requirements of the Statute of Frauds, and in the event of it being so held, whether the defendant broke or repudiated such agreement or disabled himself from its performance. If the plaintiff succeeded on both these questions, it was agreed that judgment should be entered for the plaintiff, for damages to be determined by the registrar of the Court.

MURPHY, J. decided in favour of the plaintiff and his decision was affirmed upon appeal. The reference, as to damages, then proceeded before the district registrar at Vancouver, under the terms of an order for judgment, which empowered him "to enquire and ascertain the amount of aforesaid damages." Such order further provided "that judgment be entered for the plaintiff for the amount of the damages ascertained as aforesaid." Upon such reference the district registrar, as shewn by his certificate, has fixed the amount of damages at $2,283.97; defendant being dissatisfied, seeks to vary and materially reduce the amount of such damages.

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The matter first came before me by way of motion, and objection was taken to this form of procedure, as being unwarranted by the rules. Defendant then obtained leave to proceed by way of summons to obtain the same result. The practice was discussed at great length and it was apparent that our rules omitted important provisions of the English rules, as to appealing from or varying the report upon a reference. It was also contended by the plaintiff that the defendant could not invoke the provisions of the Arbitration Act, nor section 56 of the Supreme Court Act, even as amended in 1913. While there was some weight attached to this argument, I considered that I was bound by the decision in *Beatty* v. *Bauer*

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(1913), 18 B.C. 161. I have been afforded an opportunity of perusing the order for reference in that case, and it is practically the same as the one under which the registrar proceeded in this action. It was there held that the Court had an inherent jurisdiction, to vary the report of its registrar and that such jurisdiction was not ousted, by the particular wording of the order for judgment. I might add that, in view of this authority, I do not think that the ground taken by the plaintiff, that, in the reference to the registrar, he had a position similar to an arbitrator at common law, has any effect. I think the Court could not and did not intend to abdicate its authority, to finally determine the amount of damages, after the enquiry and report by the registrar. In my opinion, I am entitled, even in advance of the certificate of the registrar being actually filed, to consider the amount of damages fixed by him.

It is contended that he adopted wrong principles, in arriving at such amount. It appears from correspondence which was made part of the record upon the motion and summons which were heard together, that such damages were ascertained under different headings. There was $60 allowed for legal expenses and interest on deposit, to which no objection was taken by the defendant. The sum of $1,000 was allowed, as being the difference between the sale price and the value of the land in the year following. Then there was a further amount of $1,223.97 allowed, as the net profits resulting from the crop of the year 1919, thus making the total amount of damages as fixed by the registrar at $2,283.97. As to the sums of $1,000 and $1,223.97 defendant submitted that $500 only should be allowed, being the difference between the sale price and that at which the property was sold to Baskin in 1918.

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The contention of the defendant raises an important question, as to how damages are to be measured under the circumstances, thus shortly outlined. Defendant made a contract to sell his land to the plaintiff and then, not only repudiated the contract, but placed himself in a position that he could not, if so directed by the Court, perform his agreement. Plaintiff lost, what is admitted to have been a profitable bargain, in arranging to purchase the property in question.

In re Daniel (1917), 2 Ch. 405 at p. 411, Sargant, J. in dealing with the question of damages to be allowed in a like case, said, that both parties had agreed—

"That the time for estimating the damages was the time when the breach occurred and the contract was broken off, so that I have to consider what the real value of the property was at the time when the contract was broken."

Is this a correct basis upon which to assess the damages under the facts here presented? In the case cited the party seeking damages had accepted the situation, as created by the breach and sought redress only in the shape of damages. It is submitted, however, that this basis is to be generally accepted in estimating damages of this nature. The law, in this respect, is stated in Arnold on Damages and Compensation, 2nd Ed., p. 47, as follows:

"The measure of such damages in these cases is the difference between the contract price and the value of the property at the date of the refusal to convey."

Engell v. *Fitch* (1869), L.R. 4 Q.B. 659; *Day* v. *Singleton* (1899), 2 Ch. 320; *In re Daniel, supra*; *Braybrooks* v. *Whaley* (1919), 1 K.B. 435 and other cases are cited, as supporting this proposition. Canadian cases, on the point, have also been referred to, as follows: *Loney* v. *Oliver* (1889), 21 Ont. 89; *Bennett* v. *Stodgell* (1916), 28 D.L.R. 639; *Morrow* v. *Langton* (1919), 3 W.W.R. 897.

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Notwithstanding such authorities, plaintiff contends that, upon the facts, of this case, the registrar arrived at the damages upon proper principles. I do not think that he could have properly held, upon the evidence, that the difference in the value of the land at the time of the repudiation of any contract in 1918, was more than $500. He could, however, have found that such difference was $1,000 in 1919, after the plaintiff had become aware in that year of the resale by the defendant. Such sale to Baskin was effected by a deed dated the 18th of July, 1918, but the execution of the conveyance was not acknowledged until the 18th of September, 1918. Further, the deed was not registered until the 5th of October, 1918.

In support of his contention, plaintiff relies upon the case of *Robertson* v. *Dumaresq* (1864), 2 Moore, P.C. (N.S.) 66;

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15 E.R. 827; 13 W.R. 280. This case is cited in Sedgwick on Damages, 8th Ed., Vol. 3, pp. 203-4, in dealing with the measure of damages, where compensation is given for the loss of land, through failure to perform a contract. A portion of the reference to the case is as follows:

"It was held that he was entitled to compensation measured by the value of the specific land at the time of bringing suit."

Then in Halsbury's Laws of England, Vol. 10, pp. 334-5, reference is made to such case as follows:

"In this case the plaintiff, having rendered services which entitled him to a grant of land, was in the position of a purchaser who, having paid the price of a chattel, has been refused delivery of it, and not in that of an ordinary purchaser of land. . . . . The Court in awarding damages avowedly followed the analogy of actions for failure to redeliver stock. In this case again the land in the vicinity in which the grant should have been made had continuously risen in value, and Lord Chelmsford, L.C., in his judgment seems to assert that the claimant was entitled to the 'highest value of the land'; but the actual decision was that he was entitled to the value at the date of trial."

If the measure of damages had been here calculated on the same basis, as in an action for not redelivering shares, lent upon a contract to return them on a given day, then the market price at the time of trial would govern. See *Owen* v. *Routh* (1854), 14 C.B. 327; 23 L.J., C.P. 105.

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It is contended that the *Robertson* v. *Dumaresq* case is not generally applicable, as an authority, in determining damages in actions of this nature, and that the redress sought and remedy there afforded arose under special circumstances, pertaining to the land offered to intending settlers by the Government of New South Wales. Is such contention correct, or are principles declared, which the registrar properly followed in fixing the damages upon the inquiry? It was referred to by Beck, J. in *Dunn* v. *Callahan* (1908), 1 Alta. L.R. 179 at p. 183 as a "peculiar case" and the general rule as to ascertaining damages laid down in the leading case of *Hadley* v. *Baxendale* (1854), 9 Ex. 341 considered as applicable equally to the case of land, as of goods, but Harvey, J. (now C.J.) did not assent to the latter view. While such peculiarity is mentioned, the principles would doubtless have been adopted if the facts had been different: see p. 184:

"Furthermore, had the plaintiff been obliged, by reason of the wrongful

act of the defendant, to accept damages in lieu of specific performance, I think perhaps the basis upon which the damages were assessed in *Robertson* v. *Dumaresq* might properly have been adopted. . . . . There was nothing to prevent the Court from awarding him [the plaintiff] specific performance had he elected to insist upon that remedy."

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Here the plaintiff commenced this action, for specific performance of an agreement for sale of the land and was met with a denial of any binding contract to that effect between the parties. He had no reason, in view of the correspondence to expect that the defendant would, in addition to repudiating any agreement to sell, also destroy his ability to do so, by selling the land to an innocent third party. He might well assume that the defendant would retain his title to the property so that he could perform his agreement, should it be decided that one existed. Plaintiff, on his part was required to be and remain in a position to carry out the terms of the contract and made the requisite payments. He was not accepting a rescission of the prospective sale, and seeking its fulfilment. His attitude was plainly stated, prior to commencement of the action and long before the execution of the conveyance by defendant to Baskin, which, it is admitted by the special case, did not take place until the 12th of September, 1918. It was not until March, 1919, that the plaintiff receded to some extent from his first position, and by an amendment to his statement of claim, sought damages as an alternative remedy. Then, finally, in August, 1919, the claim for specific performance was, in effect, abandoned and by the special case it was agreed that plaintiff should be compensated in damages if it were decided that there had been a breach by the defendant of a binding contract. So that until such liability had been determined the question of damages did not arise, nor could it be said that a breach of a contract had occurred rendering a party liable for damages.

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I think the procedure in this action precludes the complete application of the case of *Robertson* v. *Dumaresq, supra,* that the damages should be assessed as at the time of the trial. In this connection it seems clear that the statement in Sedgwick on Damages as to the time when damages were measured in that case, is wrong: see (1864), 2 Moore, P.C. (N.S.) at p. 71:

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"Evidence was tendered at the trial of the then value of land in Hyde Park, which was objected to by the defendant on the ground, that the value should have been taken at the time the alleged contract was broken, in 1831. The evidence was, however, admitted, on the ground, as stated by the judge at the trial, that the local Act, under which the proceeding was taken, gave a more extensive claim than mere damages for breach of contract, and that the ordinary rule of law was not applicable. The land in Hyde Park was proved to be worth £8,000 an acre at the time of the trial. The value in 1831 was proved to be £100 an acre."

Compare p. 74, Sir Alfred Stephens in his judgment:

"A motion was afterwards made to the Court for a new trial, on the grounds, substantially, that those damages were excessive, and had been assessed upon a wrong principle, by taking into consideration the present value of the allotment."

Compare, at p. 94, Lord Chelmsford, in considering the measure of damages and direction of the trial judge to the jury said:

"But upon what ground can it be alleged that the judge was wrong in telling the jury to find their damages upon the present value of the land?"

This judgment then discusses that the measure of damages for breach of contracts for delivery of goods and for the retransfer of stock are distinguishable. It mentions, however, that the principles of estimating damages in the latter transactions were to some extent applicable. The distinction is pointed out that (p. 95):

"The owner of the stock might have the means of purchasing other similar stock at the day, but the allotment of land promised to the respondent was a thing which he could not obtain except by the performance of the promise. If he had received his allotment as he ought to have done, he would have had it, with the benefit of the increased value which it might have acquired while in his possession. Of this the other party has deprived him by the breach of his promise."

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I think these principles are applicable in favour of the plaintiff but, in measuring the damages, should pertain to the time when such remedy was accepted by the plaintiff, as compensation for breach of the agreement. It is true that plaintiff states that he was not aware of the sale to Baskin until after the judgment deciding as to the contract and attendant liability. It is a fair assumption that his solicitor knew of the state of the title to the property at the time of the amendment of the statement of claim, and at any rate such knowledge was apparent when the special case was submitted in August, 1919. It is not material to decide this time with any certainty as, in

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my opinion, even without fully applying the decision in *Robertson* v. *Dumaresq, supra,* the registrar would have been justified in fixing the damages sustained by the plaintiff at the difference between the contract price and the value of the property in the spring of 1919. If he had done so, the evidence would support a finding that such difference was at least the sum of $1,000. This was due to the activity in land sales, in the locality, and the increased price obtainable. There is no dispute as to *quantum* of profits that plaintiff could have made from the crop on the land in 1919, had he been allowed to harvest it. It follows that the finding of the registrar as to such profits is upheld. They are properly treated as a portion of damages payable by the defendant in consequence of his conduct. Such consequence being that the plaintiff lost a profitable purchase and by the resale "a successful result to his action," that is to say "a decree for specific performance": see *Day* v. *Singleton* (1899), 2 Ch. 320 at p. 335.

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The motion and application of the defendant are both dismissed with costs and the amount of damages, as fixed by the registrar, is confirmed.

From this decision the defendant appealed. The appeal was argued at Victoria on the 9th and 10th of June, 1921, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Alfred Bull, for appellant: The appeal is only on the question of *quantum* of damages. Damages were assessed not up to the time of the breach, but a year later. The contract was repudiated in July, 1918, and he was allowed damages up to July, 1919. The case of *Robertson* v. *Dumaresq* (1864), 2 Moore, P.C. (N.S.) 66 was wrongly applied. The same rule applies as in the case of sale of goods: see *Dunn* v. *Callahan* (1908), 1 Alta. L.R. 179, and in actions for not replacing stock see Mayne on Damages, 9th Ed., 182; see also *Keck* v. *Faber* (1916), 60 Sol. Jo. 253.

Argument

Griffin, for respondent: He must pay the full loss sustained: see *Hadley* v. *Baxendale* (1854), 9 Ex. 341. On assessment of damages arising from the vendor's default see *Bagley* v. *B.C.*

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Southern Ry. Co. (1917), 24 B.C. 400. The date of the trial is the time from which damages should be assessed: see *Day* v. *Singleton* (1899), 2 Ch. 320 at p. 335; *Elliot* v. *Hughes* (1863), 3 F. & F. 387; *Royal Bristol Permanent Building Society* v. *Bomash* (1887), 35 Ch. D. 390; *Tredegar Iron and Coal Company (Limited)* v. *Hawthorn Brothers and Co.* (1902), 18 T.L.R. 716. *Keck* v. *Faber* (1916), 60 Sol. Jo. 253 is in my favour: see also *Jaques* v. *Millar* (1877), 6 Ch. D. 153. As to the finality of the registrar's report, what was done by the registrar amounts to an award and under section 17 of the Arbitration Act it is final.

Argument

Bull, in reply: This is not under the Arbitration Act, the reference is under section 56 of the Supreme Court Act: see *Mellin* v. *Monico* (1877), 3 C.P.D. 147; *Hill* v. *Hambly* (1906), 12 B.C. 253; *Hayward* v. *Mutual Reserve Association* (1891), 2 Q.B. 236. He seeks to take the case out of the common law rule that the damages must be found as of the date of the breach but the damages must be awarded as at common law: see *Day* v. *Singleton* (1899), 2 Ch. 320; *Joyner* v. *Weeks* (1891), 60 L.J., Q.B. 510 at p. 517.

Cur. adv. vult.

9th September, 1921.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: There are two questions involved in the appeal, one of the jurisdiction to hear it and the other concerning the proper measure of damages for breach by a vendor of his contract for the sale of land.

In *Beatty* v. *Bauer* (1913), 18 B.C. 161, MURPHY, J. decided that he had jurisdiction to review the registrar's certificate. When that case came up to this Court on the merits, we did not, in the reasons for judgment handed down, deal with the question of jurisdiction, but it is manifest that the Court must have thought the order of MURPHY, J. was right, otherwise we could not have entertained the appeal. In each case the reference was to the registrar as an officer of the Court. I think the Court below had inherent jurisdiction to refer the question of damages to its officer and therefore it was unnecessary to resort to the provisions of the Arbitration Act or the statute

and rules, to which we were referred, in aid of the order of reference.

The other question depends for its decision upon the following facts: The defendant, in June, 1918, agreed to sell a bearing orchard to the plaintiff but thereafter refused to carry out the agreement, and some weeks later sold the orchard to one Baskin, at an advance of $500. It is conceded that this sum represents the true difference between the contract price and the value of the orchard at the date of the repudiation. The plaintiff did not acquiesce in the repudiation, and without knowledge of the resale, sued for specific performance. Later he amended and in the alternative claimed damages for breach of contract, and still later and about a year after the breach, upon discovery of the fact of the resale, he abandoned his claim for specific performance and relied solely upon his claim for damages. The parties then agreed upon a stated case as to whether or not there had been a binding contract and to a reference to the registrar to find the damages in the event of the Court deciding that there had been. Liability was found, the reference was had, and on motion to a judge to vary the registrar's certificate being refused, this appeal was taken.

The registrar found the measure of damages to be the difference between the contract price and the value of the orchard at the date of the plaintiff's abandonment of his claim for specific performance, that is to say, the date of his discovery that specific performance could not be decreed because of the resale, and on this basis, for the loss of his bargain, awarded him $1,000, being the difference between the contract price and the value of the orchard in July, 1919, and in addition thereto, he awarded a sum for damages equal to the profits which Baskin had made from the fruit crop of 1918, amounting to $1,223.97. The defendant's counsel contended that the sole liability of his client was for the $500 above mentioned, that is to say, that the true measure of damages was the difference between the contract price and the value of the orchard at the date of the repudiation of the contract.

Had the breach been that of the purchaser and not of the vendor, the rule to be applied would be that applicable to breach

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of contract for the sale of goods: *Keck* v. *Faber* (1916), 60 Sol. Jo. 253, but where, as here, the breach was that of the vendor it was argued that that was not the rule to be applied. *Robertson* v. *Dumaresq* (1864), 11 Moore, P.C. (N.S.) 66, is the authority upon which the judgment appealed from is founded. The Supreme Court of New South Wales regarded that case as one not governed by the ordinary rules of the common law, but Lord Chelmsford, delivering the judgment of the Judicial Committee of the Privy Council, appears not to have adopted that view, but nevertheless sustained the judgment professedly upon the principle adopted in such cases as *Shepherd* v. *Johnson* (1802), 2 East 211; *Harrison* v. *Harrison* (1824), 1 Car. & P. 412; and *Owen* v. *Routh* (1854), 14 C.B. 327, wherein it was held that the damages to be awarded for failure of the borrower of shares to return them on the agreed day, were to be ascertained as of the date of the trial and not of the breach, because the lender's money had not been available to him to replace the stock. Applying that principle Lord Chelmsford held that since the plaintiff had paid for the land in 1831, when he rendered the agreed consideration, he was entitled in damages to the value of the land at the date of the trial. Had the plaintiff here paid the purchase money, no distinction in principle could be made between the two cases. There was a suggestion of the application of that principle based on the fact that the plaintiff had sent $400 to his bank to be paid to the defendant as a deposit and which he did not receive back until several months thereafter, but I do not need to consider that circumstance since the defendant was not responsible for this, as the money never came into his possession or under his control. The contract, therefore, was not an executed one, as was that in *Robertson* v. *Dumaresq, supra,* but was an executory one merely. It is therefore not within what appears to me to have been the *ratio decidendi* of the case in the Privy Council. What then is the rule to be applied in estimating damages when the vendor refuses to carry out his part of an executory contract? The submission was that as the breach was not assented to by the plaintiff and as in equity he was entitled to bring suit for specific perform-

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ance, which suit was defeated ultimately owing to the defendant having made a resale whereby he put it out of his power to convey, the time at which the difference between the selling and the market prices should be ascertained was the date of plaintiff's discovery of the fact of resale, and not the date of the repudiation, nor that of the actual resale itself.

The general rule stated in *Hadley* v. *Baxendale* (1854), 9 Ex. 341, and affirmed in the subsequent cases, is, that the party breaking his contract should be made to pay to the other the full loss sustained by him. The difficulty which arises in this and many other cases, is as to how that loss is, without entering into the realms of speculation, to be estimated. A general rule which attains only an approximate result has been adopted in the case of breaches of contract for the sale of goods capable of being replaced. The measure there is the difference between the contract price and the market price at the date of the breach. This rule is, I think, on principle and authority applicable to breaches of contract for the sale of real property, where in like circumstances it would be applicable to breaches of contract for the sale of goods. When the repudiation of the one party is acquiesced in by the other there will, in general, be no great difficulty in assessing the damages, and when specific performance cannot be sought, the date of the termination of the agreement will govern the application of the rule, but when an action for specific performance will lie and pending the trial, the vendor commits another breach, *i.e.,* defeats the purchaser's rights to specific performance by sale of the property to an innocent third person, that act is the act which determinates the contract, or in other words, renders it impossible of enforcement.

This action was commenced on the 23rd of August, 1918, the conveyance to the third person was executed in September and registered in October; the trial judge has found that the plaintiff cannot be said to have had knowledge of the resale until July, 1919, and he therefore held the damages to be the difference between the contract price and the value of the property in July, 1919. These facts raise a point which must here be noticed. The contract was in strictness at an

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end in October, 1918, and had plaintiff had notice of this, actual or imputed, that date, I think, would govern. He had no actual notice until July, 1919, and in my opinion, notice cannot be imputed to him by reason of the registration of the deed in October, 1918. If the plaintiff wished to protect himself as against innocent purchasers, prudence would lead him to file a certificate of *lis pendens,* but as against the defendant, the wrongdoer, he was under no obligation to do this or to keep himself posted from day to day of the state of defendant's title.

One may therefore ask, would it be correct to hold that if the resale had not actually been made until July, 1919, the measure of damages would be the difference between the contract price and the value of the orchard in July, 1919? I think it would, since the plaintiff would then and not until then, have lost his right to specific performance. The reasons, particularly those of Sir Francis Jeune in *Day* v. *Singleton* (1899), 2 Ch. 320, appear to me to lend some support to this conclusion.

Then, must the result be different where, as in the present case, the resale was at an earlier date but unknown to the plaintiff? I think not. The rule is based upon the doctrine that the plaintiff must mitigate his loss if he can do so. Ordinarily this is done by replacement at once of the thing which was the subject-matter of the contract. But where the plaintiff is pursuing his remedy for enforcement of the contract, that doctrine can have no application. The plaintiff was within his rights in persisting in his claim for specific performance until the impossibility of success was disclosed. It was upon discovery of that fact, wrongly concealed from him by defendant, and then only, that he was thrown back upon his claim for damages.

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The judgment for the item of $1,000 must stand. But in addition to this item, a sum equal to the net profits realized from the fruit crop of 1918 by the person who gathered it, *viz.,* Baskin, was allowed and confirmed in the judgment appealed from. These were damages which at the date of the trial were capable of reasonably accurate ascertainment. The

appellant attacks the principle of the assessment not the amount assessed; he denies any liability whatever on that score. In cases wherein specific performance has been decreed, damages have been given for delay in carrying out the contract. On the principle of *Hadley* v. *Baxendale, supra,* that would appear to be only justice. On the other hand, where the contract is executory, anticipated profits are regarded as too speculative to be enquired into. In such cases the difficulty of arriving at a safe conclusion when so many factors must be uncertain and impossible of satisfactory ascertainment, has, I apprehend, been the obstacle in the way rather than a want of consciousness of the fact of loss sustained. Here there is not uncertainty. The registrar was in as favourable a position to define with reasonable accuracy the loss suffered by the respondent by the appellant's refusal to put him in possession of the orchard as he would have been had specific performance been decreed in July, 1919. If, therefore, I am not in error in respect of the first branch of the case, it would appear to me to follow that the second item of damages was properly allowed.

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I would, therefore, dismiss the appeal.

MARTIN, J.A.: As to the first point raised, *viz.,* that the decision of the registrar is final under the terms of the consent judgment directing "that it be referred to the district registrar to inquire and ascertain the amount of the damages . . . . and that judgment be entered for the plaintiff for the amount of the damages ascertained," I am of opinion that the decision of the trial judge in the very similar case of *Beatty* v. *Bauer* (1913), 18 B.C. 161; 4 W.W.R. 66, should be followed, *i.e.,* upholding the jurisdiction of the Court, or one of its judges in Chambers, to review the certificate of the registrar ascertaining and fixing the damages, despite the unusual and ostensibly final language of the judgment, which the learned judge below says, is "practically the same" as in the *Beatty* case. The point is not wholly free from doubt, but it is better to adhere to the established practice than to uproot it.

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As to the second point, the allowance of damages to a purchaser in a case where the vendor has deliberately precluded

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himself from completing the contract by selling the land to another I am of opinion that the award of the registrar can be fully justified by the decision of the Privy Council in *Robertson* v. *Dumaresq* (1864), 2 Moore, P.C. (N.S.) 66; 13 W.R. 280; 15 E.R. 827; which was a case where the Crown, after contracting to grant lands to the plaintiff, deliberately otherwise alienated them (*per* Stephens, C.J., at p. 76), thus precluding itself from carrying out its contract, exactly as was done here, stripped of all immaterial circumstances. As I understand that case after a close perusal of it, their Lordships did not ground their decision upon any special statutory relief but upon the broad and general principle that in such a case the damages should be ascertained as at the trial, thus pp. 94-6 (2 Moore, P.C. (N.S.)):

"But upon what ground can it be alleged that the judge was wrong in telling the jury to find their damages upon the present value of the land? The cases which were cited as to the measure of damages upon contracts for delivery of goods and for the retransfer of stock have very little application. The distinction between these two classes of cases is said to be, that in the former the damages should be only the value of the goods at the time when they ought to have been delivered, because the purchaser has his money in hand, and may go into the market and purchase similar goods; but as to stock, that the borrower who neglects to retransfer at the time agreed upon holds in his hands the money of the lender, and prevents him from using it. The principle upon which damages are estimated upon the breach of an agreement for the retransfer of stock is more applicable to the respondent's claim than that which is applied to contracts for the sale and delivery of goods, but the right of the respondent to the highest value of the land which he has not received in performance of the promise made to him, seems to be even stronger than that of the lender of stock, upon the borrower's omission to replace it. The owner of the stock might have the means of purchasing other similar stock at the day, but the allotment of land promised to the respondent was a thing which he could not obtain except by the performance of the promise. If he had received his allotment as he ought to have done, he would have had it, with the benefit of the increased value which it might have acquired while in his possession. Of this the other party has deprived him by the breach of his promise; and whether he has obtained the benefit himself, or has hindered the respondent from enjoying it, it seems to be equally just and reasonable that he should pay the full value of the property to the person from whom he has wrongfully withheld it."

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The only tribunal, so far as we are concerned, that could limit the application of this principle is the Privy Council

itself, and it has not done so, therefore it must give it full application. It is strange that so important a decision was not referred to in the somewhat similar case in the English Court of Appeal of *Day* v. *Singleton* (1899), 2 Ch. 320, the head-note of which is incorrect, as is pointed out by Mr. T. Cyprian Williams in his very instructive articles in the Solicitors' Journal, Vol. 60, pp. 287 and 303, on the novel and important decision of *Keck* v. *Faber* (1916), 60 Sol. Jo. 253, respecting the measure of damages where the purchaser fails to complete; but it is also strange that in that learned author's excellent work on Vendors and Purchasers, the Privy Council's decision in the *Robertson* case, *supra,* is overlooked, though the subject in connection with *Day* v. *Singleton, supra,* and other cases is discussed at p. 1066.

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The appeal, therefore, should be dismissed.

GALLIHER, J.A.: In my opinion the learned trial judge came to the right conclusion, both as to jurisdiction and confirmation of the registrar's award.

GALLIHER, J.A.

I would dismiss the appeal.

MCPHILLIPS, J.A.: This appeal would seem to present some features of difficulty with regard to a review of the damages as assessed by the learned referee (registrar), and Mr. *Griffin,* the learned counsel for the respondent, strenuously submitted in his able and careful argument that there was no right of review. As at present advised, my opinion is that the right of review does lie. However, I do not wish to be considered to have given any definite or final opinion thereon, and it is unnecessary in the present case to decide the point, as I am of the view that the damages as assessed should not be disturbed.

MCPHILLIPS, J.A.

It is true that a question of some nicety arises as to what the damages should be when there has been a sale to another, and it is impossible to decree specific performance; here there was a clear breach of contract, as the appellant in disregard of the agreement for sale of the land to the respondent, sold and conveyed away the land. It follows that in a case of this kind damages must be given. At first thought it might be said the damages would be the profit made upon the resale.

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Unquestionably, in some cases, that would be the extent of the damage, but it cannot be said to be the only damages that may be assessed, when the authorities are carefully examined. Here the land was orchard land and had the appellant done what he should have done, completed the contract with the respondent and let the respondent into possession, the respondent would have earned profits from the sale of the crop, and these profits have been allowed to the respondent by the learned referee. The assessment of damages as found by the referee was appealed against and confirmed upon appeal by Mr. Justice MACDONALD, and it is from the judgment of Mr. Justice MACDONALD this appeal is brought.

In *Joyner* v. *Weeks* (1891), 60 L.J., Q.B. 510, Fry, L.J. at p. 517 said:

"As a general rule I conceive that where a cause of action vests, the damages are to be ascertained according to the rights of the parties at the time when the cause of action vested."

Unquestionably here the appellant by his conduct prevented the respondent earning profits which, had the contract been carried out, he would have earned. The rule is not so adamantine in the assessment of damages that the special circumstances of the case cannot be considered, and in this connection I observe that the learned trial judge, in arriving at the value of the land, applied, and I think rightly applied, the principles laid down in no uncertain terms by their Lordships of the Privy Council in *Robertson* v. *Dumaresq* (1864), 2 Moore, P.C. (N.S.) 66, where, in determining the value of the land, the judgment of the Supreme Court of New South Wales was upheld, *i.e.* (see head-note):

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"The rule for the measure of damages is, the value of the specific land at the time of trial, which the party had not received in performance of the contract made to him."

And see *per* Lord Chelmsford at pp. 95-6.

I had occasion to discuss the rule governing the assessment of damages where there was failure to complete a sale of land consequent upon the act of the vendor in *Bagley* v. *B.C. Southern Ry. Co.* (1917), 24 B.C. 400 at pp. 407-16. In *Engel* v. *Fitch* (1869), 38 L.J., Q.B. 304, Kelly, C.B. at pp. 305-6 said:

". . . . where the breach arises not from some defect in the title, but from the vendor's neglect in delivering possession of the premises, and that

the question is whether the purchaser in the case before us is entitled to recover this difference in the market value? Now, if this be the question which is raised, I will say at once that we are prepared to adopt the rule laid down by Parke, B., in *Robinson* v. *Harnan* [(1848)], 1 Ex. 850—S.C. 18 L.J., Ex. 202: 'The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed.' "

I, therefore, for the foregoing reasons, am of the opinion that the judgment of Mr. Justice MACDONALD, which has been appealed against, should be affirmed and the appeal dismissed.

Appeal dismissed.

Solicitor for appellant: *Alfred Bull.*

Solicitor for respondent: *W. E. Haskins.*

JAMES v. OCEAN ACCIDENT & GUARANTEE CORPORATION, LIMITED.

Insurance, burglary—Application—Contract based on application—Policy issued containing limitation not in application—Liability.

An agent of the defendant Corporation on receiving an application for burglary insurance over the telephone made a memorandum of the particulars recited and stated that the property was covered. He then wrote the particulars into an application form which he sent in order to have certain further information inserted therein and for the applicant's signature. Upon its return duly signed with the further information inserted, the policy was issued and forwarded to the applicant who had in the meantime left the city, but a clause was inserted in the policy limiting the liability for "wines and liquors to the extent of $50 only" which limitation had not been mentioned between the parties or in the application form. Shortly after the issue of the policy liquors were stolen from the applicant's house valued at $1,515. An action to recover this sum from the defendant Corporation was dismissed.

Held, on appeal, reversing the decision of MURPHY, J. (MACDONALD, C.J.A. and GALLIHER, J.A. dissenting), that as on the telephone application the insurance agent had stated that the property was "covered" a contract was completed on the basis of the application form as filled

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in and the insertion in the policy of said limitation of liability was not binding on the insured.

APPEAL by plaintiff from the decision of MURPHY, J., of the 12th of January, 1921, in an action to recover $1,515, on a burglary insurance policy. On the 12th of August, 1920, the plaintiff, intending to take a trip, consulted a neighbour, one Watson, whom he knew to be an insurance agent as to obtaining $4,000 burglary insurance on contents of his house during his absence. Watson undertook to get the insurance for him and immediately communicated with one Hannah by telephone, who was provincial superintendent for the defendant Corporation, and told him he wanted a burglary policy for the plaintiff for $4,000 covering the plaintiff's household property generally, the only specific property mentioned being a considerable quantity of silverware. Watson then gave Hannah certain details which Hannah filled into a formal application. Hannah then told Watson the plaintiff's property was covered and that the premium would be $30, and he then sent the application to Watson's office for signing and filling in the approximate total value of the property insured and the applicant's business address. Watson filled in the value of the property at $15,000 and the applicant's address and signed it. The application set out the articles to be covered which included liquors, the only limitation being for money or securities to $50. On being advised that the property was covered Watson told the plaintiff that his property was insured as set out in the application and the plaintiff went away on his trip. On receipt of the application duly signed, Hannah made out the policy but inserted in it without the plaintiff or Watson's knowledge, a clause limiting the liability for "wines and liquors" to the extent of $50 only. The policy was then sent to Watson, who without seeing the change that had been made in it from the application, forwarded it to the plaintiff. On the following day the plaintiff's house was entered by burglars and the wines and liquors valued at $1,515 were stolen.

Statement

The appeal was argued at Vancouver on the 21st of March,

1921, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

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Lennie (*J. A. Clark,* with him), for appellant: The learned judge has misconstrued the instructions given the agent, and on the question of private instructions given an agent see *Westminster Woodworking Co.* v. *Stuyvesant Insurance Co.* (1915), 22 B.C. 197 at p. 206. It was the agent's duty to state to the insured his instructions as to limitation on liquor as the plaintiff was justified in assuming his liquor was insured. We say that what transpired between Hannah and Watson verbally was a contract: see *Canadian Casualty and Boiler Ins. Co.* v. *Boulter, Davies & Co.* (1907), 39 S.C.R. 558. James went to Watson as an insurance agent.

E. J. Grant, for respondent: Watson was the plaintiff's agent: see *The Canadian Fire Ins. Company* v. *Robinson* (1901), 31 S.C.R. 488; *Summers* v. *The Commercial Union Ins. Co.* (1881), 6 S.C.R. 19. It was James's duty to disclose the unusual amount of liquor that he had: see *Seaton* v. *Heath* (1899), 1 Q.B. 782; *Mahomed* v. *Anchor Fire and Marine Ins. Co.* (1913), 48 S.C.R. 546; *Sharkey* v. *Yorkshire Insurance Co.* (1916), 37 O.L.R. 344; 54 S.C.R. 92; *The Provident Savings Life Assurance Society of New York* v. *Mowat* (1902), 32 S.C.R. 147 at p. 156; Bacon on Insurance, 4th Ed., 347. On the question of *bona fides* see *London Assurance* v. *Mansel* (1879), 11 Ch. D. 363 at p. 367; *Joel* v. *Law Union and Crown Insurance Company* (1908), 2 K.B. 431; *Seaton* v. *Heath* (1899), 1 Q.B. 782; *Carter* v. *Boehm* (1766), 3 Burr. 1905; MacGillivray on Insurance, 312. On the question of agency see MacGillivray, 1888; *Linford* v. *The Provincial Horse and Cattle Insurance Co.* (1864), 34 Beav. 291; *Walkerville Match Co.* v. *Scottish Union* (1903), 6 O.L.R. 674 at p. 679; *Hedican* v. *Crow's Nest Pass Lumber Co.* (1914), 19 B.C. 416; *Elk Lumber Co.* v. *Crow's Nest Pass Coal Co.* (1907), 39 S.C.R. 169 at p. 172; *Refuge Assurance Company, Limited* v. *Kettlewell* (1909), A.C. 243; Holt on Insurance, 498; *Sanderson* v. *Cunningham* (1919), 2 I.R. 234; *Fowler* v. *The Scottish Equitable Life*

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Insurance Society and Ritchie (1858), 28 L.J., Ch. 225 at p. 229. On the question of rectification of the contract see *The Marquis Townshend* v. *Stangroom* (1801), 6 Ves. 328 at p. 333; *Henkle* v. *Royal Exchange Assurance Company* (1749), 1 Ves. Sen. 317; *The Montreal Assurance Company* v. *McGillivray* (1859), 13 Moore, P.C. 87; *Coope* v. *Ridout* (1921), 1 Ch. 291; Pollock on Contracts, 8th Ed., 506 and 552; Fry on Specific Performance, 6th Ed., pp. 372 and 378; *Beaumont* v. *Bramley* (1822), Turn. & R. 41; *Macdougall* v. *T. and H. Knight* (1889), 58 L.J., Q.B. 537.

Argument

Clark, in reply: The sole question is whether there was a contract. We submit that there was: see *Coulter* v. *Equity Fire Insurance Co.* (1904), 9 O.L.R. 35; *Hawthorne and Boulter* v. *Canadian Casualty and Boiler Insurance Co.* (1907), 14 O.L.R. 166 at p. 169.

Cur. adv. vult.

2nd August, 1921.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: There was, to my mind, no agreement on the part of the defendant to cover the risk pending the issue of the policy. While Mr. Hannah, the defendant's manager, filled out the application form on information furnished him by Mr. Watson over the telephone, there was one item of information lacking to enable Mr. Hannah to say whether he would take the risk or not; that item was the value of the plaintiff's property. When the application was finally completed and returned to Mr. Hannah he was then, for the first time, in a position to deal with it finally, he might then either accept or reject it or, to put it in another way, he might then have offered the plaintiff a policy on the exact terms of the application or on different terms, which policy would become binding upon the parties only if and when accepted by the plaintiff.

I do not think the evidence sufficient to justify the conclusion that there was an acceptance of any risk whatever in the absence of the particulars of value upon which Mr. Hannah insisted.

I would, therefore, dismiss the appeal.

MARTIN, J.A.

MARTIN, J.A.: On August 12th last the plaintiff, who was

going away that night for a short time from his home in Vancouver, applied to an insurance agent, J. H. Watson, for $4,000 burglary insurance on his household furniture, effects, and supplies, etc., and Watson forthwith made application on plaintiff's behalf by telephone to the defendant Corporation, through its provincial superintendent, J. R. Hannah, for a policy to that extent covering insurance on plaintiff's household property generally, no particular kind of property being specified except that there was a large quantity of silverware. In the course of that conversation, Hannah asked for and was given by Watson certain details which Hannah took down and wrote into a formal application (known as a pink sheet form) which states, *inter alia,* that

"The insurance under this policy shall attach to and apply specifically as follows:

"On gold and silverware, watches, precious stones, jewelry, plated ware, wearing apparel, ornaments, glassware, furs, laces, rugs, tapestries, paintings, etchings, engravings, mirrors and their frames, piano, organ, pianola, lyraphone, drawings, library books, clocks, bronzes, bric-a-brac, china and fancy crockery, furniture, beds and bedding, linen, carpets, mattings, curtains, shades, awnings, sewing machines, trunks, valises, cameras, umbrellas, canes, stoves, range and furnace, articles de vertu, statuary, baby carriage, music, musical and professional instruments, tools, sporting outfit, billiard and pool tables, cues, racks, and balls, guns, fishing rods and reels, bicycles, lamps, electric light, plumbing, gas and water fixtures, household goods, kitchen utensils and supplies, provisions, fuel, wines, liquors, cigars, cigarettes and personal effects and family stores common in residences generally, including fifty dollars ($50) in money and securities for money . . . . . Premium $30."

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After so doing he, Hannah, told Watson, still over the telephone, that the plaintiff's property was covered and that the premium would be $30, and Watson thereupon communicated that fact to the plaintiff who was satisfied with the assurance that his property was covered and went away in that belief for about a week. Hannah says that after he told Watson "it was all right, we shall cover him" (*i.e.,* the plaintiff), he sent the application over to Watson's office for signing and completing some information ("details") which Watson could not give over the telephone, and that Watson filled in the required information, and signed the application and sent it back to Hannah, who says that after he received it in that completed shape, "we looked into the details and proceeded to issue a policy," without

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further conversation. "The application came to us on the 12th and on the 13th it [the policy] would be issued and sent over to him," *i.e.*, Watson, whose office was across the street, and Watson mailed it to the plaintiff without noticing that as regards liability for liquors it did not conform with the application. The only information that Hannah desired was the business address of the insured in answer to question 8, and particularly "the approximate value of the property being covered," in answer to question 12 of the application, that being, he says, "a very important feature as this is a big policy for burglary." This information, *viz.*, of "the approximate total value of the property covered by this assurance" in clause No. 12 of the application, was supplied and written in to said question clause 12 by Watson, as "$15,000," and he also wrote the word "retired" in answer to question 8, all the other writing therein, except Watson's signature, Hannah admits is his, and he also admits that he sent nothing to Watson except said application. The position is then clear, to me at least, that a contract for insurance was entered into at the time Hannah told Watson the plaintiff was "covered" and the only policy that could be issued would be one which was in accordance with the terms set out in the application form which was filled out by Hannah and accepted by him as completely satisfactory, even in all its details, when it was returned to him by Watson after he correctly supplied the only further information that was asked for. If there was anything that was not satisfactory, then was the time for Hannah to object to anything, either in substance or in detail. But it clearly appears from his cross-examination that he knew that the policy was to be a general covering one, including valuable silverware, and that the question of the moral hazard (as regards the plaintiff's character) had been raised and settled, upon Watson's recommendation, to his satisfaction as Hannah admits leaving only the total amount of the value of the property covered to be filled in:

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"He wanted a covering, including his silverware, and knowing the amount of $4,000 was a large amount, we wanted that answer to the question No. 8 [12] I think it is, giving us the total amount of—

"The value of his property? Yes.

"But you did not object to the moral hazard, or to the amount, or anything else? No, we didn't object any.

"It was not discussed? Well, I asked Mr. Watson as to the moral hazard. He said Mr. James was a friend of his and a neighbour and he recommended him to us.

"And that satisfied you? That quite satisfied me, yes."

The dispute arises from the fact that Hannah undertook to insert in the policy, unknown to Watson or the plaintiff, a clause limiting liability for "wines and liquors to the extent of $50 only." In my opinion, however, this was an unwarranted attempt to vary a contract which I regard as complete in all respects according to our decision in *Westminster Woodworking Co.* v. *Stuyvesant Insurance Co.* (1915), 22 B.C. 197; 32 W.L.R. 802; 9 W.W.R. 418, the principles of which cover this case, and Hannah had no more right to limit his company's liability on, say, a cask of port than on a sofa or a silver epergne, or a piano, which beyond all question would be covered by the policy. It would be strange, indeed a sinister thing, in business morality, if the principal representative of an insurance company were to tell an applicant for insurance that his application was "all right" and his property "covered" and yet escape liability by the insertion in the policy issued immediately in pursuance of such a contract of a clause of limitation respecting a matter which was not even mentioned when the application was under discussion and consideration. The decisions cited by my brother MCPHILLIPS in his judgment, MARTIN, J.A. with which I agreed, in the *Westminster* case, *supra,* shew that a company cannot shelter itself behind private instructions, unknown to the assured, given to its officers not to issue a policy without such a reservation as regards liquor, and as the learned judge below ((1921), 1 W.W.R. 551) has found that Watson had no notice of such a reservation, there is nothing to prevent the operation of said principle which is invoked by the plaintiff.

The only other point requiring notice is that the application purports, it is submitted, to restrict liability for wines and liquors thus:

"On . . . . plumbing, gas and water fixtures, household goods, kitchen utensils and supplies, provisions, fuel, wines, liquors, cigars, cigarettes,

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and personal effects and family stores common in residences generally, including $50 in money . . . ."

On this submission, I am of opinion, in the first place, after a careful consideration of the construction of the whole clause, that the words of limitation, "common in residences generally," apply only to the next antecedent class of "family stores": if they do not, then they apply equally well to all the preceding classes of property because there is no line of demarcation: and in the second place, even if they are to be given a wider ambit, there is no evidence whatever to shew what amount of wines or liquors is "common in residences generally" in this Province. And I think it would be impossible to adduce satisfactory evidence on such a point, because it is common knowledge, gleaned during these recent years of prohibitory and temperance legislation and agitation, that in a great many (it may possibly be in most, for all I know) residences no wines or liquors are kept at all, and furthermore, there would be a vast difference in those residences where they are kept between the custom or practice of the rich man in his big residence and the poor man in his small one. If the expression "common" use can be given any sensible application at all (and I think it cannot and therefore should be disregarded), that can only be accomplished by restricting this application to different classes of residences, because it is an obvious impossibility to arbitrarily jumble "uncommon" residences together and attempt then to extract a "common" user therefrom and therein. What might be a most unreasonable store of wines and liquors in one residence would be quite reasonable in another, having regard to the means and habits of their respective owners. But I do not think such a special and limited construction can properly be given the clause in the face of its positive statement that "residences generally," and not in particular, are to be taken as the test of "common use," and as the point comes back to something that is not, in my opinion, susceptible of legal proof and therefore should, as I have said, be disregarded. But in any event it is perfectly clear to me that the Court should not attempt without evidence to embark upon such a wild speculation as is involved in the expression under consideration, and I for one must decline to express any opinion whatever (even

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if I were qualified to do so, which I am not) upon the question whether $1,500 worth of wines or liquor, in these days of greatly increased prices of such liquids, is "common" in a residence of the class in question, which must be a high one, for the personal property therein is of the value of $15,000.

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

GALLIHER, J.A.: In my opinion the learned trial judge came to the right conclusion. I cannot find upon the evidence, that Hannah at any time accepted any risk or gave any covering other than as contained in the policy issued. When the application came back to him with the value filled in it was then up to him to accept or reject. He accepted with the limitation as to wines and liquors, and it was then for the plaintiff to accept or reject the policy. Unfortunately James was away and Watson, who seems to have been acting for him, gained the impression that the policy was at large as to the liquors, but if he were to be treated as acting for the Corporation he would only be a sub-agent at most and could not bind the Corporation in this regard. The learned tral judge has dealt with this phase of the case, and I agree in his conclusions.

GALLIHER, J.A.

I would dismiss the appeal.

MCPHILLIPS, J.A.: I have had the opportunity of perusing the reasons for judgment of my brother MARTIN, and I am in entire agreement with them, and feel that I cannot usefully add anything thereto. It follows that, in my opinion, the appeal should be allowed.

MCPHILLIPS, J.A.

EBERTS, J.A. would allow the appeal.

EBERTS, J.A.

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

Solicitors for appellant: *Lennie & Clark.*
Solicitors for respondent: *Grant & Ross.*

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BOYER v. MOILLET AND BELL.

Motor-vehicles—Violation of Act—Negligence of driver—Responsibility of owner of car—R.S.B.C. 1911, Cap. 169, Sec. 33—B.C. Stats. 1920, Cap. 62, Sec. 35.

M. contemplating the purchase of a motor-car from B. took it out with B.'s consent, for the purpose of trying it, when the plaintiff was injured owing to his driving in a manner forbidden by the Motor-vehicle Act. In an action for damages against B. and M. both were held liable.

Held, on appeal, reversing the decision of MORRISON, J. (MARTIN, J.A. dissenting), that the responsibility under section 35 of the Motor-vehicle Act is confined to the penalties imposed by the Act and does not create a right of action for damages against the owner of the motor when driven by a person entrusted with its possession.

APPEAL from the decision of MORRISON, J. in an action tried by him at Vancouver on the 30th of November, 1920, allowing the plaintiff $600 for damages resulting from the negligence of the defendant Moillet. The facts are that Moillet contemplating the purchase of a car owned by the defendant Bell, took the car out with Bell's consent for the purpose of trying it. He drove east along Kingsway. As he approached Commercial Drive in South Vancouver, he passed one street-car going the same way as himself and was nearing a second car going the same way when it stopped. He attempted to pass it, and as he did so struck the plaintiff immediately on her alighting from the front door of the street-car. The plaintiff who was 18 years of age escaped physical injury with the exception of bruises but suffered a severe shock. She was of a delicate physique and had suffered for some time from asthma, and claimed that the shock accelerated this trouble.

Statement

Long, for plaintiff.
Wood, for defendant Bell.
Hogg, for defendant Moillet.

4th December, 1920.

MORRISON, J.

MORRISON, J.: I find that the injuries sustained by the plaintiff were caused solely by the negligence of the defendant

Moillet whilst driving the automobile of the defendant Bell, which had been entrusted to him by the said Bell.

An automobile is a powerful engine of destruction if not properly controlled. The defendant Moillet, in this instance, lost control at a juncture when it was probably too late to avert an accident, for I infer from his own evidence that he misled himself into the belief that because just recently the tram-car having stopped at a street crossing, and no passengers had alighted, that on the occasion of its next stopping he would be safe in disregarding the statutory requirements and in proceeding at a speed which I find was inconsistent with safety under the circumstances. I find that the girl run down could not have reasonably averted the accident and that there was no contributory negligence on her part. There was a clear field of vision open to the defendant. There were no distracting, intervening circumstances. The tram came to a normal stop and was standing still for some appreciable time before the impact. The plaintiff suffered injuries to her person and apparel from the impact. The escape from a fatality would seem providential. She is a frail looking child though 18 years old.

Counsel for the defendant Bell sought to differentiate the section of the British Columbia Motor-vehicle Act, *viz.*, 35, from that of the enactment in the Ontario Act because ours included the word "entrusted" which is not found in the other. Murray's New English Dictionary gives as one of the shades of meaning of the word "entrust": "To confide the care or disposal of (a thing or person), the execution of (a task) to, or with a person. Also to trust, commit the safety of (oneself, one's property, etc.) to a thing," *e.g.*, "I should not like to entrust my safety to a boat like that."

I adopt Mr. Justice Riddell's view in *Smith* v. *Brenner* (1908), 12 O.W.R. 9 at p. 12 that the meaning of the statute is that every owner of a motor-vehicle having obtained a permit must see to it that his motor shall be kept and managed as the statute provided; that he, the owner, shall either manage it himself and keep within the Act, or see to it that

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those who get possession of it in any way shall obey the rules laid down by the Act, and this he must do at his peril.

It is difficult to estimate the extent of damages in a case of this kind. There were no fractures or serious hurt, but it is argued that there was a recurrence of her asthmatic condition in consequence of the impact. Certain special damage was proven. There will be judgment for the sum of $50 for damages to her clothing and $50 for medical attendance and $500 for her pain and suffering.

From this decision the defendant Bell appealed. The appeal was argued at Vancouver on the 7th of March, 1921, before MACDONALD, C.J.A., MARTIN and MCPHILLIPS, JJ.A.

Wood, for appellant: The question is whether section 35 of the Act applies in this case. We contend that the Act does not extend to a civil liability: see *File* v. *Unger* (1900), 27 A.R. 468. The Ontario cases of *Mattei* v. *Gillies* (1908), 16 O.L.R. 558, and *Verral* v. *Dominion Automobile Co.* (1911), 24 O.L.R. 551 do not apply owing to the difference in the Act: see also *Smith* v. *Brenner* (1908), 12 O.W.R. 9 at p. 12; *B. & R. Co.* v. *MeLeod* (1912), 2 W.W.R. 1093; *Johnson* v. *Mosher* (1919), 50 D.L.R. 321; *Moore* v. *B.C. Electric Ry. Co.* (1917), 24 B.C. 314; Mayne on Damages, 9th Ed., pp. 45-6. On the question of shock to the complainant and her condition previously to the accident see *Geiger* v. *Grand Trunk R.W. Co.* (1905), 10 O.L.R. 511; *Henderson* v. *Canada Atlantic R.W. Co.* (1898), 25 A.R. 437; *Toms* v. *Toronto R.W. Co.* (1910), 22 O.L.R. 204.

Argument

Long, for respondent: My submission is that the difference in the Ontario Act does not distinguish the cases referred to: see also *Bernstein* v. *Lynch* (1913), 28 O.L.R. 435; *Lowry* v. *Thompson* (1913), 29 O.L.R. 478 at p. 485; *Hirshman* v. *Beal* (1916), 38 O.L.R. 40; *Lennard's Carrying Company, Limited* v. *Asiatic Petroleum Company, Limited* (1915), A.C. 705; *Witsoe* v. *Arnold* (1914), 6 W.W.R. 4.

Wood, in reply.

Cur. adv. vult.

2nd August, 1921. MORRISON, J.

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MACDONALD, C.J.A.: If I am right in my construction of section 33 of the Motor-traffic Regulation Act, R.S.B.C. 1911, the appellant must succeed. The section reads:

"The owner of a motor for which a licence is issued under this Act shall be held responsible for any violation of this Act, or of any regulations provided by order of the Lieutenant-Governor in Council, by any person intrusted with the possession of such motor."

The section is the same as one which was in force in Ontario in 1908 and which is still in force with some amendments, except that the Ontario section does not contain the words "by any person intrusted with the possession of such motor."

In *Mattei* v. *Gillies* (1908), 16 O.L.R. 558, Boyd, C. delivering the judgment of the Divisional Court said at p. 563, speaking of "responsibility" under the Ontario statute:

"That would cover responsibility in regard to fines and penalties imposed by the Act, and may it not also civil responsibility for damages?"

He then refers to section 14 of the Ontario Act, which enacts that

"No such fine or imprisonment shall be a bar to recovery of damages by the injured party before a Court of competent jurisdiction,"

and proceeds:

"The collocation of the sections suggest that a liberal reading is to be given to the 'responsibility' clause—as is, indeed, the general canon to be observed in the interpretation of the revised and other statutes."

In *Smith* v. *Brenner* (1908), 12 O.W.R. 9, Riddell, J. expressed the opinion that the section imposed upon the owner civil liability in damages, even if the driver were not his servant but a friend to whom he had loaned the car. In *Verral* v. *Dominion Automobile Co.* (1911), 24 O.L.R. 551, Boyd, C., delivering the judgment of the Divisional Court, again construed the said section as imposing civil liability. He referred to an amendment of the Act, which provided that in the event of the employer, of a person driving a motor for hire, being present in the vehicle at the time of the offence, he as well as the driver should be liable to conviction. The Court appears to have considered that this amendment was an aid to the interpretation of the responsibility clause.

In *Hirshman* v. *Beal* (1916), 38 O.L.R. 40, the Appellate Division had before them the section as re-enacted in 1914.

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Meredith, C.J.C.P., said, that the interpretation put upon the section had assuredly gone to the widest extent possible. None of the learned judges, however, questioned the soundness of these interpretations.

In the Province of Alberta the like section received opposite interpretations in the lower Court. Thereafter it was radically amended and the Court of Appeal, basing its judgment upon the amended section, held that it did not impose civil liability.

As I have already indicated we have in our statute no *indiciæ* of the intention of the Legislature other than is contained in the section itself and is shewn by the absence in the statute of any reference to civil liability. In Ontario the Courts thought they had such *indiciæ* in the other sections above noticed. In addition thereto there was a section in the Ontario statute which placed the onus of proof on the owner or driver, "when loss or damage" is incurred by any person, shewing that the Ontario Legislature intended the Act to embrace a wider field than that covered by our statute.

The responsibility imposed by section 33 is for the violation of the Act, not, I think, for the consequences of its violation, such as civil injury to another. If the construction contended for by the respondent be the true one, the common law right of the owner is taken away, and it is a sound and well-established canon of construction of statutes that such a right is not to be held to be taken away except by express words or necessary intendment. The Legislature was dealing with a subject quite apart from the rights of persons as between themselves for injuries done by one to the other on public highways. The Act was passed, I think, for the protection of the public and for the punishment by fine or imprisonment of those who violate its provisions. There is nothing in the Act from beginning to end to suggest that the rights of individuals in civil actions were to be disturbed. I therefore think that section 33 appears in the Act only in furtherance of the general scheme to punish by fine or imprisonment those who offend against its provisions.

MACDONALD, C.J.A.

I would, therefore, allow the appeal.

MARTIN, J.A.: After careful consideration of the numerous authorities cited, and adding to them *Gray* v. *Peterborough Radial Ry.* (1920), 47 O.L.R. 540; 18 O.W.N. 260, I do not doubt that this appeal should be dismissed, because the result of the cases in Ontario on an essentially similar section, from which ours is taken, is, as was said by Mr. Justice Riddell in *Hirshman* v. *Beal* (1916), 38 O.L.R. 40 at p. 48; 11 O.W.N. 83, that:

"It is beyond question that the defendant [the owner of the car] is liable unless he can make his case come within this amendment, that is, he is liable for the violation of the Act, 'unless at the time of such violation the motor-vehicle was in the possession of a person, not being in the employ of the owner, who had stolen it from the owner."

This amendment, to cover the case of theft, is not necessary in our Act, because by it the owner is only liable where he has "entrusted" the possession of the motor to some other person, which is the case at bar.

And I am in accord with the decision of the Supreme Court of Alberta, Appellate Division, on this question in *B. & R. Co.* v. *McLeod* (1914), 7 Alta. L.R. 349; 6 W.W.R. 1299; 28 W.L.R. 778, which so far as the case at bar is concerned is not affected in principle by the later decision of the same Court in *Johnson* v. *Mosher,* 15 Alta. L.R. 117; (1919), 3 W.W.R. 1039, based as it is upon legislative amendments which have so much changed the section that, as the Court said, it "now bears little resemblance to the original section formerly judicially interpreted." The view that the interpretation of the Courts of the countries from which legislation is borrowed is entitled to great weight has been given effect to by our Courts, *e.g., Bank of B.C.* v. *Oppenheimer* (1900), 7 B.C. 448.

MARTIN, J.A.

I am unable to find anything in the other sections of our Act or the Ontario or Alberta Acts, which would justify me in departing from the principle laid down in the above cases.

MCPHILLIPS, J.A.: This appeal involves the construction of the Motor-traffic Regulation Act, Cap. 169, R.S.B.C. 1911. That Act has now been superseded by the Motor-vehicle Act, Cap. 62 of the statutes of 1920. However, the liability has to be determined under the previous Act. In any case it

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would not appear that there is any very material change in the legislation.

It has been held in the Province of Ontario that The Motor Vehicles Act, 9 Edw. VII., Cap. 81, has imposed a liability beyond that existing at common law in respect of accidents occurring in the operation of motor-vehicles on highways. It is clear, however, that all of the learned judges who passed upon the point were of the opinion that the legislation was in its terms such that the intention of the Legislature was clearly apparent and that it was the intention to extend the liability beyond that which would obtain at common law. It is to be noted, however, that the British Columbia legislation is not in complete uniformity with that of the Province of Ontario, in fact, there are some very striking differences, and when this is considered, it cannot be a safe course to follow the decisions founded upon different though somewhat analogous legislation. In this connection it is instructive to remember what Lord Parmoor said in *City of London Corporation* v. *Associated Newspapers, Limited* (1915), A.C. 674 at p. 704:

"I do not think that cases decided on other Acts have much bearing on the construction of the Acts or sections on which the present case depends."

MCPHILLIPS, J.A.

It is true that the section upon which it is contended that there is liability, namely, section 33, is in its terms similar to section 19 of the Ontario Act, with the added provisions in the British Columbia section of liability where any person is entrusted with the possession of a motor. It is, however, to be observed that there is no section in the British Columbia Act similar to section 23 of the Ontario Act [R.S.O. 1914, Cap. 207], which reads as follows:

"23. When loss or damage is sustained by any person by reason of a motor vehicle on a highway the onus of proof that such loss or damage did not arise through the negligence or improper conduct of the owner or driver of the motor vehicle shall be upon the owner or driver."

This reference to "loss or damage" would appear to indicate that in Ontario the scope of the Act was intended to extend beyond merely prosecutions under the Act. On the other hand, in British Columbia, without entering into detail of the matter, the whole legislation imports that the liability is con-

fined to the responsibility imposed by the express terms of the Act itself, and that seems to me to be incontrovertible. By way of illustration I would draw attention to the heading placed over sections 41 to 46 inclusive (Cap. 169, R.S.B.C. 1911), "Information and Evidence," and the sections deal with the description of the offence, the burden of proof, etc., and it is to be observed commences with the words: "In any prosecutions under this Act." It is plain, therefore, that the evidence called for and the burden of proof generally is wholly directed to prosecutions under the Act, which would repel any conclusion that there was any intention whatever to impose liability other than the penalties provided for in the Act. Unquestionably the Court should not invade the province of the Legislature and the Court admittedly should not legislate, that being beyond the province of the Court. If the Legislature intended to impose any liability in excess of that existing at common law, it is reasonable that that should be found in apt words imposing liability and those apt words are absent in the legislation.

In *Mattei* v. *Gillies* (1908), 16 O.L.R. 558, being a judgment in appeal, Chancellor Boyd, in dealing with the question of responsibility, said at p. 563:

"That would cover responsibility in regard to fines and penalties imposed by the Act, and may it not also civil responsibility for damages? Section 12, which precedes this section as to responsibility, incorporates the provisions of the Act relating to Travelling on Public Highways, one section of which section 14, is important in this relation. That declares 'that no such fine or imprisonment shall be a bar to the recovery of damages by the injured party before a Court of competent jurisdiction.'"

MCPHILLIPS, J.A.

We have no legislation of a similar character and it may be said that the decisions in the Province of Ontario are based upon a premise that is absent with us.

I would also refer to the case of *Johnston* v. *Mosher* (1919), 3 W.W.R. 1039 at pp. 1044-5, where Chief Justice Harvey gave the judgment of the Court, which was to the effect that no responsibility beyond liability for penalties under the Alberta Act exists in that Province, as it would appear that theretofore the Ontario decisions had been followed in Alberta. The state of the statute law in Alberta differs from that of British Columbia but the *ratio decidendi* of the decisions is

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analogous to the view which I have expressed in considering this appeal; that is, the legislation in the Province of Ontario is so different in character to the legislation that we have in this Province that the authorities so much relied upon by the respondent cannot be of any assistance in the determination of this appeal. It therefore follows that, in my opinion, the British Columbia legislation in its whole purview confines the responsibility to the penalties imposed by the Act. (See *Atkinson* v. *Newcastle Waterworks Co.* (1877), 2 Ex. D. 441; *Groves* v. *Wimborne* (*Lord*) (1898), 2 Q.B. 402 at p. 407).

I would therefore allow the appeal.

Appeal allowed, Martin, J.A. dissenting.

Solicitors for appellant: *Lane, Wood & Company.*
Solicitor for respondent: *G. Roy Long.*

GREENIZEN v. TWIGG *ET AL.*

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GREENIZEN v. TWIGG

Vendor and purchaser—Option to one member of syndicate formed to purchase—Collusion between vendor and member of syndicate as to profit—Fraud—Notice—Rescission—Restitutio in integrum—Pleading —Admission by counsel—Laches—Election.

M. obtained a thirty-day option in 1912 on a tract of land owned by G. at $60 per acre less $10 per acre to M. as commission, payable one quarter in cash and the balance in two yearly payments. A syndicate was then formed by M., he himself being a member thereof, to purchase the property at $75 per acre, payable one quarter in cash and the balance in two yearly payments as above. By direction of M. the land was then conveyed by G. to a solicitor who was a member of the syndicate as trustee, and such solicitor executed a mortgage back to G. on the land, to secure the deferred payments. All the members of the syndicate including M. executed a bond guaranteeing payment of the mortgage. Later, a limited company was formed by the syndicate and the solicitor conveyed the lands to the company subject to G.'s mortgage. The company then in 1913 subdivided the land into a townsite and registered a plan thereof and conveyed one-quarter of the lots to the Crown, as required by the Land Act. G., at the direction of the syndicate, had conveyed a small portion of the lands to a railway company for a station and other railway purposes. None of the lots were ever sold to the public.

In an action by G. for payment of the balance owing under the mortgage and bond, the defendants set up that the plaintiff's claim was void by reason of collusion between G. and M. and in non-disclosure by G. to the other syndicate members of the profit M. was making in the transaction, and counterclaimed for rescission and return of amounts paid by them, and the defendant executrix pleaded that her deceased husband M. (killed in the war) had been guilty of fraud in the transaction in that he colluded with the plaintiff. The action was dismissed and rescission granted by the trial judge conditional upon restoration of the lands to G.

Held, on appeal, *per* MACDONALD, C.J.A. and GALLIHER, J.A., that rescission could not be decreed, the defendants being unable to restore the portion of the lands given to the Crown; but the conduct of G. in misstating the price of the lands in his conveyance at $75 per acre when he only received $50 per acre was ground upon which to found an action for deceit, and although no claim for damages was specifically made, the defendants should be allowed to amend by claiming damages which should be based on the difference between the real and fictitious price (*i.e.*, $25 per acre), which damages should be set off against the mortgage moneys due the plaintiff.

Per MCPHILLIPS, J.A.: No collusion, fraud or deceit was proved. On the

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facts and documents, the plaintiff had given actual notice to the defendant T., the solicitor and trustee, that he was only receiving $50 per acre; the executrix of M. not claiming said profit, the mortgage debt should be reduced by $25 per acre, and the defence of the executrix, setting up the alleged fraud of her deceased husband, should have been struck out.

[Reversed by Supreme Court of Canada.]

APPEAL by plaintiff from the decision of CLEMENT, J., of the 17th of May, 1921, dismissing an action to recover $24,800 and interest due upon a mortgage made by the defendant Twigg and upon a guarantee of payment thereof made by all the defendants. The plaintiff, who lived in Ontario, was owner of lot 833, group 1, Cariboo District, being 590 acres of land in the Nechaco Valley, situate near the junction of the Stewart and Nechaco Rivers. Early in 1912, the plaintiff entered into negotiations with the firm of Gore & McGregor, land surveyors, Victoria, for the subdivision of the property, but later decided not to subdivide. After returning to his home in Ontario in August, the said firm, learning that the Grand Trunk Pacific Railway, then under construction, was about to place a station on the lands, entered into correspondence with the plaintiff, resulting in their receiving an option for 30 days at $60 per acre, less $10 per acre to be retained by said firm as commission. The said firm then resold the land to a syndicate composed of J. H. Moore, A. H. Head, H. B. Thompson, the defendant Twigg and J. Herrick McGregor (a member of the firm of Gore & McGregor) at the price of $75 per acre, making $44,250 in all, and payable one quarter ($11,062.50) in cash and the balance in two yearly instalments of $16,593.75 each, with interest at 6½ per cent. The said firm then sent its secretary, one Down, to Ontario, late in October, who interviewed the plaintiff and advised him of the said sale being made to the syndicate at the price of $75 per acre, including the profit of $25 to his firm. At the direction of Down, the plaintiff executed a conveyance of the land in favour of the defendant Twigg, who was a solicitor in Victoria, and was to act as trustee for the syndicate. The conveyance was sent to the Royal Bank in Victoria to be delivered to Twigg on payment of the said $11,062.50 and on execution of the mort-

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gage for $33,187.50 and a bond by the members of the syndicate guaranteeing payment of the mortgage in the plaintiff's favour. While the title papers remained in the said Bank, the personnel of the syndicate changed and a new syndicate, consisting of the said Twigg and McGregor, and the defendant Landry as well as Eliot, Holland and Head, was formed, and the said mortgage was executed by the defendant Twigg, and the said bond by all the members. This arrangement delayed matters from November, 1912, until February, 1913, and the plaintiff did not know of the defendant Landry becoming a member of the syndicate. The defendant Twigg collected the said $11,062.50 from the other members but delayed paying same over, and finally in February, 1913, notified the plaintiff by telegram that such moneys would only be paid over if the plaintiff would execute an agreement to refund the same in case the railway company failed to locate its proposed station on the lands. Consequently, the plaintiff on February 3rd, 1913, executed and sent to the defendant Twigg an agreement to refund, to the effect that in case the railway defaulted in locating said station, he would refund to the defendants the sum of $7,375 only. On receipt of same, the defendant Twigg paid over the whole sum of $11,062.50 and received the title papers from the Bank. The sum of $7,375 was forwarded to the plaintiff, and the remaining $3,687.50 was paid by the Bank to the credit of Gore & McGregor, which at that date had become incorporated as Gore & McGregor Limited. The title was then registered in the name of the defendant Twigg, and the mortgage back to the plaintiff was also registered. The syndicate then became incorporated as the Nechaco River Estates Limited, and later the defendant Twigg conveyed the lands (except 50.47 acres thereof, which the plaintiff had previously, at the defendants' request, conveyed to the railway) to the said Nechaco Company. The shares in same were allotted to the syndicate members in accordance with their respective interests. Gore & McGregor Limited then proceeded to subdivide the lands into some 5,000 townsite lots and streets and the Nechaco Company registered the said subdivision plan and then conveyed some 1,400 lots, being one-

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quarter in area of the lands, to the Provincial Government, pursuant to the requirements of the Land Act, R.S.B.C. 1911, Cap. 129. The plaintiff executed a partial discharge of his mortgage in order to clear the Crown title to the same. The instalment of $16,593.75 fell due on the mortgage, and McGregor went East and interviewed the plaintiff, who agreed to accept $8,000 cash and $2,000 in shares in the Nechaco Company and extend the balance, Twigg undertaking to obtain the consent of the guarantors to such extension. The "boom" in real estate ended early in 1914, and no lots were sold. The payment of $4,000 fell due under the new arrangement on May 1st, 1914, and the defendant Twigg called upon McGregor for his share thereof, about $2,600, but as the plaintiff had given Gore & McGregor an order on Twigg for $6,637.50, part of their profit of $25 per acre, the said firm notified Twigg in May, 1914, that it held such order and deducted $2,000 from McGregor's contribution and remitted Twigg $600 only on such call. On the outbreak of war in August, 1914, McGregor immediately left for the front and was killed in 1915. In March, 1916, Holland negotiated with the plaintiff and the plaintiff released him from the bond in consideration of $5,500 cash paid, but reserving his rights against the other obligors. Subsequently in the same year, Head paid $2,200 and procured a similar release. No further payments being made, the plaintiff, in October, 1920, brought action against the defendants Twigg, Eliot, Landry and the executrix of McGregor's estate for the balance of $24,800 and interest owing on said mortgage. The said defendants, except the executrix, counterclaimed for rescission. The learned trial judge dismissed the action and gave judgment for rescission and return by the plaintiff to the defendants Twigg and Landry of the moneys paid by them on the purchase and dismissed the action as against the McGregor estate without costs.

Statement

The appeal was argued at Victoria on the 27th of June, 1921, before MACDONALD, C.J.A., GALLIHER and MCPHILLIPS, JJ.A.

W. J. Taylor, K.C. (*J. R. Green,* with him), for appellant: This is an action on a mortgage and guarantee bond and the

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defence is that there was collusion and concealment on the part of the plaintiff and the defendant McGregor. Our contention is that Greenizen gave McGregor an option at $60 an acre and Greenizen had nothing to do with McGregor increasing the price. McGregor was not his agent and the allowing a commission of $10 per acre to McGregor is not inconsistent with this: see *Kelly* v. *Enderton* (1913), A.C. 191 at p. 195. When the contract is executed, non-disclosure is not sufficient to set it aside: see *Lecky* v. *Walter* (1914), 1 I.R. 378 at p. 385; *Brownlie* v. *Campbell* (1880), 5 App. Cas. 925 at p. 937; *Eaglesfield* v. *Marquis of Londonderry* (1876), 4 Ch. D. 693; *Bell* v. *Macklin* (1887), 15 S.C.R. 576. In an action on deceit omission is not sufficient: see *Arkwright* v. *Newbold* (1881), 17 Ch. D. 301; *Peek* v. *Gurney* (1873), L.R. 6 H.L. 377; *Merriam* v. *Kenderdine Realty Co. (No. 1)* (1915), 34 O.L.R. 556. In setting aside a purchase the greatest care must be taken by the Courts not to relieve speculators: see *Jennings* v. *Broughton* (1854), 5 De G.M. & G. 126 at p. 140; *Clark* v. *Hepworth and Michener, Carscallen & Co.* (1918), 1 W.W.R. 147 at pp. 153-4. There cannot be restitution in this case as a large portion of the property has been disposed of and cannot be restored: see *Fleming* v. *Mair* (1921), 2 W.W.R. 421. There is no question that the alleged false representation was not the inducing cause of the sale: see *Gagnon* v. *Nelson* (1915), 21 B.C. 356. This was a speculation they were going into, and they were quite willing to pay $75 an acre. They have not pleaded the ability to restore: see *Clough* v. *London and North Western Railway Co.* (1871), L.R. 7 Ex. 26; Morison's Rescission of Contracts, 194; *Meldon* v. *Lawless* (1869), 18 W.R. 261; *Anderson* v. *Costello* (1871), 19 W.R. 628; *Deposit Life Assurance* v. *Ayscough* (1856), 6 El. & Bl. 761; *Aaron's Reefs* v. *Twiss* (1896), A.C. 273; *Rolt* v. *Long* (1920), 2 W.W.R. 244; (1921), 1 W.W.R. 54; *Scheuerman* v. *Scheuerman* (1916), 52 S.C.R. 625 at p. 632.

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Mayers, for respondent: McGregor was Greenizen's agent for the sale of the property for $60 an acre of which McGregor was to get $10 an acre when he affected a sale. McGregor

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increased the price to $75 an acre to a syndicate of which he was the largest shareholder. The plaintiff should have disclosed as to McGregor's profit: see *Hitchcock* v. *Sykes* (1913), 29 O.L.R. 6 at p. 20; (1914), 49 S.C.R. 403; *Kildonan Investment* v. *Thompson* (1915), 25 Man. L.R. 446; *Schrader* v. *Manville* (1915), 8 Sask. L.R. 83. In answer to *Kelly* v. *Enderton* (1913), A.C. 191 see *Livingstone* v. *Ross* (1901), A.C. 327. On the question of right of rescission see *Rawlins* v. *Wickham* (1858), 3 De G. & J. 304; *Arnison* v. *Smith* (1889), 41 Ch. D. 348 at p. 369; *Lindsay Petroleum Company* v. *Hurd* (1874), L.R. 5 P.C. 221 at p. 239. The principal is bound in case of fraud of agent not only when it is for the benefit of the principal but when it is for the benefit of the agent: see *Barwick* v. *English Joint Stock Bank* (1867), L.R. 2 Ex. 259; *Lloyd* v. *Grace, Smith & Co.* (1912), A.C. 716. As to restitution, we can restore in the same position in which he intended to bring it. He cannot complain of the subdivision: see *McKinnon* v. *Brockinton* (1921), 2 W.W.R. 437 at p. 441; *Chapman* v. *Withers* (1888), 20 Q.B.D. 824; *Adam* v. *Newbigging* (1888), 13 App. Cas. 308. The contract is not voidable but it is void because it is illegal: see Halsbury's Laws of England, Vol. 20, p. 762, par. 1787; *Jackson* v. *Duchaire* (1790), 3 Term Rep. 551. It may be established by parol evidence: see Chitty on Contracts, 17th Ed., 745, as to its being the inducing cause; *Farmers' Mart, Lim.* v. *Milne* (1914), 84 L.J., P.C. 33; *Redgrave* v. *Hurd* (1881), 20 Ch. D. 1 at p. 21; *Anderson's Case* (1869), L.R. 8 Eq. 509 at p. 511; *Clough* v. *London and North Western Railway Co.* (1871), L.R. 7 Ex. 26 at p. 35. As to what the deceived party ought to do see *Rolfe* v. *Gregory* (1865), 4 De G.J. & S. 576. As to damages it is the difference between the value of the lands and the price we pay: see *Goold* v. *Gillies* (1908), 40 S.C.R. 437 at p. 452.

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Maclean, K.C., for McGregor Estate: We say the transaction was an illegal one and that the sale should be set aside.

Heisterman, for Landry: As to secret commission he referred to *Owen* v. *Homan* (1853), 4 H.L. Cas. 997 at pp. 1034-5.

Taylor, in reply: The cases referred to are all with relation

to executory contracts except *Redgrave* v. *Hurd* (1881), 20 Ch. D. 1 at p. 21, in which actual fraud was disclosed.

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Cur. adv. vult.

14th October, 1921.

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MACDONALD, C.J.A.: The action is for foreclosure of a mortgage and upon a guarantee of payment thereof.

The plaintiff in the year 1912 sold a tract of land containing upwards of 500 acres, situate on the line of the Grand Trunk Pacific Railway, at the price of $75 an acre to a syndicate of which the defendant Twigg was trustee for the purpose of taking the conveyance and granting a mortgage back for the balance of the purchase-money. After the execution of the conveyance and mortgage and a guarantee by members of the syndicate, the syndicate caused a joint-stock company to be registered under the name of Nechaco River Estates Limited, to which company the trustee conveyed the land subject to the mortgage. The company then subdivided the land into town-site blocks of lots and registered a plan or map thereof in the Land Registry office of the district in which the lands are. The Land Act, Cap. 129, R.S.B.C. 1911, contains a provision entitling the Crown in right of the Province to a conveyance of one-quarter of the blocks of the lots of such a subdivision, and enacts that the lots selected by the Crown shall be conveyed to it before the plan or map shall be filed in the Land Registry office. Whether or not the lots were so conveyed does not appear in evidence.

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The mortgage moneys falling into arrears, this action was brought and the substantial defence to it is that the plaintiff colluded with one of the members of the syndicate, now deceased, whereby such member was enabled to obtain a secret profit of $25 an acre.

In the conveyance from the plaintiff to the said trustee, the price at which the land was sold was intentionally misstated by the plaintiff to be $75 an acre, whereas the amount actually to be received by the plaintiff was $50 an acre. The balance, unknown to the other members of the syndicate, was to be received by the said deceased.

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I agree with the learned trial judge that the plaintiff's conduct in this respect was wrongful and would found an action by the defendants, other than the defendant executrix, for damages for deceit.

The defendants have counterclaimed for rescission and for an account, but as rescission cannot be decreed unless the defendants are able to reconvey the land it becomes necessary to inquire whether the defendants have shewn their ability to restore the property to the plaintiff should rescission be decreed.

The judgment dismisses the action unconditionally; it orders cancellation of the mortgage and guarantee; subject to plaintiff's right to a reconveyance as aftermentioned, it rescinds the sale and conveyance; it declares that upon reconveyance the plaintiff is to repay the purchase-money received by him, but that if reconveyance be not made the counterclaim is to stand dismissed; and that restitution shall be sufficiently made by deposit with the registrar of the Court of a duly-executed deed of the land as subdivided, together with written consents on defendants' part to the cancellation of the plan or map.

The Nechaco River Estates Limited is not a party to the action, but it is suggested that its assistance and concurrence can be obtained by the defendants in furtherance of the reconveyance. It is also suggested that the consent of the Crown may be obtained to the cancellation of the plan or map and to the giving up of its interest in the lots to which it is entitled. The effect of the judgment, as I read it, is to declare that restitution shall be deemed to be sufficiently made when the defendants have deposited with the registrar a deed of all the interest of themselves and the said company in the land, together with their own written consents to the cancellation of the plan, leaving the plaintiff to do the best he can to recover the interest of the Crown. We have not been told by what authority the representatives of the Crown can give up the lots which the statute has declared shall be Crown property. Unless there be clear statutory authority for the gift back to the company or to the plaintiff of these lots, the plaintiff will get by way of restitution the privilege of first, with the assist-

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ance of the defendants, persuading the Crown to make the gift and, if made, of taking the risk of its validity. I may say that I do not think the land granted to the railway company for right of way and station grounds are lands with respect to which restitution must be made. That was an independent transaction between the defendants and the railway company.

In support of the judgment we were referred to *Lindsay Petroleum Company* v. *Hurd* (1874), L.R. 5 P.C. 221. That case fully sustains the finding of the learned trial judge on the first branch of the case. Their Lordships decreed rescission upon condition that the land there in question should be reconveyed to the vendor. The only obstacle in the way of an absolute order was a suggestion that the company had ceased to exist and could not therefore reconvey. It was a mere suggestion not raised in the Courts below, and one which their Lordships said in the circumstances, should not have been made before them, and which in all likelihood could be easily removed. They, however, thought it their duty to take notice of it in giving directions for judgment. I cannot think that that case can be relied upon in support of a case like the present one, where the vendee has parted with the land and where his vendee has changed its character from that of wild or farm land to townsite lots, and as a consequence has given another a substantial interest in them. What was ordered by the judgment was not restitution at all, it was at most the return to the vendor of part of the land, together with consents that might facilitate him in an endeavour to recover the balance.

The defendants by their pleadings have not specifically asked for damages for the deceit practiced upon them by the plaintiff. Mr. *Mayers* referred us on this point to the prayer in the counterclaims for an account, no doubt having in mind a similar prayer in *Lindsay Petroleum Company* v. *Hurd,* under which Hurd was, in the event of the company's want of power to reconvey, ordered to refund to the company his secret profits. No such order was made against the other defendant, for the manifest reason that while Hurd was adjudged to have stood in a fiduciary relationship to the company, the other defendant had not. The like situation exists here. Mr. McGregor was

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so related to the syndicate of which he was the promoter, but no relief such as was given against Hurd is claimed against the defendant executrix. The case of *Lindsay Petroleum Company* v. *Hurd* was tried in the Ontario Court of Chancery before the passing of the Judicature Act, a Court which had no jurisdiction to award damages for deceit. Here the Court below had jurisdiction to award such damages, and while there is no prayer for such relief beyond the omnibus one, yet the evidence is all before us and if it be necessary to amend the prayer, which I doubt, I would amend it to include a claim for damages against the plaintiff. The damages which ought to be awarded is the difference between the real and the fictitious price, namely, $25 per acre. In my opinion, the judgment should be set aside and the usual judgment for foreclosure should be directed with a reference to take the accounts on which reference the sum awarded for damages should be set off against the mortgage moneys with all due adjustments of interest.

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Costs of the appeal should follow the event. The plaintiff is entitled in the Court below to the costs of the action and the defendants, other than the said executrix, to the costs of their counterclaims.

GALLIHER, J.A.

GALLIHER, J.A.: I am in accord with the views expressed by the Chief Justice.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: In my opinion the appeal should succeed with a reduction in the amount claimed, which I will later explain.

The action is upon a mortgage made by Twigg, one of the respondents and one of a syndicate of speculators in land in Northern British Columbia acquired for townsite purposes, it being arranged amongst the syndicate that the conveyance of the property should be to Twigg and that a mortgage for a portion of the consideration money should be given by Twigg. The appellant was the vendor and had given an option upon the property to the late J. Herrick McGregor (*Kelly* v. *Enderton* (1913), A.C. 191), and the executrix of the estate of J. Herrick McGregor is one of the respondents.

The defence of the respondents is that of fraud, and rescission is claimed by way of counterclaim, but there is no alternative claim for damages as and for deceit, but it was argued at this bar that nevertheless that the respondents were entitled to that alternative remedy. The gravamen of the charge of fraud is that the appellant was an active party in collusion with the late J. Herrick McGregor to misrepresent the facts, notably that the appellant was willing to sell for $50 an acre, whereas the appellant sold ostensibly at and for the price of $75 an acre and that the appellant was cognizant of this misrepresentation to the respondents and that a part of this collusive arrangement was the agreement between the appellant and the late J. Herrick McGregor that the late J. Herrick McGregor was to receive $25 per acre out of the purchase price. The terms of the sale were that the syndicate or partnership, as it is alleged the joint adventurers were, were to pay the sum of $11,062.50 in cash and a mortgage be given upon the property for the remainder of the purchase price, *viz.*, $33,187.50, and this was carried out and a conveyance, as previously stated, made to the respondent Twigg on the 19th of December, 1912, and a mortgage of even date. It would appear that the appellant made a payment to the late J. Herrick McGregor of $3,687.50 in February, 1913, and two assignments for $4,425 and $6,637.50 in November, 1912, of the moneys to be paid by the syndicate or partnership, in all the sum of $14,750, being moneys the late J. Herrick McGregor was entitled to. The syndicate or partnership then, in order to exploit the property, it being a highly speculative proposition, out of which they expected to get from the public $500,000, incorporated a company and conveyed the lands to it. The company (Nechaco River Estates Limited) undertook to pay the mortgage and agreed to indemnify the respondent Twigg therefrom. Later there were alterations of terms of payment, the appellant being lenient in regard thereto. The defence is that the fraud, as laid, was not discovered until after the commencement of the action. Now it is trite law that he who alleges fraud must clearly and distinctly prove the fraud as laid—every material step must be proved by sufficient evidence (*Angus* v. *Clifford*

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(1891), 2 Ch. 449 at p. 479). After the most careful reading of the evidence and analyzing the same throughout, I unhesitatingly say that the respondents have failed to fix upon the appellant the fraud as laid, that he colluded with the late J. Herrick McGregor in the perpetration of a fraud upon the syndicate or partnership. In my opinion, no evidence was adduced sufficient in its nature to fix fraud upon either the appellant or the late J. Herrick McGregor, in truth, I am not satisfied that any fraud of any nature or kind was perpetrated, certainly no collusion was established between the late J. Herrick McGregor and the appellant and everything points to the appellant not being aware of any failure upon the part of the late J. Herrick McGregor to acquaint his associates with the true position and that he was making a profit or participating in the purchase price, in fact a letter and agreement came to the knowledge of Twigg in J. Herrick McGregor's lifetime, *i.e.*, long before 1915, the year in which J. Herrick McGregor gave up his life in the great war, that fully explained matters and no repudiation took place or election to rescind but an election to affirm the contract must be assumed upon the facts. There is the clearest documentary evidence that the appellant was open and frank throughout, and the appellant had every reason to believe that the facts were known to the associates of the late J. Herrick McGregor. He had taken pains to make it known. What a terrible thing to charge fraud in such a case. The late J. Herrick McGregor was a gentleman of high professional and social standing in the City of Victoria. What would entitle the appellant to question his integrity? The joint adventurers never apparently went into the question of the value of the land but profited by Mr. McGregor's great knowledge and experience and heavy outlay of money and expense of surveys borne by McGregor, and now the respondents do not hesitate to defame the fair name and character of a valorous soldier, as the late (Major) J. Herrick McGregor died for his King and country leading on Canada's valiant soldiers in the forefront of battle. This is a matter of common knowledge (Anglin, J. said in *In re Price Bros. and Company and The Board of Commerce of Canada* (1920), 60 S.C.R. 265 at p. 279:

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"The common knowledge possessed by every man on the street, of which courts of justice cannot divest themselves.")

And in the present case the unfortunate situation was that five years after the death of Mr. McGregor, never mooted in his lifetime, with knowledge in his lifetime of the facts in Twigg, this terrible accusation of fraud is made—it revolts one and it should be received with judicial abhorrence.

A still more painful thing has taken place in this action. The widow of the late J. Herrick McGregor, one of the respondents, as executrix of the estate of the late J. Herrick McGregor, has spread upon the pleadings in her defence an allegation of the same fraud, as is alleged by the other respondents, and that her husband, the late J. Herrick McGregor, was guilty of fraud. A more scandalous pleading, I venture to say, was never known in the annals of the law, and whoever is really responsible for instructing or advising such a pleading is entitled to be visited with the severest judicial animadversion. Further, at this bar, counsel appearing for the executrix stated, no doubt instructed to do so, that the fraud of the late J. Herrick McGregor was not contested or denied, in fact admitted. I was appalled by this and there came to my memory what Lord Macnaghten said in the celebrated case of *Neale* v. *Gordon-Lennox* (1902), 71 L.J., K.B. 939:

"I do not think that the Court is entirely in the hands of counsel, and bound to give the seal of its authority to any arrangement the counsel may make when the arrangement itself is not in its opinion a proper one."

Can it be said to be proper or seemly that the executrix, the widow of the late J. Herrick McGregor, should admit that her husband committed a fraud, something inscrutable and something she knew nothing of and impossible of being spoken to by her husband cut off by death? It could only have been advanced to relieve the estate from liability. The pleading should have been struck out, as in effect, being a pleading by the representative of the estate of the late J. Herrick McGregor, it was the pleading of a party's own fraud by way of defence, which is not admissible or permissible. Further, it is the pleading of that which, as I have said, is inscrutable, not proved in the action or capable of proof and, if the late J. Herrick McGregor had not been cut off by death, it might

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well have been that such facts would have been shewn that would have displaced wholly and totally this allegation of fraud. As it is, there is evidence that it came to the knowledge of the respondent Twigg long before, years before, the commencement of this action, that the appellant was not in fact receiving the total purchase price and notice to Twigg was notice to all of the respondents. Further, if it could be said that the appellant was not perfectly clear in his dealings, there is no proof whatever of the fraud as laid, and relief cannot be had (*Mowatt* v. *Blake* (1858), 31 L.T. Jo. 387; *Luff* v. *Lord* (1865), 11 Jur. (N.S.) 50, *per* Lord Westbury at p. 52). What is alleged here is, the fraud and collusion of the appellant and the late J. Herrick McGregor, with not a tittle of proof of it, and fraud will not be carried by way of relief beyond that which is proved to the satisfaction of the Court (*Mowat* v. *Blake, supra, per* Lord Westbury). Further, again, where actual fraud is alleged relief cannot be obtained by proving only a case of constructive fraud, and here actual fraud is set up (*Wilde* v. *Gibson* (1848), 1 H.L. Cas. 605). It would appear that the majority of the Court has come to the conclusion that rescission cannot be decreed but that relief should be granted by way of damages for deceit. Were I of the opinion that fraud was established, I would also have been of the opinion that rescission could not be granted. I cannot come to the conclusion that a case of deceit was made out, quite apart from the fact that there is no alternative claim which, to my mind, is an insuperable obstacle. Clearly *Derry* v. *Peek* (1889), 14 App. Cas. 337 lays it down that without proof of actual fraud no action for deceit is maintainable. At p. 362 Lord Herschell said:

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> "I shall have by-and-by to consider the discussions which have arisen as to the difference between the popular understanding of the word 'fraud' and the interpretation given to it by lawyers, which have led to the use of such expressions as 'legal fraud,' or 'fraud in law'; but I may state at once that, in my opinion, without proof of fraud no action of deceit is maintainable. When I examine the cases which have been decided upon this branch of the law, I shall endeavour to shew that there is abundant authority to warrant this proposition."

(See also Lord Herschell at pp. 373, 374, 375, 376).

Nothing less than a fraudulent intention will suffice for an

action of deceit, and where has it been established that the appellant had any fraudulent intention? What reason had he to believe that J. Herrick McGregor did not disclose all the facts to his associates? The appellant, upon his part, placed in McGregor's hands that which gave complete disclosure, and what reason had the appellant to believe that the information would be withheld, if it were withheld, and there is no evidence that it was withheld, in any case there is express evidence that years before the action was commenced, notice was brought to the respondent Twigg that J. Herrick McGregor was getting a portion of the purchase price and if he did not appreciate the facts that came to his knowledge he should have, and must be held to have become apprised of the fact that all the purchase price of the property was not going to the appellant.

Now, as to fraudulent intention. We have Viscount Haldane, L.C. in *Nocton* v. *Ashburton (Lord)* (1914), A.C. 932 at pp. 953-4 saying:

"It must now be taken to be settled that nothing short of proof of a fraudulent intention in the strict sense will suffice for an action of deceit."

And it was held in *Derry* v. *Peek, supra,* that in an action for deceit the plaintiff must prove actual fraud. In *Angus* v. *Clifford* (1891), 2 Ch. 449, Lindley, L.J. at p. 469 said:

"But, as I say, I base my judgment purposely on the broader ground that after *Peek* v. *Derry* [(1889)], 14 App. Cas. 337, an action of this kind [for deceit] cannot be supported without proof of fraud, an intention to deceive, and that it is not sufficient that there is blundering carelessness, however gross, unless there is wilful recklessness, by which I mean wilfully shutting one's eyes, which is of course fraud."

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Nothing of this nature can be attributed to the plaintiff. Then if an action for deceit was established, no damages have been proved and fraud without damage is not sufficient. The property may well be worth a great deal more than what has been paid for it (*Ajello* v. *Worsley* (1898), 1 Ch. 274; *Derry* v. *Peek* (1889), 14 App. Cas. 337, 374; Lord Blackburn in *Smith* v. *Chadwick* (1884), 9 App. Cas. 187 at p. 196).

The only relief that I think the respondents can be said to be entitled to is the reduction of the principal sum due upon the mortgage by the amount which the late J. Herrick McGregor was to be paid, *viz.,* the $25 per acre, in all the sum of $14,750. This sum the appellant is not entitled to recover,

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as it would go to the executrix of the estate if it were paid, and, as I understand at this bar, counsel for the estate expressly abandoned any claim in respect of these moneys.

The respondents could have accomplished this relief by proper pleading and not embarked upon the untenable contention that there was fraud, in which they have, in my opinion, woefully failed. The authorities which support this view are the following: *Fawcett* v. *Whitehouse* (1829), 1 Russ. & M. 132, 133; 32 R.R. 163; *Bentley* v. *Craven* (1853), 18 Beav. 75, 78; 104 R.R. 373; *Grant* v. *Gold Exploration and Development Syndicate* (1900), 1 Q.B. 233; *Cameron* v. *Cuddy* (1914), A.C. 651, Lord Shaw of Dunfermline at p. 656.

I would, therefore, allow the appeal in part, the appellant being entitled to payment less the amount payable to the late J. Herrick McGregor in respect to the sale of the property. In the result, according to my view, the respondents would fail in the defence of fraud.

Appeal allowed in part.

Solicitor for appellant: *John R. Green.*

Solicitor for respondents Twigg *et al.*: *H. D. Twigg.*

Solicitor for respondent McGregor Estate: *J. B. Clearihue.*

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

PERRIN v. VANCOUVER DRIVE YOURSELF AUTO LIVERY LIMITED.

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PERRIN v. VANCOUVER DRIVE YOURSELF AUTO LIVERY

Motor-car — Hiring out automobile without driver — Accident — Negligence—Liability of owner—B.C. Stats. 1920, Cap. 62, Sec. 35.

A violation of the Motor-vehicle Act arising from the negligence of the hirer of an automobile who drives it himself, creates no civil liability in damages on the owner under section 35 thereof (MARTIN, J.A. dissenting).

APPEAL by defendant from the decision of RUGGLES, Co. J. in favour of the plaintiff for $100 in an action for damages resulting from an automobile collision. The defendant Company kept for hire a number of automobiles which were let out to customers for certain specified times without a driver, the person hiring to arrange for the driving himself. The defendant Company let out a car to one Nelson who drove the car himself. Owing to his driving on the wrong side of the street he ran into the plaintiff, causing the damage for which this action was brought. The learned judge found in favour of the plaintiff in the sum of $100. The defendant Company appealed.

Statement

The appeal was argued at Vancouver on the 1st of April, 1921, before MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Wood, for appellant: There is no definition of "entrusted" in the Act. The word is dealt with in *Phillips* v. *Huth* (1840), 10 L.J., Ex. 65; see also *Moore* v. *B.C. Electric Ry. Co.* (1917), 24 B.C. 314. In the case of *Boyer* v. *Moillet* heard by this Court but in which judgment was reserved the point was discussed [see *ante* p. 216]. My contention is the Act does not apply to a case where the car is hired by another. The liability for violation of this Act is penal and not a civil one: see *Johnson* v. *Mosher* (1919), 50 D.L.R. 321; *B. & R. Co.* v. *McLeod* (1914), 6 W.W.R. 1299; *Mattei* v. *Gillies* (1908), 16 O.L.R. 558; *Verral* v. *Dominion Automobile Co.* (1911), 24 O.L.R. 551.

Argument

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Congdon, K.C., for respondent: It was the special section in the Ontario Act that relieved the defendant in the *Johnson* case, so that it does not apply here. On the question of liability see *Gray* v. *Peterborough Radial R. Co.* (1920), 54 D.L.R. 236; *Couch* v. *Steel* (1854), 3 El. & Bl. 402 at p. 411; *Groves* v. *Wimborne* (*Lord*) (1898), 2 Q.B. 402 at p. 407.

Wood, in reply.

Cur. adv. vult.

2nd August, 1921.

MARTIN, J.A.: Under the contract for the hire of the motor-car in question, I have no doubt that the hirer was "entrusted with the possession" thereof when the owner knowingly permitted him to drive it away from his garage. If the owner did not entrust it to the hirer's keeping when he expected the hirer to use it and pay him for that use to whom did he entrust it, *i.e.,* confide its keeping? In Wharton's Law Lexicon, 11th Ed., 99, "bailment" is defined as

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> "a compendious expression to signify a contract resulting from delivery; perhaps best defined as a 'delivery of a thing in trust for some special object or person, and upon a contract express or implied, to conform to the object or purpose of the trust.'"

On the other point of the civil liability of the defendant, I have nothing to add to the opinion I expressed in *Boyer* v. *Moillet* [*ante* p. 216] in favour of it, and therefore I think the appeal should be dismissed.

GALLIHER, J.A.: Without approving or disapproving of the Ontario and Alberta cases cited to us, and which may be distinguishable under the respective Acts governing them, I am clearly of the opinion that our Act creates no civil liability which did not before exist.

GALLIHER, J.A.

As the defendant clearly is not liable at common law, it follows that the appeal must be allowed.

MCPHILLIPS, J.A.: My reasons for judgment in *Boyer* v. *Moillet* [*ante* p. 216] are determinative of this appeal. It follows therefore that, in my opinion, the appeal should be allowed.

MCPHILLIPS, J.A.

EBERTS, J.A. would allow the appeal.

Appeal allowed, Martin, J.A. dissenting.

Solicitors for appellant: *Lane, Wood & Company.*
Solicitors for respondent: *Congdon, Campbell & Meredith.*

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IN RE MARRIAGE ACT AND EATON.

MACDONALD, J. (At Chambers)
1921
Aug. 10.
IN RE MARRIAGE ACT AND EATON

Marriage—Divorce—Remarrying within six months prohibited by decree —Change of domicil—Effect on prohibition.

An applicant for a marriage licence obtained a decree of divorce in the State of Washington on the 26th of June, 1921, that contained a clause in conformance with the Washington Divorce Act prohibiting the marriage of either party for six months. On the refusal of a licence in July, 1921, the applicant applied for a *mandamus*.

Held, that the prohibition contained in the decree of divorce against the remarriage of either party within six months of the date of the decree is an integral part of the proceeding which must be fulfilled before the parties can contract a fresh marriage, and the application was refused.

APPLICATION for a *mandamus* to compel the issuer of marriage licences to issue a marriage licence. The applicant, C. Eaton, was divorced in the State of Washington, U.S.A., on the 26th of June, 1921. The decree, in accordance with the provisions of the Washington Divorce Act, contained a clause prohibiting the marriage of either party to any third party for a period of six months from the entry of the decree, this being the time limited by the law of the State for institution of any appeal from the decree. Early in July the applicant applied to the issuer of licences for a licence to marry in British Columbia claiming that he had changed his domicil to Vancouver. The issuer of licences refused to issue a licence on the ground that under the terms of the decree he was not

Statement

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competent to contract a legal marriage. Heard by MACDONALD, J. at Chambers in Vancouver on the 20th of July, 1921.

C. L. McAlpine, for the application: The decree having dissolved the marriage, the applicant had the *status* of an unmarried person and the prohibition against marriage was effective only in the State of Washington. Having acquired a new domicil in British Columbia he has the *status* of an unmarried man here, the prohibition against remarriage not being effective in this Province: see *Scott* v. *Her Majesty's Attorney-General* (1886), 11 P.D. 128; *Pierce* v. *Pierce* (1910), 58 Wash. 622; 109 Pac. 45.

Argument

J. A. MacInnes, contra: The prohibition being applicable to both parties should not be considered as final and for that reason is distinguishable from *Scott* v. *Her Majesty's Attorney General* (1886), 11 P.D. 128. The case is covered by the decision and reasoning in *Warter* v. *Warter* (1890), 15 P.D. 152. It was conceded that the applicant was at the time of the divorce domiciled in the State of Washington and that, at the time of the application for a licence, he had acquired a new domicil in British Columbia.

10th August, 1921.

Judgment

MACDONALD, J.: The application should be dismissed. The prohibition against remarriage of either party for a period of six months from the decree was not in the nature of a penalty, but formed an integral part of the decree, and is therefore a bar to the remarriage of both parties during the pendency of the prohibition. In the conflict between the law laid down in *Pierce* v. *Pierce* (1910), 58 Wash. 622; 58 Pac. 45; and that in *Warter* v. *Warter* (1890), 15 P.D. 152, the latter case is the controlling authority. The issuer of licences was right in refusing to issue a licence and a *mandamus* is refused.

Application refused.

REX v. COLUMBIA WINE & SPIRIT COMPANY, LIMITED.

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1921

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REX v. COLUMBIA WINE AND SPIRIT CO.

Criminal law—Prohibition—Sale of liquor—Transaction within Province—Order on Alberta firm—Liquors sent to Alberta and returned—Fictitious transaction—B.C. Stats. 1916, Cap. 49, Sec. 10.

S. asked P. the manager of a liquor company at Golden to sell him a case of whisky. P. said he would have the whisky shipped to Calgary, Alberta, and it would be shipped from Calgary to S. at Revelstoke. S. paid P. $45 for the whisky and then at P.'s request, signed an order on a Calgary firm for a case of whisky which P. retained. Some days later S. received a case of whisky at Revelstoke that had been shipped from Calgary. A conviction of the Liquor Company under section 10 of the Prohibition Act by the stipendiary magistrate at Golden was quashed on appeal to the County Court.

Held, on appeal, reversing the decision of THOMPSON, Co. J., and restoring the conviction, that the transaction was a completed sale which took place wholly within the Province and was in contravention of the Prohibition Act. It was never intended that the liquor should be sent in from an outside firm, the signing of the order and the sending of the liquor to Calgary, thence to be returned, being merely a fictitious attempt to evade the Act.

APPEAL by the Crown from the decision of THOMPSON, Co. J., quashing a conviction by the stipendiary magistrate at Golden, B.C., on the 28th of April, 1921, that the Columbia Wine & Spirit Company, Limited, sold liquor at Golden on the 18th of January, 1921, contrary to the provisions of the British Columbia Prohibition Act. The defendant Company was incorporated in 1905 and carried on a liquor business at Golden. It was under the management of one H. G. Parsons. Two detectives entered Mr. Parsons's store on the 12th of January, 1921, and told him they wanted to buy a case of whisky but he refused to sell to them. A week later they again entered the store and one of the detectives asked Parsons to sell him a case of whisky. Parsons told him he would send a case of Dawson's Scotch whisky to Calgary and have it shipped from there to the purchaser at Revelstoke. The purchaser then paid Parsons $45 for the case and Parsons then produced an order blank which he asked the purchaser to sign,

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which Parsons said was "just a form to make believe that this order was shipped from an Alberta firm." The order was addressed to the "Standard Export Company, Calgary, Alberta," with the request that the Company send a case of Scotch whisky to the applicant at Revelstoke. A week later the purchaser received a case of Dawson's Scotch whisky at Revelstoke that had been shipped from Calgary, Alberta. The stipendiary magistrate imposed a fine of $1,000 and costs.

Statement

The appeal was argued at Vancouver on the 12th of October, 1921, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Argument

Pattullo, K.C., for appellant: The question is whether this was an inter-provincial transaction or whether it was a purchase within the Province: see *In re British Columbia Prohibition Act* (1918), 26 B.C. 137. The shipping of the liquor to Calgary and back again was all done in pursuance of a contract made in British Columbia. The goods were appropriated by delivery to the Express Company and was a complete transaction.

Buell, for respondent: My submission is the transaction was consummated at Calgary by the acceptance there of the order and it was on that order that the case of whisky was sent from Calgary irrespective of whether the whisky had previously been sent there from Golden or not: see *Rex* v. *Shaw* (1917), 29 Can. Cr. Cas. 130 at p. 135.

Pattullo, in reply.

MACDONALD, C.J.A.: I think the appeal must be allowed and the conviction restored. It is only necessary to this end to state the facts of this case as set forth by the learned judge in his notes. He says:

MACDONALD, C.J.A.

"Parsons said he did not see how he could ship whisky to Revelstoke, but would ship to Calgary and have it shipped from Calgary to Revelstoke. Sibley asked how much it would be. Parsons said it would be $45. Parsons asked what kind he wanted. Sibley said the best in the warehouse. Parsons said he would ship Dawson's and it would be the best. Sibley gave Parsons a $50 bill and Parsons gave back $5. Parsons produced an order blank, which he asked Sibley to sign and state what he wanted. Parsons said it was to make believe the order was going to Calgary. He said, 'This is just a form to make believe that this order was shipped

from an Alberta firm.' Sibley wrote an order for one case Dawson's. Parsons said that would be sufficient as it was just a pretense."

Now that is the transaction set forth in the words of the learned judge himself. Clearly a mere fictitious transaction made entirely in British Columbia. It was never intended that the liquor should be sent in by an outside firm. It was a specious attempt to evade the provisions of the Act.

MARTIN, J.A.: This is a case where the admitted facts shew the whisky was sold in British Columbia, but the vendor, in order to evade the Act, as he thought, sent it to Calgary and then sent it back to the purchaser in British Columbia. In the face of a case of that kind I never heard a Court of Justice to give effect to such an admitted scheme.

MARTIN, J.A.

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

GALLIHER, J.A.

MCPHILLIPS, J.A.: In my opinion the transaction was a sale complete in British Columbia and the procedure followed, to send the whisky to Calgary and have it sent from Calgary to Revelstoke, was a mere circuitous process in an endeavour to establish a sale in another Province. It was only a circumlocutionary method of dealing. Everything had been done in British Columbia, under the Sale of Goods Act, constituting a valid and effective sale but an illegal transaction under the British Columbia Prohibition Act, and therefore cannot be sustained.

MCPHILLIPS, J.A.

EBERTS, J.A.: I am of opinion the sale was made at Golden, Province of British Columbia, and therefore would allow the appeal. The conviction must be restored.

EBERTS, J.A.

Appeal allowed.

MURPHY, J.

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Sept. 3.

REX v. THE ARMY AND NAVY VETERANS IN CANADA (VICTORIA UNIT). (No. 2).

Intoxicating liquors—Branch association of incorporated body—Sale of beer—"Person," meaning of—Can. Stats. 1917, Cap. 70—B.C. Stats. 1921, Cap. 30, Secs. 26 and 46.

REX v. THE ARMY AND NAVY VETERANS IN CANADA

The Victoria Unit of The Army and Navy Veterans in Canada, being a branch established in Victoria by that body, which was incorporated by chapter 70 of 7 & 8 Geo. V. of the Statutes of Canada, is not a "person" within the meaning of the Government Liquor Act, 1921, and can not be a subject of conviction under section 26 or section 46 thereof.

Statement

APPEAL by way of case stated from a conviction by the police magistrate at Victoria on the 10th of August, 1921, of The Army and Navy Veterans in Canada (Victoria Unit) on the charge that The Army and Navy Veterans in Canada (Victoria Unit), Victoria, B.C., on the 4th day of July, 1921, at Victoria, B.C., not being a Government vendor did unlawfully sell liquid known or described as beer contrary to the Government Liquor Act. Four questions were submitted to the Court, question two being "whether The Army and Navy Veterans in Canada (Victoria Unit), Victoria, B.C., is a person or corporation within the meaning of the said Government Liquor Act, the same being simply a unit created by The Army and Navy Veterans in Canada under the powers conferred by chapter 70 of the Statutes of Canada, 7 & 8 Geo. V. Argued before MURPHY, J. at Victoria on the 18th of August, 1921.

Mayers, for the Crown.
Twigg, for the Veterans.

3rd September, 1921.

Judgment

MURPHY, J.: In this opinion the Dominion statute, Cap. 70 of 7 & 8 Geo. V., is referred to as "the statute," the corporation thereby created under the name of "The Army and Navy Veterans in Canada" is referred to as "the Association," and the body named in the case stated, "The Army and Navy

Veterans in Canada (Victoria Unit)," is referred to as "the Victoria Unit."

The legal point raised by question No. 1 has already been decided by MACDONALD, J. and, as I intimated I would follow his decision, was not argued before me. I would answer it in the affirmative.

As to question No. 2. "Person," by the Interpretation Act, includes any body corporate or politic. The phrase "or corporation" in this question is, therefore, I think surplusage. "Person" in law may include both a natural person (a human being) and an artificial person (a corporation): *Pharmaceutical Society* v. *London & Provincial Supply Association* (1880), 49 L.J., Q.B. 736. As stated, by virtue of the Interpretation Act, it does not include both as used in the Government Liquor Act. I know of no other entity or concept that, as used in the Government Liquor Act, it can include and none was suggested in argument. Obviously, the Victoria Unit is not a natural person (a human being). Is it an artificial person (a corporation)? If it is, it must be so by reason of something contained in the statute under the provisions whereof, according to the case stated, it was created. The case stated further finds that the Victoria Unit was created by the Association under powers conferred by the statute. There is no power in the statute authorizing the Association to confer the *status* of a corporation on the Victoria Unit. It cannot, therefore, be a corporation by virtue of any act of the Association nor, as I understood his argument, did counsel for the Crown so contend. Since whatever legal *status* the Victoria Unit has must be the creation of the statute; since the Association cannot create a corporation and since the statute creates but one corporation, *viz.*, the Association, it follows that if the Victoria Unit is a corporation, it must be the corporation created by the statute. In other words, "the Victoria Unit" and "the Association" are one and the same artificial person. This, to my mind, is to assert the identity of cause and effect. The statute did not create the Victoria Unit; it authorized the Association (which it did create a corporation) to establish the Victoria Unit. How can a corporation created by statute

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REX v. THE ARMY AND NAVY VETERANS IN CANADA

create another body which is the identical artificial person as itself? In my opinion, to assert that it can involves an absurdity. It was endeavoured, in argument, to maintain the identity of the Victoria Unit and the Association by the analogy of branches of a Canadian chartered bank. But no one, I think, would argue that a Vancouver branch of, say, the Bank of Montreal, is the corporation known as "the Bank of Montreal." The fallacy involved, I think, arises from confusing *status* with agency. Question No. 2 of the case stated deals with *status* not agency. It had to do so, for sections 26 and 46 of the Government Liquor Act deal with *status* not agency. I would answer the question thus, "The Victoria Unit" is not a person within the meaning of the Government Liquor Act.

I do not think, in view of my answer to question 2, that the Court is called upon to answer question No. 3. This question is propounded to obtain light on section 26 of the Government Liquor Act and would be a proper question for submission if the facts of the case stated shewed that any "person," for instance, any servant, officer, or member of the Victoria Unit was the convicted party. The conviction here, however, is against the Victoria Unit. Since I hold "the Victoria Unit" is not a "person" within the meaning of the Government Liquor Act, no case can arise on section 26 of said Act which contains a prohibition aimed at a "person" and at nothing else.

Judgment

For the same reasons, I consider question 4 does not call for an answer, since the prohibition in section 46 of the Government Liquor Act is identical in nature with that contained in section 26.

MARCHIORI v. FEWSTER.

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1921

Sept. 9.

MARCHIORI v. FEWSTER

Costs—County Court—Jurisdiction to award costs against a person not a party to action—R.S.B.C. 1911, Cap. 53, Sec. 161.

The plaintiff after insuring against loss or damage to his automobile, the policy containing a clause that the insurance company be subrogated to all rights of the insured against any person in respect to any matters upon which payments were made under the policy, suffered damages through collision with the defendant. At the instance of the insurance company he brought an action for damages in which he was successful but lost in the Court of Appeal and the costs of the appeal and of the Court below were awarded against him, amounting to $1,165.05. A writ of execution was returned *nulla bona*. The defendant then obtained an order from the County Court that the insurance company pay said costs.

Held, on appeal, *per* MACDONALD, C.J.A. and GALLIHER, J.A., that authority to impose such costs must be found in the statutes as the County Court has no inherent jurisdiction, and no such authority is given by statute, section 161 of the County Courts Act only applying to the parties to the action.

Per MARTIN and MCPHILLIPS, JJ.A.: That apart from any power of inherent jurisdiction a Court may have over the costs caused by the real party, the jurisdiction was conferred by section 161 of the County Courts Act.

The Court being equally divided the appeal was dismissed.

APPEAL by the St. Lawrence Underwriters Agency of the Western Assurance Company from an order of GRANT, Co. J. ordering the present appellant to pay to the defendant the taxed costs of the trial and appeal in an action brought by Marchiori for damages to his motor-car. The facts are that Marchiori and Fewster while driving their respective motor-cars had come into collision. In an action for damages Marchiori succeeded before the trial judge but on appeal the judgment of the trial judge was reversed and Marchiori was ordered to pay the costs of the appeal and of the trial amounting to $1,165.05. Execution issued but the writ was returned *nulla bona*. Later the defendant found that the plaintiff had previously to the accident insured his car in the St. Lawrence Underwriters Agency, the policy containing a clause that the Company be subrogated to all rights of the assured against any

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person in respect of the matter upon which payments were made, and the insurance company was in fact the party to bring the action in the plaintiff's name. The defendant then applied to the County Court judge and obtained the order from which this appeal was taken.

The appeal was argued at Vancouver on the 7th of April, 1921, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Alfred Bull, for appellant: The judgment of the Court of Appeal is enforced under section 21 of the Court of Appeal Rules: see *Re Sturmer and Town of Beaverton* (1912), 25 O.L.R. 566, the Ontario cases being governed by section 74(1) of the Judicature Act: see Holmested's Judicature Act, 4th Ed., 238. As to the order appealed from, first, the amount exceeds the statutory jurisdiction and secondly, under section 161 of the County Courts Act the costs follow the event. Under this section there is no jurisdiction to give judgment for costs against a person not a party to the action: see *In re Dominion Trust Co., Boyce and MacPherson* (1918), 26 B.C. 330; *Perry* v. *Perry* (1917), 3 W.W.R. 315 at p. 329; *Forbes-Smith* v. *Forbes-Smith* (1901), P. 258 at p. 271. An order cannot be made against a stranger to the proceedings: see *Rex* v. *Ashton* (1915), 85 L.J., K.B. 27. His remedy was to proceed under Order XVIII., r. 1 of the County Court Rules.

Argument

J. A. Clark, for respondent: By the doctrine of subrogation the Company could be made plaintiff; the action was brought in Marchiori's name: see *Castellain* v. *Preston* (1883), 11 Q.B.D. 380 at p. 386. We are not bound to apply for security, we have this remedy: see *Re Sturmer and Town of Beaverton* (1912), 25 O.L.R. 566 at p. 572; *Allen* v. *London Guarantee and Accident Company (Limited)* (1912), 28 T.L.R. 254. There is the inherent jurisdiction of the Court and the common law liability on the company to pay Marchiori these costs. By subrogation they have elected to take the risk and place themselves in the position of Marchiori. Marchiori has the right of indemnification against the company for the costs: see

Attorney-General v. *Skinners' Company* (1837), C. P. Cooper 1. This is the only way in which the successful party could proceed: see *James Thomson & Sons* v. *Denny* (1917), 25 B.C. 29 at p. 31; *British Union and National Insurance Company* v. *Rawson* (1916), 2 Ch. 476 at p. 482.

Bull, in reply: There is no inherent jurisdiction in the County Court. The statute states explicitly how the costs are to be paid.

Cur. adv. vult.

9th September, 1921.

MACDONALD, C.J.A.: I would allow the appeal for the reasons stated by my brother GALLIHER.

MACDONALD, C.J.A.

MARTIN, J.A.: In my opinion and quite apart from any power of inherent jurisdiction that any Court may have over the costs incurred therein by the real party, the learned judge below had jurisdiction to make the order appealed from, and rightly exercised it, under section 161 of the County Courts Act, R.S.B.C. 1911, Cap. 53, as follows:

"All the costs of any action or proceeding in the Court not herein otherwise provided for shall be paid by or apportioned between the parties in such manner as the judge shall think fit, and in default of any special direction shall abide by the event of the action, and execution may issue for the recoverey of any such costs in like manner as for any debt adjudged in the said Court."

In section 2 "party" is thus defined:

"'Party' means a party to a suit, action, or proceeding, and includes a body politic or corporate, and every person served with notice of or attending any proceeding, although not named on the record."

MARTIN, J.A.

And in the instructive and similar case of *Re Sturmer and Town of Beaverton* (1911-12), 25 O.L.R. 190, 566, Chief Justice Moss in delivering the judgment of the Court of Appeal, refusing leave to appeal, said, at p. 578, that

"While apparent conflict between some of the early and the later decisions may be pointed at, it is plain that objections founded on technical reasons are no longer permitted to prevent the Court from dealing, so far as costs are concerned, with one who has so intervened as to make himself the substantial though not the ostensible party."

It is submitted that the "substantial," *i.e.*, the real, litigant here is the appellant, and I see no reason why the principle so laid down in Ontario should not be applied to this case, seeing that the language of our statute is fully as wide, nor can I see

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why the principle is altered after judgment has been entered for costs awarded in a sum greater than could have been sued for in the County Court—a judgment for costs in that Court may exceed, and has often far exceeded, the amount of a claim that could have been recovered therein but nevertheless *qua* costs there is no limit for which judgment may be entered and appropriate remedies thereon enforced.

I have not overlooked the divorce case of *Forbes-Smith* v. *Forbes-Smith* (1901), P. 258; 70 L.J., P. 61, relied upon by the appellant, but it has, in my opinion, with every respect, no application because costs were there refused as against the co-respondent in two consolidated actions for the reason that he was held to be, in the special circumstances, " a stranger to the proceedings" (p. 271), being neither a real nor ostensible party thereto, as regards the point in question, under the statutes and rules in question (cited at p. 260), whereas the appellant in the case at bar is admittedly the real litigant and prime and sole maintainer of the litigation which has gone against it and therefore is the party answerable for the consequences thereof.

MARTIN, J.A.

The appeal, therefore, should be dismissed.

GALLIHER, J.A.: In my opinion the appeal should be allowed.

The motor-cars of the plaintiff and defendant came into collision and were damaged. The plaintiff brought action against the defendant and was awarded damages in the County Court. On appeal this judgment was reversed and the defendant taxed the costs of the trial Court and the Court of Appeal against the plaintiff at $1,165.05, and issued execution, but the sheriff returned the writ *nulla bona*. Subsequently the defendant discovered that the present appellant had insured the car of the plaintiff and were in fact the parties behind the action brought against the defendant and responsible for the proceedings, though not a party thereto. On discovering this, the defendant made an application to the County Court judge (GRANT, Co. J.), who ordered that the present appellant (the St. Lawrence Underwriters Agency) pay to the defendant the taxed costs of the trial and Appeal Courts as taxed. The Underwriters Agency appealed.

GALLIHER, J.A.

Several cases were cited to us wherein the Courts in England had exercised their inherent jurisdiction in awarding costs against parties who, although not parties to the proceedings, were the instigators thereof and had a beneficial interest in the outcome. As our County Court has no inherent jurisdiction and is a creature of the statute, these cases have no application and we must look to the statute itself for any authority to impose costs.

I have examined section 161 of the County Courts Act and the different rules and orders cited to us, but in none of these do I find anything which would sustain the order made herein. Section 161, in my opinion, can only have reference to parties to the action.

If the decision in *Re Sturmer and Town of Beaverton* (1912), 25 O.L.R. 566, in the Court of Appeal, is to be taken as deciding that independent of the inherent jurisdiction of the Court, under their Judicature Act as amended to correspond with the English rule as amended in 1890, whereby these words were added:

GALLIHER, J.A.

"And the Court or judge shall have full power to determine by whom and to what extent such costs are to be paid,"

the Courts of Ontario have power to order costs against persons not parties to the suit in circumstances of this kind, I am, with respect, constrained to say that I prefer and adopt the reasoning of Collins, L.J., in *Forbes-Smith* v. *Forbes-Smith* (1901), P. 258, where he says at p. 271, in dealing with section 5 of the English Act of 1890 amending the English rule by adding the words I have just quoted:

"Some limitation must be put upon the generality of the words. They cannot enable the Court to order the costs to be paid by a stranger to the proceedings; they can only mean that the Court may order the costs to be paid by any of the parties."

We have no such broad rule to contend with here, but had we, I would have no hesitation in following the English decision.

MCPHILLIPS, J.A.

McPHILLIPS, J.A. would dismiss the appeal.

The Court being equally divided the appeal was dismissed.

Solicitors for appellant: *Tupper & Bull.*
Solicitors for respondent: *Lennie & Clark.*

RUGGLES, CO. J.

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REX v. QUEEN

REX v. QUEEN.

Desertion—Canada Shipping Act—Justification—Construction of articles.

A fireman signed articles of agreement for a "voyage from Halifax to Vancouver *via* Newport News, thence to any port or ports between the limits of 75 degrees north and 65 degrees south latitude to and fro as required for a period not to exceed twelve months, final port of discharge to be in the Dominion of Canada." The vessel touched at Newport News and Galveston, and Nanaimo and Ocean Falls in British Columbia, where the accused left the ship against the expressed will of the master, and where her cargo was entirely discharged and she loaded a fresh cargo: she also put into English Bay, but did not enter Vancouver harbour.

Held, that on the true construction of the clause, the master was entitled to require the fireman to proceed on the ship to any ports within the prescribed limits and for any period not exceeding a year, for the discharge of the cargo at Ocean Falls did not determine the agreement as the voyage was that of the ship and not of the cargo. The master had a right of election as to which of the ports within the Dominion of Canada, should, within the period of twelve months, be the final port of destination of the ship, and the agreement did not contravene the provisions of section 152, subsection 2(*a*) of the Canada Shipping Act.

Statement

PROSECUTION under section 287 of the Canada Shipping Act for desertion from the S.S. Canadian Rover, tried by RUGGLES, Co. J. at Vancouver on the 9th of August, 1921.

Argument

Mayers, for the Crown, applied to allow evidence to be given under section 288, subsection (3), notwithstanding that the entries in the log were signed only by the master and a corporal of the R.M.C. The application was opposed on the ground that no sufficient cause had been shewn for the exercise of the Court's discretion.

The Court allowed the application, concluding that the master had procured the signature of the corporal for the purpose of introducing an impartial party not connected with the ship.

Price, for the accused, applied to lead evidence to shew that at the time of signing the articles the accused had verbally

stipulated that he should be discharged at Vancouver, and had so stipulated as a condition of signing the articles. This was refused, the Court considering that the whole contract must be found within the articles.

Price, on the merits: The articles contravene section 152, subsection 2(*a*) of the Canada Shipping Act, which is much narrower than section 114, subsection 2(*a*) of the Merchant Shipping Act. Moreover, as soon as the ship reached Vancouver, which she did when she entered English Bay, the accused was entitled to his discharge. Alternatively, if she went to Ocean Falls before touching at Vancouver, there was a deviation. Again, there was justification because the food was bad, and the ash-hoist had broken down before she left Halifax, necessitating an additional number of men, who were not engaged: *O'Reilly* v. *Dryman* (1915), 13 Asp. M.C. 298; *Varuna* (1855), 1 Stu. Adm. 357.

Argument

Mayers: The true construction of the articles is settled by *The Scarsdale* (1906), P. 103; (1907), A.C. 373, and *Haylett* v. *Thompson* (1911), 1 K.B. 311. There was clearly a desertion: *The Pearl* (1804), 5 C. Rob. 224 and the *Amphitrite* (1832), 2 Hag. Adm. 403. The fact of the ship being short-handed, if she were so, is no justification, since there was no danger to life: *Harris* v. *Carter* (1854), 3 El. & Bl. 559; *Hartley* v. *Ponsonby* (1857), 26 L.J., Q.B. 322, *per* Lord Campbell, C.J. at p. 324; *T. and J. Harrison* v. *Dodd* (1914), 30 T.L.R. 376.

RUGGLES, Co. J.: These articles provide for a voyage to Vancouver, thence to any port or ports between the limits of 75 north and 65 south, to and fro, as required, for a period not exceeding one year, the final port of discharge to be in the Dominion of Canada. That contemplates, as I would take it, if the English language means anything, a series of voyages from one port to another over a period not exceeding 12 months.

Judgment

I might as well deal now with the question as to when this comes to an end. It is impossible, in a case of this sort, to fix the exact time, and it would be impossible, not knowing exactly the voyages on which the ship would have to go,

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between what ports, it would be impossible to find out in advance for 12 months the different places at which the vessel is to call. There comes a time, however, when the crew must be discharged. That time, if they are in a Canadian port, is at the end of the 12 months, not later than the end of the 12 months. The contract is one that has to be lived up to by both parties. It seems to me to have anticipated a possibly earlier discharge of the crew than at the end of 12 months. Now, as Mr. *Mayers* remarked, there is only one person who would be the judge of this, and that is the master of the ship. Supposing the ship did call at Vancouver (whether she did or not does not seem to me to affect the case), I presume the crew would just as soon have gone to Ocean Falls as to Vancouver, and I do not think they would have been any slower to sign on if Ocean Falls had been mentioned than if Vancouver were mentioned. The reason that Vancouver was mentioned and not Ocean Falls, I take it to be, is that the shipowners did not know at the time this contract was made that the ship would be required to go to Ocean Falls. They probably did not have a charter to Ocean Falls. However, I do not think it works any hardship on the men by reason of the fact that she went to Ocean Falls instead of to Vancouver. Supposing she did call at Vancouver, then according to the wording of these articles, of this first paragraph pasted on the contract, that anticipates several voyages back and forth. I do not think that it contemplates three months at sea and then the discharge of the crew. It means, as I would take it, in the absence of any authority to the contrary, the signing on for a term of approximately 12 months.

Judgment

Now, the first point I have to decide is, was there a desertion? Desertion is leaving the ship without the proper consent of the commander. There is no question about that, and the men themselves say the captain would not let them go and they left. It is true that one of them did offer to provide a substitute. I do not know what the captain's reasons were for not accepting him; he might have been as good a man and he may not have been as good a man. That, however, is neither here nor there. The sailor was obliged under the

terms of this contract to remain on the ship, and he should have done so. I find that there was, beyond a doubt, a desertion. Now, was that desertion justified? The cases cited by Mr. *Mayers,* as I remarked during his argument, are very familiar. The fact that a little extra work has to be done by men on a voyage would not relieve them in the least, nor does it entitle them to larger pay. Now, the chief trouble seems to have been in connection with the disposition of the ashes. There was nothing shewn with regard to food. [The complaint as to food is here dealt with and not sustained].

With regard to the disposition of these ashes, it appears that the machinery got out of gear at Halifax and was fixed up again, and got out of gear two days before they left. The parts, as I understand the captain, had to come from Collingwood, Ontario. It would take some considerable time to get parts from Collingwood, Ontario, to Halifax, and this break was of a nature of a break of the same character as a breakdown at sea and a sailor would not be entitled to quit his duty if the machinery broke down at sea. Here they were in a similar position; the vessel would have had to lie at Halifax for two or three weeks. If it were anything to endanger their lives, it would have been the owner's duty to remedy it, and there are provisions in the articles by which seamen are obliged to assist firemen and *vice versa,* in a case of necessity. I understand the captain's evidence was that this had been done.

Judgment

MARTIN, LO. J.A.

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Sept. 9.

CROMBIE v. CANADIAN GOVERNMENT MERCHANT MARINE

CROMBIE *ET AL.* v. CANADIAN GOVERNMENT MERCHANT MARINE LIMITED.

Shipping—Seaman's articles—Interpretation of—Effect of differences in natural conditions upon applicability of English decisions—Final port of discharge—Place of in "tramp" voyage.

Courts—Stare decisis—Effect of English decisions—Importance of changes in conditions.

In construing a seaman's articles, some of the reasons upon which English decisions are based which apply to an island with relatively only a small and all-enveloping accessible coast-line need not necessarily be applied where the articles in question have reference to such a vast country as Canada fronting upon two oceans thousands of miles apart, the separated coasts of which are most accessible through a canal owned by another nation (the remarks of Halsbury, L.C. in *Quinn* v. *Leathem* (1901), A.C. 506, as to interpreting decisions in the light of the facts upon which they are pronounced, and *Travis-Barker* v. *Reed* (1921), 3 W.W.R. 770, referred to).

In view of the geographical and nautical facts involved the voyage contemplated by the articles in question herein, was held to be a twelve months "tramp" one "to and fro" within certain latitudes as required by the master (*The Scarsdale* (1907), A.C. 373, followed, and the observations of Lord Collins at pp. 384-5 held to have added force in favour of the defendant herein because of the geographical differences between Canada and England).

Statement

ACTION by a seaman to recover wages alleged to be owing on a contract of employment. Tried by MARTIN, LO. J.A. at Vancouver on the 31st of August, 1921.

Price, for plaintiff.

Mayers, and *A. R. MacLeod,* for defendant.

2nd September, 1921.

Judgment

MARTIN, LO. J.A.: According to articles signed at Halifax, N.S., on February 2nd, 1921, the plaintiff agreed "to serve on board the S.S. 'Canadian Carrier' . . . . . on a voyage from Halifax, N.S., to New York, U.S.A., thence to any port or ports between the limits of 75 degrees north, and 65 degrees south latitude to and fro as required for a period not to exceed twelve months. Final port of discharge to be in the Dominion of Canada."

The ship, which is registered at Montreal, sailed from Hali-

fax on March 4th for New York, where she loaded part of her cargo for Callao, completing her cargo at Baltimore, and sailing on March 17th for Callao *via* the Panama Canal, arriving at Callao on April 2nd, where she discharged cargo and left for Iquique (*via* Africa), arriving on the 19th, where she loaded cargo for Honolulu, arriving there on May 15th, where she discharged cargo, and took on cargo for Vancouver, arriving there on June 3rd and discharged cargo; left Vancouver on June 5th for Nanoose Bay, V.I., loaded part of cargo there and returned to Vancouver on June 14th, where she completed cargo for Montreal and sailed on the 20th for Montreal, *via* Panama, and arrived there on August 7th, 1921, when she finally discharged cargo and paid off her crew, which, according to the evidence of the captain, was the final discharge and "termination" of the voyage.

The plaintiff was the boatswain and claimed the right to be paid off after the ship first reached Vancouver, though only about four and a half months of the twelve months time specified in the articles had expired, on the ground that the voyage was at an end there, that port being, he contended, the "final port of discharge" in Canada, but after discussion his claim was eventually refused by the master, upon instructions from his owners, and so the plaintiff left the ship against the master's orders before June 18th, when she was on the point of sailing for Montreal.

Judgment

The main question is, was he right in his contention, and therefore entitled to the wages he claims? The answer depends upon the true construction of the articles applied to the particular facts, and I have referred to several authorities more or less applicable but, as might be expected, based upon circumstances more or less varying. It is difficult to apply to such a vast country as Canada fronting upon two oceans thousands of miles apart, the separated coasts of which are most readily reached through a canal owned by another nation, some of the reasons upon which English decisions are based which apply to an island having relatively only a small and all-enveloping, accessible coast-line. In *Quinn* v. *Leathem* (1901), A.C. 495 at p. 506; 70 L.J., P.C. 76, Lord Chancellor Halsbury empha-

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sized the point that decisions must be interpreted by the facts upon which they are pronounced, and in the very instructive recent case upon fixtures of *Travis-Barker* v. *Reed* (1921), 3 W.W.R. 770, the Alberta Court of Appeal drew attention to the care that must be taken

"in adopting the decisions of the English Courts on the question of fixtures in view of the very different conditions of this new country and the very different manners and methods of construction of buildings and the very different customs and habits of the people living here, especially their readiness to move from one place to another, and the not infrequent removal even of large buildings, pointing out that what might be considered a very serious injury to soil in England might well be regarded here as quite trivial and negligible":

Per Beck, J.A. at p. 780, and *Cf.* Stuart, J.A. at pp. 773, 776.

Considering these articles, then, upon the geographical and nautical facts before me, I am of opinion that the voyage contemplated was a twelve-months' "tramp," one "to and fro" within certain latitudes, as "required," *i.e.*, by the master. The articles do not in essentials differ from those which were under consideration in *The "Scarsdale"* (1906), P. 103; 75 L.J., P. 31; (1907), A.C. 373; 76 L.J., P. 147, which when carefully examined supports the defendant's submission, though invoked by the plaintiff in support of the view that the voyage ended upon arrival at Vancouver, being the first Canadian port touched at since leaving Canada at the beginning of the voyage. But I am unable to see why the plaintiff was not, under these articles, called upon to go to Montreal as "required" by the master, just as the fireman was called upon to go on to Cardiff as required by the master in *The Scarsdale* case; indeed, this case is if anything a stronger one against the plaintiff, because in *The Scarsdale* case, after the cargo had been discharged at Southampton the ship went on in ballast only to Cardiff as the loading port for the next cargo, whereas here the ship took on a cargo from Vancouver to Montreal, the master fixing that point as the "termination" of the voyage, and the leaving of that discretion to the master was declared to be legal in *The Scarsdale* case. I refer particularly to the judgment of Lord Collins on that point, and cite his observations on pp. 384-5 (1907), A.C.:

Judgment

"Now it is not disputed that the adventure contemplated by this agree-

ment is properly described as a voyage (see *per* Bargrave Deane, J., Vaughan Williams and Stirling, L.JJ.), though it covers many possible distinct subordinate adventures involving the discharging and receiving of cargoes at many different points 'trading in any rotation.' The maximum period, *viz.*, one year, is named, and the places or parts of the world to which the voyage or engagement is not to extend are defined. Nor was exception taken to the provision giving discretion to the master to name the port within home trade limits at which the voyage, treating that word as concerned with the transit and delivery of cargo only, was to end. How, then, was the suggested element of illegality introduced into the discussion? With the greatest deference to the eminent counsel who argued for the appellants, be it said, simply by begging the question. On the assumption that the voyage ended at the port where the last cargo was delivered, a provision that the master might order the ship on to a fresh destination might involve the commencement of a new voyage and so sin against the statute; but if the voyage did not end till the ship had reached her destination at the home port required by the master, there is nothing upon which to found an implication of illegality. I agree with the contention of Mr. Hamilton, which was adopted by the Court of Appeal, that the voyage contemplated for the cargo need not be co-extensive with that contemplated for the ship, though it very often is. I think it is very much to be deprecated that the Court should be subtle to find implications of illegality having the effect of hampering freedom of contract in business matters where no express prohibition can be found."

Judgment

And these observations have added force in favour of the defendant in view of the geographical differences between Canada and England already referred to.

Being of this opinion, it is unnecessary to consider the other questions raised, and therefore the action must be dismissed, with costs, and it follows that the defendant is entitled to judgment upon the counterclaim, the small amount of which is not disputed.

Action dismissed.

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DOMINION TRUST CO. v. BRYDGES

DOMINION TRUST COMPANY v. BRYDGES *ET AL.*: TORONTO GENERAL TRUSTS CORPORATION, INTERVENER.

Costs—Appeal book—Irrelevant matter—Included at instance of successful respondent—Cost thereof ordered against successful respondent—Marginal rule 872c.

The Court of Appeal has jurisdiction to order a successful respondent to pay the additional costs occasioned by the inclusion in the appeal book of certain material insisted upon by the respondent that was irrelevant to the issues raised on the appeal.

Statement

MOTION to the Court of Appeal by the unsuccessful appellant (defendant Brydges) that the costs incurred by him by reason of including in the appeal book a certain portion of the notes of evidence which he contended was irrelevant to the questions to be decided in the appeal but which the respondent insisted should be included should be ordered to be paid by the respondent to the appellant. Heard by MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A. at Victoria on the 2nd of August, 1921.

Argument

Bucke, for the motion.

Sir C. H. Tupper, K.C., for respondent Toronto General Trusts Corporation, took the preliminary objection that under the marginal rules 872B. and 872C. added to marginal rule 872 (see B.C. Gazette, 1921, Vol. 1, p. 393) this was entirely a matter for the taxing officer the discussion of such details not being a matter for the Court of Appeal.

Bucke: It is impossible for any other forum than this Court to determine the necessity of this material: see Privy Council rule 9; see also *James Thomson & Sons* v. *Denny* (1917), 25 B.C. 29; *Wand* v. *Mainland Transfer Company* (1919), 27 B.C. 340.

Tupper, in reply.

Cur. adv. vult.

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MACDONALD, C.J.A.: By order in council, dated the 31st of July, 1920, the following rule was made:

"872c. Where in the course of the preparation of the appeal-book, one party objects to the inclusion of a document or of a portion of the notes of evidence on the ground that it is unnecessary or irrelevant and the other party nevertheless insists upon it being included, the appeal-book, as finally prepared, shall, with a view to the subsequent adjustment of the costs of and incidental to such document or notes of evidence, indicate in the index of papers or otherwise the fact that, and the party by whom, the inclusion of the same was objected to."

After the dismissal of the appeal, counsel for the appellant applied to the Court for a direction that the costs incurred by his client by reason of the respondent's insistence upon the inclusion in the appeal book of a certain portion of the notes of evidence, which he contended was irrelevant to the questions to be decided in the appeal, and which, I think, clearly was so, should be ordered to be paid by the respondent to the appellant. This portion of the notes of evidence had been duly indexed, pursuant to the rule. I think the only effect of the rule, if indeed it required a Rule of Court to effect that purpose, was to enable the party opposing the inclusion of the notes of evidence in the appeal book, to have the same earmarked for identification in view of a subsequent adjustment of the costs.

MACDONALD, C.J.A.

It was argued that the taxing officer is the one to make such adjustment, in other words, that the taxing officer is to decide how the costs of such notes of evidence should be disposed of as between the parties. It is hardly needful to point out that the taxing officer can only tax where there is an order of the Court that one party shall recover costs from the other. When an appeal is dismissed and no special order is made by the Court disposing of the costs otherwise than to the successful party, the costs are to be taxed to the respondent and while the officer may disallow items which he shall consider irrelevant to the issues raised in the appeal, he has no power to saddle such costs upon the successful respondent. Is the party then who rightly opposes inclusion of unnecessary matter in an appeal book without means of redress for the expenditure occasioned thereby? I think not. While the general costs

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of the appeal are by statute directed to be given in accordance with the event, yet the Court has power, for good cause, to order that they be otherwise disposed of, and that being so, *a fortiori,* the Court has power to order that the costs of particular matters or issues shall, for good cause, be otherwise disposed of.

With respect to the general costs of an appeal, it is, I think, the practice not to order the successful respondent to pay these to the unsuccessful appellant. He may be deprived of them for good cause, but it has not been the practice, I think, to order him to pay them: *James Thomson & Sons* v. *Denny* (1917), 25 B.C. 29. We are not here, however, dealing with the general costs of the appeal but with particular costs. It is, I think, clear that before the Judicature Act, the Court of Chancery enjoyed and exercised jurisdiction inherent in the Court to impose costs of particular proceedings upon the party who ought to pay them, irrespective of whether he were the plaintiff or defendant. When, therefore, there is in the opinion of the Court, good cause for ordering that the costs of a particular proceeding or matter in the appeal, should be paid by the successful party, the Court has full discretion and, in the exercise of that discretion, may order a respondent as well as an appellant to pay such costs.

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Jessel, M.R. in *Dicks* v. *Yates* (1881), 18 Ch. D. 76 at p. 85, after pointing out that the Court had power to deprive a successful defendant in an action of the costs of the action, also pointed out that the Court had

> "a discretion to make him pay perhaps a greater part of the costs by giving against him the costs of the issues on which he fails, or costs in respect of misconduct by him in the course of the action."

The misconduct here referred to, is, I take it, legal misconduct. That was the exercise of the inherent power of the Court, a power which this Court possesses in as full a measure as did the former Court of Chancery, subject of course to the restrictions imposed by statute, which restriction is wholly removed when good cause is found. The practice which prevailed in England is considered more at large in *James Thomson & Sons* v. *Denny, supra.*

The said rule 8c neither adds to nor detracts from this

inherent jurisdiction; it confers no new power upon the taxing officer, but provides, very properly, I think, a means of earmarking the particular material in the appeal book, in respect of which the Court may later be asked to give relief. This power ought, I think, to be exercised with due caution, having regard to the fact that it is often difficult for counsel to determine with precision what evidence or material may or may not be regarded by the Court as of value. The Court, however, at or after the delivery of judgment in the appeal, should be in a much better position to decide questions of this character than any officer of the Court, since the evidence would be fresh in our minds.

MACDONALD, C.J.A.

As I have already said, I think the notes of evidence in question were clearly irrelevant to the issues raised in the appeal and therefore would order that the costs of and incidental to their inclusion in the appeal book should be paid by the respondent to the appellant, or set off against the general costs of the appeal.

MARTIN, J.A.: During the argument we ruled that a considerable body of evidence which had been before the trial judge and was included in the appeal book at the insistence of the respondent (The Toronto General Trusts Corporation) was irrelevant to this appeal and therefore should not be referred to. The appeal was dismissed and the appellant's counsel thereupon moved that though the respondent corporation was successful yet it should be ordered to pay the unnecessary costs occasioned by the inclusion, at its wrongful instance, of the irrelevant matter in the appeal book.

MARTIN, J.A.

This Court has inherent jurisdiction to control the appeal books before it, and can always say whether or not there has been an abuse of its process by the conduct of a party in unnecessarily increasing the costs of litigation. Usually, if the appeal book contains matter which it ought not to contain, the proper course is to make a formal motion, to be heard when the appeal is called on, to the Court to strike it out of the appeal book, but there are exceptional cases, like the present, where because the matter objected to was before the Court

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below (or it may be for other causes) that course may not be the most desirable and the question may better be left for elucidation to await the course of the hearing, and after its conclusion a motion may be made in accordance with any ruling that may have been given, as was done herein. The costs of and occasioned by such wrongful inclusion of matter are quite distinct from those of the "event" of the appeal, and are not affected by any statute or rule. On the special facts of the present case I agree that the order asked for should be made, with the costs of this motion.

MARTIN, J.A.

I express no opinion on the effect of the new rule 872B, other than to say, first, that it does not apply adequately, if indeed at all, to the facts of this case, and second, that it is clumsily and ambiguously worded and obviously incomplete: its construction, however, should be postponed to an appropriate occasion. The motion should be allowed with costs.

GALLIHER, J.A.: This is an application by an unsuccessful appellant asking not only that we disallow the successful respondent's costs (if any) of the inclusion of certain material in the appeal book, but that we order the respondent to pay the costs of such inclusion to the unsuccessful appellant.

The circumstances are these: In preparing the appeal book the appellant opposed the inclusion of this material and the respondent insisted on its going in and was upheld by the registrar, with the result that the appeal book as it was settled and came before us, contained this material. The cost of this amounted to a considerable sum. This Court was of the opinion that this material was not necessary or relevant to the matter to be argued before us, although it was adduced at the trial. There can be no question as to our jurisdiction in a proper case to refuse costs to the respondent for good cause. Apart from any statute or rule governing the matter, our jurisdiction would be that which was vested in the Court of Chancery in England prior to the Judicature Act. Our rule limiting that jurisdiction is to the effect that costs follow the event, unless the Court for good cause otherwise orders. But

GALLIHER, J.A.

we are asked to go further here, and to award costs to an unsuccessful appellant.

It is to be noted that the costs we are asked to award are not the general costs of appeal. This, I have no doubt, we could not do, and I refer to the case of *James Thomson & Sons* v. *Denny* (1917), 25 B.C. 29, where the Chief Justice has collected and discussed the English cases, and as I view those cases, has drawn the proper inferences therefrom.

The costs we are asked to award here are, as I have before stated, not the general costs of appeal but specific costs incurred in that appeal brought about entirely by the wrongful insistence of the respondent and against the express opposition of the appellant. In other words, the appellant was burdened and wrongly so with these costs by the wrongful insistence of the respondent. To the extent to which costs are asked here, I think we have the jurisdiction, but I feel much as Lord Justice Knight Bruce expressed it in *Dufaur* v. *Sigel* (1853), 4 De G.M. & G. 520, that it is a jurisdiction of considerable delicacy and difficulty. No general rule could very well be laid down and the circumstances of each case would have to be considered. Both parties are entitled to have all the evidence that may be relevant to the issues in appeal included in the appeal book, or, I will go further and say, that may be fairly and reasonably considered to be so, but where as here, in my opinion, it should have been apparent that the evidence was not necessary or relevant for the purposes of appeal and the appellant, against his will, was forced to include it and incur unnecessary expense, he should be reimbursed those expenses by the party in fault.

GALLIHER, J.A.

I think it is a proper case in which to grant the application and with costs.

McPHILLIPS, J.A. concurred in the result.

MCPHILLIPS, J.A.

Motion allowed.

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MARSHALL v. THE CANADIAN PACIFIC LUMBER COMPANY LIMITED, AND THE TRUSTEES CORPORATION, LIMITED.

MARSHALL v. CANADIAN PACIFIC LUMBER CO.

Sale of land—Auction in pursuance of order of Court—Whole property of company—One parcel not included in particulars by mistake—Right to order delivery of omitted parcel.

The defendant Lumber Company having gone into liquidation, the receiver was empowered by order of the Court to borrow a certain sum from a bank to cover a debt to said bank and provide funds for operation, the order further providing that the sum borrowed should be a first charge on the whole property and assets of the Company and that in default of repayment the bank could sell the property. Default having taken place the bank sold what was intended to be the whole of the Company's property by public auction to another company, but a certain lot with adjoining water lot belonging to the company were not included in the particulars of sale the solicitor being under the impression that this plot had been expropriated by the Dominion Government, whereas, in fact the Government had previously given notice of abandonment of the plot of which he was not aware. The bank believed that it was selling and the purchasing company believed that it was buying the whole property. On motion of the bank and of the purchasing company it was ordered that the receiver execute and deliver to the purchasing company a conveyance of said lot and adjoining water lot.

Held, on appeal, reversing the order of MORRISON, J. (MARTIN, J.A. dissenting), that the appeal should be allowed as the property in dispute was deliberately excluded from the particulars of sale and cannot be said to form a part of what was offered for sale or purchased.

Statement

APPEAL by plaintiff and defendant Trustees Corporation from the order of MORRISON, J., of the 5th of May, 1921, directing the receiver of the defendant Lumber Company to execute and deliver to the London & Canadian Investment Company, Limited, a conveyance of lot 14, block 1, subdivision "D" of district lot 183, group 1, New Westminster District, and that portion of the foreshore abutting on said lot 14. In an action by the bondholders of The Canadian Pacific Lumber Company Limited to enforce payment of the bonds an order was made by MURPHY, J. on the 20th of July, 1917, granting the receiver leave to borrow $310,000 from the

Dominion Bank to cover an indebtedness to the Bank and to provide funds for carrying on the Company's operations; the order further provided that the Bank should have a first charge on all the Company's assets and that in default of payment of the debt as therein provided the Bank was empowered to sell and dispose of all the assets of the Company in order to discharge the debt. The lot in dispute and the adjoining water lot were expropriated by the Dominion Government in 1913, for wharf purposes, but finding later that it was not so required the Dominion Government gave notice of abandonment which was served on Messrs. Davis & Co. in February, 1914, the then solicitors of the receiver. Default having been made in payment of the moneys borrowed under the order of MURPHY, J. above referred to the Dominion Bank proceeded to sell by public auction all the property of the Canadian Pacific Lumber Company and the London & Canadian Investment Company, through its manager E. W. Hamber, became the purchasers. Before the sale Mr. Tiffin had become solicitor for the receiver. He was not advised of the abandonment of lot 14 and the adjoining water lot by the Dominion Government and in preparing the conditions and particulars for sale of the assets of the Company he did not include lot 14 and the adjoining water lot. After the sale had been completed it was discovered by the purchasers that lot 14 and the adjoining water lot were not included in the transfer and on the ground that it was the intention of all parties that the sale was to include all the assets of the Company, they applied to the receiver for execution of a transfer of these lots to the purchaser. This was refused by the receiver and on the application of the purchasers an order was made by MORRISON, J. directing the receiver to execute and deliver a conveyance to the purchasers of the lots in question, from which this appeal is taken.

Statement

The appeal was argued at Victoria on the 15th of June, 1921, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Congdon, K.C., for appellants: The property of the company was sold under the provisions of the order of Mr. Justice

Argument

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MURPHY, of July, 1921. The bank selected the mode of sale and the purchasers had before them a list of the properties to be sold.

A. Alexander, for respondent: All parties concerned intended that the whole of the assets of the Company were to be sold in one lot. Owing to a change of solicitors the fact that the Government had abandoned its expropriation proceedings did not come to the notice of the solicitor who had the matter in hand. This is a sufficient ground for rectification. [He referred to *In re St. Nazaire Company* (1879), 12 Ch. D. 88, and *Nocton* v. *Ashburton (Lord)* (1914), A.C. 932.]

Symes, on the same side, referred to *In re Thellusson. Ex parte Abdy* (1919), 2 K.B. 735.

Argument

Congdon, in reply, referred to *Kennedy* v. *De Trafford* (1896), 1 Ch. 762; *Catterall* v. *Sweetman, falsely calling herself Catterall* (1845), 9 Jur. 951. This is an executed contract: see Williams on Vendors and Purchasers, 2nd Ed., 784-5; *Fowler* v. *Fowler* (1859), 4 De G. & J. 250; *Mackenzie* v. *Coulson* (1869), L.R. 8 Eq. 368; Halsbury's Laws of England, Vol. 21, p. 6; *The Duke of Beaufort* v. *Neeld* (1844), 12 Cl. & F. 248 at p. 285; *Preston Banking Company* v. *William Allsup & Sons* (1895), 1 Ch. 141.

Cur. adv. vult.

9th September, 1921.

MACDONALD, C.J.A.

MACDONALD, C.J.A. concurred with GALLIHER, J.A.

MARTIN, J.A.

MARTIN, J.A.: This appeal should, I think, be dismissed, because as I briefly view the matter on the facts before us, it is one where all concerned admittedly intended that the whole estate of the defendant Lumber Company should be sold in one lot but by a mistake of fact this mutual design failed as to one out of the 130 parcels set out in the particulars of sale, which was omitted in the mistaken belief that it was not the property of said Company. If this be the correct view of the facts, then, with all respect, I am unable to perceive any legal ground upon which the order below, giving effect to this intention, should be set aside. This view is confirmed by the order of July 20th, 1917, authorizing the receiver of the Lumber Com-

Company to borrow certain sums from the Dominion Bank, which were to be a charge "upon the whole property and assets" of the company, and directing the sale "of the said property either by public auction or tender" in case of certain specified default in repayment, subject to a reserve bid to be fixed by the Court and the settlement of all questions relating to the sale by the registrar in case of disagreement between the bank and the receiver; and the receiver's certificates, A and B, evidencing the first charge for said loans under such Court order, recite that "the said charge will be by way of security upon the whole of the said assets as aforesaid."

In the notice of sale of September 3rd, 1920, given under and in pursuance of said order of July 20th, 1917, it is notified that "there will be offered for sale by public auction in one lot . . . . the property of the Canadian Pacific Lumber Company (in liquidation) situate in the Province of British Columbia, shortly described as follows": then follows a short description which was afterwards expanded into fuller particulars. I find nothing here, having regard to the antecedent circumstances, to indicate that "the property" thus intended to be sold was anything short of the "whole property and assets" originally dealt with by the said order empowering the sale to be held, and the said notice of sale requested inquirers "for further particulars, terms and conditions of sale [to] apply to the vendors' solicitors," which course was adopted by the London & Canadian Trust Company, Limited (which became the purchaser at the sale on October 11th, 1920), as is set out in the affidavit of its managing director, Hamber, and he received the assurance from said solicitors that all the property and assets of the Company were to be included in the one lot as offered for sale as aforesaid. In all these circumstances, I am quite unable to see upon what ground the Court can refuse to find a remedy for such an obvious failure in the carrying out of the admitted intention of all concerned and, therefore, I think the order appealed from was rightly made. Furthermore, I think it can be supported on another ground, *viz.*, that the missing lot, No. 14, is in fact included in the particulars, as explained by the affidavit of Hamber, where it

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is identified as part of the piling ground of the mill property (to which it is necessarily appurtenant), subject to a certain lease as therein mentioned.

GALLIHER, J.A.: This is an appeal from the order of MORRISON, J. by which it was ordered that the receiver, L. A. Matthews, do execute and deliver to the London & Canadian Investment Company, Limited, a conveyance of a certain lot 14, as therein described, together with a portion of the foreshore abutting on said lot, also fully described in said order.

Matthews was the receiver for the defendant, the Canadian Pacific Lumber Company, Limited (in liquidation), and as such receiver was, by order of the Court (MURPHY, J.), empowered to borrow large sums of money from the Dominion Bank for the purpose of carrying on the business of the Company, and by said order the sums so borrowed, together with interest, were declared to be a charge upon the revenues and upon the whole property and assets of the Company. It was further provided that in default of payment of moneys so advanced that the Dominion Bank should, under certain conditions, and after giving certain notice, be at liberty to sell the property of the said Company in the manner directed in the said order. Default having been made the Bank proceeded to sell the property by public auction and the respondent, the London & Canadian Investment Company, through its manager, E. W. Hamber, became the purchasers at such sale.

GALLIHER, J.A.

This lot 14 and that portion of the foreshore abutting thereon, which I have before referred to, were not included in the particulars of sale and upon discovering, after the sale, that they had been omitted, application was made to the receiver to execute a transfer of these to the purchaser. This was not acceded to and an application was made to MORRISON, J., who granted the application and made the order appealed from. This application was made jointly by the Dominion Bank and the London & Canadian Investment Company, Limited, represented by separate counsel at the hearing. There was also represented by counsel at the hearing, the receiver, the plaintiffs, the defendant, the Canadian Pacific Lumber Company Limited, and the Trustees Corporation Limited.

It appears that in February, 1913, the Dominion Government expropriated the whole of lot 14 and the water lot adjoining for the purpose of constructing a Government wharf, and later on, discovering that the whole of said lot and water lot were not required for such purposes, the minister of public works of Canada gave notice of abandonment of that portion of lot 14 and water lot adjoining, which is now the subject of dispute, said notice bearing date the 5th of February, 1914, and served on Messrs. Davis & Company, solicitors for the receiver, on or about the 16th of February, 1914. Mr. *Tiffin* who appeared on behalf of the receiver, in the expropriation proceedings was not aware of this abandonment, as the receiver's solicitors at that time were Messrs. Davis & Co. In preparing the conditions and particulars for sale on behalf of his clients, the Dominion Bank, Mr. *Tiffin* not being aware of the abandonment, excluded lot 14 and the adjoining water lot, as he thought the Dominion Government had taken all of said lot and water lot and that they were no longer the property of the Pacific Lumber Company (in liquidation). These particulars were checked up with a Mr. Speer, in the office of Davis & Co., who apparently had forgotten or did not know of the abandonment by the Government.

It is abundantly clear that the Dominion Bank intended to sell under its securities all the property of the Pacific Lumber Company, and the receiver states that, had he known lot 14 and the water lot were not included in the particulars, he would have had same inserted before the sale, as he was aware of the abandonment. It is equally clear, I think, from Mr. Hamber's affidavit, that he thought he was bidding on the whole of the Company's property, including lot 14, as he says that prior to the sale he had seen this property used as a piling ground for the mill and though he did not identify the description with that in the particulars, he took it into consideration in the valuation on which his bid was based and believed it was included. Moreover, he made enquiries and was justified in believing from such enquiries that he was purchasing the whole of the Company's property.

We have then this situation: the Dominion Bank believed

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they were selling all the Company's property and the purchasers believed they were purchasing same. But the fact is that the property in question was not included in the particulars and was never sold (subject to a phase of the question I will deal with later).

Now as I have before pointed out, it seems clear that it was the intention to sell and the intention to purchase all the Company's property, but through a misapprehension as to the ownership of the property in dispute, it was deliberately excluded from the particulars of sale and cannot be said to form a part of what was offered for sale or purchased.

The phase of the question referred to above is whether under the following paragraph the property in question could be said to come within the word "plant":

"On the property situate at Vancouver are mill buildings, plant and machinery fully equipped for a capacity of approximately 80,000 feet per day. The mill is at present leased to a lessee whose lease expires on January 1st, 1921."

Now a piling ground is a very necessary adjunct in connection with a mill of this capacity, or any mill for that matter, but whatever force there might be in the contention that as such it might be treated as "plant," is, I think, nullified by the fact that under the heading "Vancouver" in the particulars, we find a particular description of the real estate connected with this mill site set out and the property in question forms no part of that description, neither is the lease mentioned, so that we are in no position to determine whether that would throw any further light on the matter.

GALLIHER, J.A.

I regret to have to come to the conclusion that the appeal must be allowed, as I have no doubt that but for the misapprehension on the part of Mr. *Tiffin* this matter would never have been before us. In connection with this I wish to point out that, in my opinon, there is not a shadow of suspicion that can attach to the *bona fides* of either Mr. *Tiffin* or Mr. Hamber in this transaction. Both acted *bona fide* throughout, and unfortunately for Mr. Hamber or his Company, he believed he was bidding on and purchasing something not actually included in the sale particulars.

McPHILLIPS, J.A. concurred in the judgment of GALLIHER, J.A.

Appeal allowed, Martin, J.A. dissenting.

Solicitors for appellants: *Davis & Co.*

Solicitors for respondent Dominion Bank: *Tiffin & Alexander.*

Solicitor for respondent London & Canadian Investment Co., Ltd.: *A. Whealler.*

REX v. LAI COW *ET AL.*

Criminal law—Certiorari—Evidence—Affidavit—Sworn before notary public—Crown Office Rules—Criminal Code, Sec. 576—R.S.C. 1906, Cap. 145, Sec. 35—R.S.B.C. 1911, Cap. 78—B.C. Stats. 1916, Cap. 21, Sec. 2.

An affidavit proving service of process on a magistrate on an application to quash a conviction by way of *certiorari*, cannot be sworn before a notary public or a justice of the peace, as neither is an officer authorized to take affidavits under Crown Office Rules relating to *certiorari*.

APPLICATION to make absolute four orders *nisi* for four writs of *certiorari* in respect of four convictions by the police magistrate at Prince George, made on the 11th of May, 1921, whereby each applicant was convicted of keeping a disorderly house, to wit, a common gaming-house in Quebec Street in the said City of Prince George on or about the 5th of April, 1921. The affidavit on file proving service on the justice or magistrate was sworn before a notary public in and for the Province of British Columbia, and the affidavit verifying copies of the proceedings and convictions was sworn before a justice of the peace in and for the Province of British Columbia. Heard by GREGORY, J. at Chambers in Victoria on the 21st of September, 1921.

Statement

GREGORY, J. (At Chambers)

1921

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Argument

Higgins, K.C., for the application.

Lowe, for the police magistrate, took the preliminary objection that the affidavits were nullities as they were sworn before functionaries who had no power to take such affidavits in matters of criminal procedure. The British Columbia Evidence Act which authorizes these functionaries to take affidavits in British Columbia in matters in which the jurisdiction of the Province prevails cannot apply in respect of a charge which is governed by the Criminal Code of Canada. [He referred to *Rex.* v. *Jones* (1911), 16 B.C. 117; *In re Tiderington* (1912), 17 B.C. 81, and rule 9 of the Crown Office (Civil) Rules which are incorporated in the Crown Office (Criminal) Rules].

Higgins: Section 35 of the Canada Evidence Act gives authority to the functionaries named in the British Columbia Evidence Act to take these affidavits.

29th September, 1921.

GREGORY, J.: The rule *nisi* must be discharged. Mr. *Lowe's* objection to the affidavit of verification must, I think, prevail. Crown Office (Criminal) Rule 1 provides that in *certiorari* proceedings the practice shall be the same as in civil proceedings. Crown Office (Civil) Rule 9 provides that affidavits shall be sworn before a judge, district registrar, commissioner to administer oaths or officer empowered under the Rules of the Supreme Court to administer oaths. The affidavit herein was sworn before a notary public and the Rules of the Supreme Court make no provision for the swearing of an affidavit before a notary public.

Judgment

The Crown Office Rules (Criminal) were made under the authority of section 576 of the Criminal Code. That section provides that no rule so made shall be inconsistent with any statute of Canada, and it is objected that the rule is inconsistent, for section 35 of the Canada Evidence Act which provides that:

"In all proceedings over which the Parliament of Canada has legislative authority, the laws of evidence in force in the Province in which such proceedings are taken, including the laws of proof of service of, any warrant, summons, subpoena, or other document, shall, subject to the provisions of this and other Acts of the Parliament of Canada, apply to such proceedings."

And section 61 of the British Columbia Evidence Act, as amended by Cap. 21, section 2, of 1916, provides that an affidavit to be used before a judge of the Supreme Court, etc., may be sworn before a notary public.

This objection would be good were it not for the last clause of section 35 of the Canada Evidence Act, which is the only authority for giving the British Columbia Evidence Act any standing in criminal proceedings, which this is, but the final clause of that section says that the Provincial laws of evidence "shall be subject to the provisions of this and other Acts of the Parliament of Canada."

The Criminal Code is another Act of the Parliament of Canada, and it by said section 576 pointedly and explicitly gives to the judges the right to make rules governing the practice in *certiorari, habeas corpus,* etc., provided they are not inconsistent with any statute of Canada. There is no inconsistency in the rule with any such statute, and if there is any conflict between the Canada Evidence Act and the Criminal Code I think the language in the code must govern, as it deals explicitly with practice in *certiorari* while the Evidence Act is general. It is also to be noted that at the date of the coming into force of these Acts and the Crown Office Rules in question (1906), there was no provision in our British Columbia statutes for the swearing of an affidavit in *certiorari* proceedings before a notary public. That was not possible until the amendment of our Evidence Act in 1916.

Judgment

Rule nisi discharged.

MORRISON, J. (At Chambers)

1921

Oct. 24.

IN RE BRADLEY

IN RE BRADLEY.

Shipping—Stranded ship—Investigation into loss—Assessors—Selection of —Delegation of authority — Suspension of captain — Submission of defence—R.S.C. 1906, Cap. 113, Secs. 783, 784, 795 and 801(3).

The minister of marine and fisheries has no power to delegate to a local wreck commissioner the authority to select assessors on an investigation into the loss of a ship. The power to so select is given to the minister only under sections 783 and 784 of the Canada Shipping Act. Under sections 795 and 801(3) of said Act there must be, at some time during inquiry proceedings, definite charges formulated and after notice, an opportunity afforded to meet them, before a certificate can be suspended. Certain general questions with relation to the stranding and submitted before the hearing, were held not to be definite charges such as to enable one who is under inquiry to controvert the matters in respect of which he was in jeopardy of being found in default.

Statement

APPLICATION by the master of a ship by way of *certiorari* for a rule absolute to quash the finding of a Court of Inquiry under the Canada Shipping Act suspending his captain's certificate for a period of six months. The British steamship Canadian Exporter was stranded on the 31st of July, 1921, and the minister of marine and fisheries delegated the power of selecting the assessors to the local wreck commissioner at Victoria, who selected a Board, and after the evidence was heard the Board suspended the captain's certificate for six months. Heard by MORRISON, J. at Chambers in Vancouver on the 3rd of October, 1921.

McTaggart, for the application.
Reid, K.C., for the Wreck Commissioner.

24th October, 1921.

Judgment

MORRISON, J.: There was a formal investigation pursuant to the Canada Shipping Act into the loss of the British steamship Canadian Exporter, which was stranded July 31st, 1921, directed by the minister of marine and fisheries of Canada, who delegated the power of selecting the assessors to the local wreck commissioner at Victoria. The commissioner selected his

assessors and served Captain Bradley with notice of the hearing, accompanying which were set out a number of questions for the opinion of what he termed "the Court" as follows:

"1. What number of compasses had the vessel; were they in good order and sufficient for the safe navigation of the vessel, and when and by whom were they last adjusted?

"2. Did the master ascertain the deviation of his compasses by observation from time to time; were the errors correctly ascertained and the corrections to the courses properly applied?

"3. Was the vessel supplied with proper and sufficient charts and sailing directions?

"4. Was the vessel navigated at too great a rate of speed for the six hours immediately preceding the stranding, having in view the conditions of the weather?

"5. Was the lead used at any time during the six hours immediately preceding the stranding? If not, should it have been used?

"6. What was the cause of the stranding and loss of the vessel?

"7. Was the vessel navigated with proper and seamanlike care?

"8. Was the stranding of the British steamship Canadian Exporter, and or subsequent loss, caused by the wrongful act or default of the master, first, second or third officers, or any one or more of them, and, if so, which of them?"

The captain appeared with counsel and gave evidence along with many other witnesses, after which the Board handed down their findings suspending the captain's certificate for six months. He now applies for a rule absolute to quash this finding. His counsel, Mr. *McTaggart,* submits *in limine* that the minister may not delegate to the commissioner the power to select the assessors and relies upon section 783 of the Shipping Act, which provides for the appointment by the minister of assessors to hold office for three years, and also upon section 784 (as amended in 1908) which enacts that the Court shall hold the investigation with two or more assessors to be selected for that purpose by the minister. As to this submission, I am of opinion that the above sections embody a special statutory power and must be strictly construed. It is a power with which the responsible head of a great Department of State is invested. To delegate such a power to a remote subordinate is not in consonance with the intention of Parliament. The minister is thus clothed by Parliament with the power to select. Express power to delegate is withheld. It may be that a practice, now more or less inveterate, has grown up to the con-

Judgment

MORRISON, J. (At Chambers)

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IN RE BRADLEY

trary, but it is only after all a practice, doubtless a convenient one, but yet not sanctioned by the statute, which, if persisted in, may result in serious consequences amounting in some cases to a miscarriage of justice. In this case principle is more important than practice. *In re Behari Lal* (1908), 13 B.C. 415; *Burroughs* v. *The Queen* (1892), 20 S.C.R. 420 at p. 428; *Richards* v. *Wood* (1906), 12 B.C. 182; *Regina* v. *Abrahams* (1880), 24 L.C.J. 325 at p. 332; on appeal (1881), 6 S.C.R. 10.

It is further submitted that there was no opportunity given Captain Bradley to make an effective defence. Section 801, subsection 3, as amended in 1908, enacts that "a certificate shall not be cancelled or suspended unless the holder . . . . has had an opportunity of making a defence," and by section 795 "every formal investigation shall be conducted in such manner that if a charge is made against any person, such person shall have an opportunity of making a defence." The effect of these sections is that, at some time during the proceedings, definite charges shall be formulated and that after notice of them, an opportunity to meet them shall be afforded. In this case certain general questions were prepared but they cannot be said to be definite charges and are not of such a character to enable Captain Bradley to controvert the matters in respect of which he was afterwards found to be in default. See *The Chelston* (1920), P. 400 at p. 406, *per* The President:

Judgment

> "There must be a hearing and there must be a charge preferred before a penalty can be inflicted."

I give effect to both these submissions, and quash the decision of the Court of Inquiry, and direct that the certificate of Captain Bradley be restored free from any suspension.

Application granted.

COAST STEAMSHIP COMPANY LIMITED v. CANADIAN PACIFIC RAILWAY COMPANY.

CLEMENT, J.

1921

Oct. 3.

COAST STEAMSHIP CO. v. CANADIAN PACIFIC RY. CO.

Ship—Pier—Tidal waters—Grounding of vessel at pier—Liability of owners of pier.

A coasting vessel of the plaintiffs in approaching the defendant Company's pier to discharge cargo was directed and assisted by the defendant's servants to tie up near the shore end of the pier, the berth which the vessel first intended taking being required for an ocean-going vessel. The wharfinger of the defendant informed the officer in charge of the vessel there was sufficient depth of water for the ship at the point where it tied up. The ship grounded on a falling tide, filled with water and foundered.

Held, that the defendant Company was liable for the damage sustained by the plaintiff.

The Moorcock (1889), 58 L.J., Adm. 15 and 73 followed.

ACTION for damages to the plaintiff's steamship Clansman through her taking the ground alongside the defendant's pier. The plaintiff Company owned and operated a fleet of small coasting vessels. On the 8th of November, 1920, the steamship Clansman arrived at Vancouver with a cargo of herring for transhipment on the ocean-going steamship Arabia Maru, and proceeded to pier H of the defendant Company with the intention of taking a berth close to the northerly end of its east side, but officers in charge of the pier directed those in charge of the Clansman to tie up near the shore end as the berth where she was about to tie up was required for another ocean-going vessel. The Clansman was carrying 101 tons of cargo and drawing 6.1 feet forward and 7.4 feet aft. A wharfinger of the defendant Company told the officer in charge of the Clansman that there was sufficient water for his ship at the berth where they tied up. In the evening after tying up the Clansman grounded on a falling tide, filled with water and foundered. Tried by CLEMENT, J. at Vancouver on the 26th of September, 1921.

Statement

Robinson, and *W. S. Lane*, for plaintiff.
McMullen, and *Greaves*, for defendant.

CLEMENT, J.

1921

Oct. 3.

COAST STEAMSHIP CO. v. CANADIAN PACIFIC RY. CO.

3rd October, 1921.

CLEMENT, J.: Bearing in mind the difference between a jetty on a tidal flat, where a boat is intended to lie on the mud at low tide, and a wharf like Pier H in this case, where a boat is to be water-borne at all times, it seems to me that *The Moorcock* (1889), 58 L.J., Adm. 15 and 73 is decisive in plaintiff's favour. That case is referred to with approval by the learned lords who gave judgment in *The Calliope* (1890), 60 L.J., Adm. 28 (so much relied on by Mr. *McMullen* for the defendants), a case which, as I read it, has very little bearing on this controversy as it turned largely on questions of fact. On my findings of fact, as expressed on the trial, the case at bar is, on its facts, stronger in plaintiff's favour than *The Moorcock, ubi supra.*

Judgment

There will be judgment for the plaintiff, with a reference to the district registrar to report as to damages. Further directions and costs of the reference reserved. The plaintiff will receive its costs up to and inclusive of this judgment.

Judgment for plaintiff.

HUNTER, C.J.B.C.

1921

Oct. 5.

SANDERS v. CROLL

SANDERS v. CROLL.

Negligence—Collision—Automobile and bicycle—Contributory negligence—Decisive cause of accident—Costs.

The plaintiff when riding on a bicycle on the highway between Alberni and Port Alberni on the 24th of August, 1920, at about 8 o'clock in the evening was struck and injured by the defendant's automobile coming in the opposite direction. The road was about 16 feet wide and straight for some considerable distance in both directions from the point of accident. The automobile had one light but there was no light on the bicycle. Sunset was at about 7.20 p.m. at that time of year and at the time of the accident it was dark. It was found on the evidence that the accident took place on the plaintiff's side of the road.

Held, that the driver of a rapidly-moving vehicle on a public highway is

bound at common law to take reasonable precaution in time of darkness or fog to warn others, the natural and ordinary mode being by a light attached to the vehicle. Had the plaintiff carried a light the defendant would have been warned of his presence and would have avoided him. The want of a light on the bicycle was therefore the decisive cause of the accident and the action failed.

As the defendant had only one light burning and was going at too high a speed, considering the width of the highway and amount of traffic, the action was dismissed without costs.

ACTION for damages for injuries sustained by the plaintiff owing to a collision between himself while riding his bicycle and the defendant's automobile. The facts are fully set out in the head-note and reasons for judgment. Tried by HUNTER, C.J.B.C. at Nanaimo on the 31st of May, 1921. Statement

Arthur Leighton, for plaintiff.
Macgowan, for defendant.

5th October, 1921.

HUNTER, C.J.B.C.: On the 24th of August last year, the plaintiff, who was riding a bicycle on the highway between Alberni and Port Alberni, collided with a motor-car which was being driven in the opposite direction by the defendant.

About the only material facts not in dispute are that he sustained severe injuries and in fact had a narrow escape from death, and had no light on his bicycle at the time of the accident. Judgment

The collision took place about 400 feet from what is known as "Hospital Bend" and about 2,100 feet from the next nearest curve in the highway in the opposite direction. The exact spot is in dispute, that is to say, whether it took place on the plaintiff's or the defendant's side of the road. The defendant says he was on his own side close to the middle of the highway, and that he did not see the plaintiff but hearing something scraping the off side of his car, turned to see what it was and in so doing swerved off into the ditch on the plaintiff's side of the road, where his car capsized with the result that he himself sustained severe injuries.

I am satisfied that the collision took place on the plaintiff's side of the road and of course that puts the onus on the defend-

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ant. Every driver of a vehicle has a paramount right to his side of the road as against any other driver meeting or overtaking him, but he must use the right reasonably and give as much room as is necessary to enable the other to go by in safety. He has also a qualified right to use any portion of the other side of the road, provided the way is clear and he is not interfering with another's paramount right. It would be unreasonable to hold that a motorist must always keep on his own side except when overtaking another vehicle, and especially so in the case of the average country road. At the same time a great degree of vigilance is imposed on him if he travels over that part of the highway which he must quit when meeting another vehicle and especially so at night; his lights should be in order and his speed reasonable, according to the conditions.

With regard to the time of the collision, I will assume the statement of Dr. Morgan to be correct, who says he received the call for aid at 8.06 p.m., which would make the time of the collision close to 8 p.m. It was agreed that, according to the calendar, sunset took place at 7.21, but it took place earlier at the scene of the collision by reason of the existence of the range of foot hills on the farther shore of the canal. At any rate, judging by the view had on the day after the anniversary of the event, it was dark enough to require the use of lights, and according to the evidence, all the motors were using their lights at the time of the accident. Much stress was laid upon the by-law requiring bicycles to carry a light one hour after sunset, which would of course mean local time. I do not think that the fact that the plaintiff was not required by the by-law to carry a light at the time of the accident relieved him of the duty to take the simple precaution of having a light after darkness set in, having regard to the fact that he was travelling on a public highway and the conditions of the traffic. In my opinion, the driver of a rapidly-moving vehicle, such as a motor-car, or bicycle, on a public highway, is bound at common law to take reasonable precaution in time of darkness or fog to warn any other person who may be near him on the highway of his presence, and the natural and ordinary mode of doing so is by means of a light attached to the vehicle. Let it be

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granted that the defendant was to blame for not having both lights burning and for travelling at an excessive speed. He states that he was prevented from seeing the plaintiff by the glare of the lights in Motion's car, which had come up behind the plaintiff who was not carrying any light, but that if the plaintiff had been carrying a light he would have been warned of his presence in plenty of time to avoid any collision. Both personal experience and experiments had on the ground, satisfy me that the defendant is speaking the truth when he says the plaintiff was invisible by reason of his having no light on the bicycle. Experiments shewed that a constable stationed at the place of collision and although of course known to be there, could not be seen by reason of the glare of the lights from the other car which had been placed at the spot where Motion said he had stopped, nor could it make any difference what make of car was used or how its lights were focused, provided they were shining sufficiently bright on the eyes of the person approaching, as the fundamental cause of the invisibility is the dark background.

I have no doubt that if the plaintiff had had a light on his bicycle that there would have been no accident, as his presence would have been indicated in plenty of time to avoid any collision, as both were travelling on a perfectly straight stretch of road at the time, being a distance of at least 2,400 feet. It was argued that it was no more incumbent on a bicycle to carry a light than a pedestrian. I cannot agree. A bicycle travels generally at more than double the speed of a pedestrian; it is capable of more mischief in the event of a collision and it cannot avoid a collision with the same promptness as a person on foot. A pedestrian may escape a head-on collision by jumping out of the way when within even 3 or 4 feet of a car, which would be impossible for a bicycle.

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We have then this state of facts, that at the time of the collision the plaintiff was riding his machine after dark without a light, on a highway about 16 feet wide, which is the main travelled road between Alberni and Port Alberni, on which there is considerable traffic, while the defendant was proceeding at a good rate of speed with only one light and along the

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middle of the road. The question then is: What was the decisive cause of the accident? It was argued on the one hand that had the defendant proceeded more slowly or had both lights going, or stopped the car as soon as possible after invisibility occurred, or kept well over on his own side, there would have been no collision, and it was argued on the other hand, that if the plaintiff had had a light there would have been no collision.

As to the first three suggestions advanced on behalf of the plaintiff, it seems to me that they invite one into pure speculation and can lead to no certain conclusion, while as to the fourth, in my opinion, the mere fact that the defendant was travelling in the middle of the road did not in itself constitute negligence if he had no reason to suppose that another vehicle was meeting him and there might be a collision if he did not turn out. On the other hand, it is clear that had the plaintiff had a light there would have been no excuse for the defendant to interfere with the plaintiff's right of way and that the defendant would have been warned of his presence long before invisibility occurred, in as much as there was a straight stretch of 2,000 feet or more along which the defendant travelled before reaching the plaintiff. I am, therefore, of opinion that the want of a light on the bicycle was the decisive cause of the accident, and accordingly the action fails. As, however, the defendant had only one light burning and was going at too high a speed, considering the width of the highway and the amount of the traffic, there will be no costs.

Judgment

Action dismissed.

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Sale of timber limits—Agency—Introduction of contemplated purchaser—Sale falls through—Subsequent contract to cut timber—Commission—Quantum meruit.

At the solicitation of the plaintiff by wire for an option from the defendant on certain timber limits the defendant replied "will give option until July 30th Topaz Harbour timber $500,000 allowing you ten per cent. commission. If any reduction from this price is made such reduction will be from your commission as I would accept not less than $450,000 net and not less than $125,000 cash. Your commission to be paid by deferred payment." The plaintiff then introduced to the defendant proposed purchasers who, after inspecting the property, declined to purchase but made a proposal to the defendant for logging the timber limits. The defendant declined to make any arrangement at the time but after subsequent correspondence a contract was entered into whereby the proposed purchasers obtained the right to cut and sell the timber, the amount which the defendant was to receive to vary with the market value of timber. The plaintiff did nothing further to bring about a deal of any kind after the first introduction. In an action for commission on a contract or in the alternative upon a *quantum meruit*:—

Held, that the plaintiff as an agent could not found on the introduction of the contemplated purchasers a claim upon a *quantum meruit*: the introduction was not made under such circumstances as would lead the owner to know he was expected to pay a commission on such a contract as was eventually made, as in order to found a legal claim for commission there must be a contractual relation between the introduction and the ultimate transaction of sale.

ACTION on a *quantum meruit* for services rendered in connection with the contemplated sale of certain properties at Kitsilano for which a claim of $750 was made, also for commission upon a contract or alternatively upon a *quantum meruit* for the sale of certain timber limits known as the Topaz limits. The facts are set out in the reasons for judgment. Tried by GREGORY, J. at Vancouver on the 7th of September, 1921.

Statement

A. M. Whiteside, and *Haney*, for plaintiff.

Davis, K.C., and *Ghent Davis*, for defendant.

GREGORY, J.

11th October, 1921.

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GREGORY, J.: There must be judgment for the defendant. The plaintiff's claim is divided into two parts, one on a *quantum meruit* for services rendered in connection with properties at Kitsilano, etc., for which he claims $750, and the second claim is for commission (upon a contract and alternatively upon a *quantum meruit*) upon the sale of certain timber limits known as the Topaz limits. As to the claim for $750, I do not think there is a shadow of doubt that it must fail. In *Barnett* v. *Isaacson* (1888), 4 T.L.R. 645, the Master of the Rolls says at p. 646:

> "To entitle a plaintiff to sue upon a *quantum meruit* the rule is that if the plaintiff relied upon the acceptance by the defendant of something he had done, he must have done it under circumstances which led the defendant to know that if he, the defendant, accepted what had been done it was on the terms that he must pay for it."

The plaintiff was an exceedingly unsatisfactory witness and neither fair nor frank. He admits he never had any connection with defendant *re* the services. He has no entries of any kind in his books of such services. He never made any claim for them prior to bringing this action. He had the properties for sale upon commission and admits that if he had made a sale he never would have made any claim. He was unable to give any clear statement of what he really had done, but wanted it to be inferred from his letter that he had done work worth $750 over and above what he would have done in his capacity of agent for sale. His partner (equal), whom he bought out for $150 cash and $35 a month for six months, though he knew of the work done, and in fact did some of it himself, never knew that there was any such claim. I am fully satisfied that when he rendered the services he never intended that they should be paid for apart from his commission in case he made a sale, and he never did or could have expected that the defendant accepted the services upon the terms that he was to pay for them, unless a sale was made and that then they would be included in his commission.

Judgment

As to the claim for commission on the sale of the Topaz timber limits, I wish to say at the outset that I cannot find the slightest ground for the suggestion that the defendant has

deliberately tried to defraud or defeat the plaintiff's claim, or that he has done anything whatever with that object in view.

A great many cases have been cited to me and I have carefully read them all, but see no occasion to refer to them in particular, as cases of this nature depend upon the particular facts of such case. The rule of law is, I think, not questioned. If there is a general employment to find a purchaser, and the agent does find a purchaser, he is entitled to his commission even though the sale is carried through at a price less than that first fixed by the owner. Whether there is a general employment or not is a question of intention or the proper inference to be drawn from the facts of the case, in the absence of an express contract, assuming that there was a general employment. Plaintiff first bases his claim on the allegation that he found a purchaser but the sale was defeated by reason of the misrepresentation of the defendant as to the amount of timber on the limits. I do not think he has proved that he found a purchaser. I am sure that there was no misrepresentation by the defendant as to the amount of timber. The plaintiff himself knew as much about the amount of timber as the defendant did, and neither the plaintiff nor the intending purchaser was in any way deceived.

The negotiations between the parties begins with plaintiff's letter to the defendant of the 14th of November, 1918, wherein he asks defendant to list the property with him for sale. This letter was answered on the 26th of November, 1918, and the defendant declined to list the property. That is, he refused to give him any authority to sell but he says "if you have a good, *bona fide* customer who would be interested . . . . you might write me in reference to same and take it up with me." I cannot construe this into a general authority to find a purchaser but merely as a permission to approach the defendant again on the subject in case he thought he had a *bona fide* customer, etc. There is no authority to sell even at the price of $500,000, which defendant, in the same letter states, is, in his opinion, the value of the property. If the very next day plaintiff had found a person able and willing to pay $500,000 for the property he could not have compelled the defendant

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to sell for that sum nor could he have insisted that he had earned a commission, though if he had introduced such person to the defendant, and a sale for that sum had resulted, it would require very little to justify the Court in inferring a liability to pay upon a *quantum meruit* upon the principle before referred to. Defendant himself did not understand that he had a general authority, etc., for on the 17th of January, 1919, he wrote: "If you decide to give us a listing . . . . we would advertise it at our own expense." On the 6th of March, 1919, defendant wrote to plaintiff he would not care to make a price until a responsible purchaser was interested, and adds at the end, "when I come out we can possibly make some arrangement for you to look after my property and handle same." Plaintiff interested some people in the property, Messrs. Anderson, Hanson *et al.*, and considerable correspondence follows. In defendant's letter of the 17th of April, 1919, he says $500,000 is cheap, and says if the property could be sold at his price he would be liberal in the matter of commission. There is a good deal of correspondence about the proposed sale, and it is to be noted that plaintiff in his letter of the 28th of April, 1919, in speaking of his commission and the probability of his having to share it with a third person, says he will do nothing to obligate defendant and he will require his friend to sign a letter accepting whatever commission "we [*i.e.*, he, plaintiff, and defendant] agree on" and that such third person's commission is payable "in the event of a deal at a certain specified price." After further correspondence this deal fell through. On the 11th of June, 1919, defendant wrote plaintiff, *inter alia,* that he was not particularly anxious to sell the property. New purchasers appeared. Plaintiff wired defendant 2nd July, 1919, as follows:

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"Will you authorize price five hundred thousand Topaz Harbour timber thirty days option party willing leave immediately for investigation. Commission 10 per cent. Responsible party Mr. Jenkins recommends him."

To which the defendant replied 3rd July, 1919:

"Will give option until July thirtieth Topaz Harbour timber five hundred thousand allowing you ten per cent. commission if any reduction from this price is made such reduction will be from your commission as I would accept not less than four hundred fifty thousand net and not

less than one hundred and twenty-five thousand cash. Your commission to be paid by deferred payment."

The proposed purchasers were Messrs. Wilson & Brady. In accordance with the telegram plaintiff gave them an option. They went to see the property and finding much less timber than they expected they would not entertain the proposition and all parties agreed that the deal was off, and defendant returned to New York about the 5th of August.

Plaintiff in acknowledging the receipt of defendant's telegram of 3rd July, disclosed the name of the proposed purchasers, and when defendant came to Vancouver introduced him to them and it is upon the introduction that he bases his claim; he did absolutely nothing more towards bringing about a sale or deal of any kind.

Wilson & Brady, while not willing to buy at the price, were anxious to have the privilege of logging the timber limits and made a proposition to defendant. He declined it but, having learned that his limits had nothing like the value he had thought, did not apparently dismiss the idea from his mind. A good deal of correspondence passed between him and Wilson & Brady, which eventually culminated in their entering into a contract on the 3rd of January, 1920. This contract the plaintiff says was a sale and that he is entitled to a commission of 10 per cent. upon whatever amount defendant may realize out of it.

Judgment

I do not think it can be called a sale. In a sale the title to the property passes from one person to another, and thereafter the purchaser assumes the risks of loss by fire, etc. Here there is no change of ownership—that risk is entirely the defendant's. Messrs. Wilson & Brady have only the right to cut and sell; the amount which defendant is to receive varies with the state of the market. If there was any ground for believing that this agreement took the form it did for the purpose of enabling defendant to avoid payment of a commission to plaintiff and that it was in reality intended as a sale, it should be so treated.

Lord Watson in *Toulmin* v. *Millar* (1887), 58 L.T. 96 says:

"In order to found a legal claim for commission, there must not only be a casual, there must also be a contractual relation between the intro-

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duction and the ultimate transaction of sale. If A. had no employment to sell, express or implied, he could have no claim to be remunerated."

He then goes on to deal with the case of a general employment to sell. The only authority which plaintiff had at any time to sell was to Anderson & Hanson, which fell through; and to Wilson & Brady pursuant to telegram. The correspondence with reference to Anderson & Hanson dealt only with that transaction and cannot be used to create a general employment. The right to sell to Wilson & Brady was expressly and pointedly limited to a sale for a fixed amount.

The introduction of Wilson & Brady was made with the definite knowledge that if there was any sale at less than the price of $500,000, the difference would have to come out of plaintiff's commission, as defendant would not accept less than $450,000 net. That being so, how can it be the foundation for a claim upon a *quantum meruit?* The introduction was not made under such circumstances as need have led the defendant to know that he was expected to pay a commission upon a sale for a lesser amount. That would be in direct contradiction of the telegram upon which they both were acting, and I cannot see that this is in any way consistent with the language of Lord Watson in *Toulmin* v. *Millar, supra,* about the naming of a specific sum being merely the basis of future negotiations. He was speaking of a general employment to find a purchaser and of the naming of a specific sum at the time of the employment before any purchaser was in sight. No one pretends that the deal with Brady & Wilson will produce to the defendant anything like $450,000, and it is not disputed that the plaintiff, apart from the introduction, had nothing to do with the deal which was eventually consummated.

Judgment

In case another Court should decide that I have come to a wrong conclusion on either branch of the case, the expense of a new trial can perhaps be avoided if I state the damages which I would allow had I decided that the plaintiff was entitled to judgment.

On the first branch I would allow the sum of $300 which, I think, is liberal for all the services which could possibly have been rendered. On the second branch, I would allow a sum

equal to 5 per cent. of the moneys received or to be received by the defendant from his dealings with Messrs. Brady & Wilson. The same to be as to moneys not yet received there would be a declaration of right, etc. See *Prentice* v. *Merrick* (1917), 24 B.C. 432 at p. 436.

There will be judgment for the defendant and costs of cause will follow.

Action dismissed.

LOEWEN *ET AL.* v. DUNCAN.

Vendor and purchaser — Mortgage in part payment — Registered plan — Shore-line improperly plotted—Mutual mistake—Delay—Acquiescence.

The defendant desiring to purchase a certain point projecting into Shawnigan Lake and upon which the plaintiff had erected a notice for sale, purchased two fractional lots from the plaintiff which, according to a plan of survey filed in the Land Registry office, included all of said point with an area of 2.81 acres, the defendant giving back to the plaintiff a mortgage on the two lots in part payment of the purchase price. The defendant went into possession and made improvements. A year later an adjoining owner had a survey made of the waterfront from which it appeared that the two lots purchased by the defendant only included about one-half of the point with an area of 1.33 acres. The defendant was advised of this survey but continued in possession for eight years and made improvements without taking any action. In an action by the plaintiff to recover principal and interest due on the mortgage, the defendant having counterclaimed for rescission on the ground of mutual mistake, judgment was given for the plaintiff, and the counterclaim was dismissed.

Held, on appeal, affirming the decision of GREGORY, J. (MARTIN, J.A. dissenting), that apart from the question of laches, after eight years of possession and extensive changes in the *corpus*, the market for such property having in the meantime materially fallen, the parties cannot be restored to their original respective positions.

APPEAL by defendant from the decision of GREGORY, J., in an action to recover $2,500 due on a mortgage on fractional lots 2 and 3, in block 2, Shawnigan Suburban District, tried

Statement

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by him at Victoria on the 23rd of March, 1921. In 1913 the defendant had purchased the lots and gave the mortgage in question back to the vendor in part payment. The lots abut on the northern shore of Shawnigan Lake and by the original plan, number 218, filed in the Land Registry office by the Esquimalt & Nanaimo Railway Company in July, 1888, they appeared to contain 2.81 acres, lot 2 including the whole of a certain point projecting southerly into the lake. The object of the purchase was mainly the possession of the point, as the improvements in the way of buildings subsequently made by the defendant were all on this point. Prior to the sale the plaintiffs had placed a sign "for sale" on the point that according to the corrected survey was on the wrong lot. At the request of the defendant's husband, one Dennis R. Harris, a Provincial land surveyor made a resurvey of lots 2 and 3 in 1914, and he found that the shore-line of the lake had been improperly plotted in the original survey, the west-bound line of lot 2 running through the middle of the point and reducing the acreage of the two lots to 1.33 acres. The defendant counterclaimed for a declaration that the conveyance was entered into by mutual mistake and was void and that the mortgage be set aside.

Prior, for plaintiffs.
Aikman, for defendant.

5th April, 1921.

GREGORY, J.

GREGORY, J.: There must be judgment for the plaintiffs. The defendant makes no attempt to establish the defence set up that before purchase plaintiffs' agent went upon the land and shewed her the boundaries, etc., of the land in question. In fact, it is proved beyond a doubt that the defendant and her husband went upon the land on their own initiative, assumed that they knew the lines of the lots and immediately telephoned in to plaintiffs' agent saying they would take the property and asked him to keep his office open so that they could go into town and put up a deposit to bind the bargain. It is unnecessary to detail all that took place when the deposit was actually paid an hour or two later.

It is now alleged by the defendant that she has no title to a portion of the property which she thought she was buying and which plaintiffs' agent thought he was selling. In the conveyance the land is described as lots 2 and 3, etc., according to map or plan deposited in the Land Registry office under the number 218. That map shews lot 2 as a point of land jutting out into Shawnigan Lake. The defendant alleges that upon a correct survey and subdivision of the land the point of land would be shewn to be lot 2 and partly lot 7, and it is the loss of that portion of the point which should be marked as lot 7 that she complains of.

Mr. Dennis Harris, an engineer and surveyor of repute, has resurveyed the property and by a careful traverse of the shore-line of the lake has shewn that the point of land in dispute is improperly indicated on map 218 and is shewn as several feet east of its actual location. He then shews that an extension of the westerly boundary of lot 2 to the shore of the lake would divide the point into two lots and throw a portion of it into lot 7. But in order to do this he has to place upon the map 218 a line which does not exist, and he has to assume that the subdivision intended the westerly boundary lines of lots 2 and 3 to be in prolongation of each other. There is no justification for this assumption, except the perhaps not unnatural one that the surveyor who subdivided the property intended it to be so, but whatever his intention may have been, his plan has not so shewn it, and I think the description with the plan passes the whole point to the defendant, although, of course, this finding cannot be binding upon the owner of lot 7 who is not a party to these proceedings. In any case, I think the defendant is too late now in complaining. She knew of this so-called mutual mistake some years ago but never, until these proceedings were instituted, made any effort to have the same rectified.

And it is worthy of note that it was through the survey made at the request of the owner of lot 7 that this so-called error was brought to her attention, and that such owner has never up to the present day made any claim upon her that she is in possession of or trespassing upon his property, though it is well known to him that Mr. Harris's imaginary line passes

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through the middle of her house. Costs must follow the event. The counterclaim must, of course, be dismissed with costs.

From this decision the defendant appealed. The appeal was argued at Victoria on the 23rd and 24th of June, 1921, before MACDONALD, C.J.A., MARTIN and MCPHILLIPS, JJ.A.

Argument

Aikman, for appellant: The whole trouble is due to the first surveyor not taking care to survey the shore-line correctly by triangulation. The defendant thought she was getting the point of land projecting into the lake when she bought lots 2 and 3, and the vendor thought the point belonged to her. There was mutual mistake that voided the contract: see Halsbury's Laws of England, Vol. 21, p. 7, par. 14; Fry on Specific Performance, 6th Ed., 355; *Jones* v. *Rimmer* (1880), 14 Ch. D. 588 at p. 592. The sale and the mortgage back was one transaction and mutual mistake is a ground for rescission: see Fry on Specific Performance, 6th Ed., 369, par. 782. What was sold here is shewn on the original plan: see *Gordon-Cumming* v. *Houldsworth* (1910), 80 L.J., P.C. 47 at p. 49. It was the point that was for sale: see *Jones* v. *Clifford* (1876), 3 Ch. D. 779. Even in the case of a completed contract it will be declared void: see *Scott* v. *Coulson* (1903), 1 Ch. 453; (1903), 2 Ch. 249; *Robinson* v. *Musgrove* (1838), 2 M. & R. 92; Kerr on Fraud and Mistake, 5th Ed., 504; *Eastwood* v. *Ashton* (1915), A.C. 900.

Prior, for respondents: The main point is the effect of the deed. There has been undisputed possession of the point for eight years as shewn on the original plan of survey: see *Smith* v. *Millions* (1889), 16 A.R. 140 at pp. 147-8; *Fowler* v. *Henry* (1903), 10 B.C. 212. You cannot have rescission on the ground of innocent misrepresentation. The mortgagor cannot set up defective title to his own property: see Fisher's Law of Mortgages, 6th Ed., 447, par. 872; *Bristow* v. *Pegge* (1785), 1 Term Rep. 758 (n.); Jones on Mortgages, 5th Ed., 627, par. 682; *Peters* v. *Bowman* (1878), 98 U.S. 56. As to acquiescence, the defendant has owned the property since 1913 and has paid interest on the mortgage up to 1919: see Kerr on Fraud and Mistake, 5th Ed., 558; *Soper* v. *Arnold* (1889),

14 App. Cas. 429 at p. 403; *Rogers* v. *Ingham* (1876), 3 Ch. D. 351 at pp. 357-8. This is a matter of law and a mistake has no legal consequences. He has continued to deal with the property amounting to acquiescence: see *Campbell* v. *Fleming* (1834), 1 A. & E. 40; see also *Seddon* v. *North Eastern Salt Company, Limited* (1905), 1 Ch. 326 at p. 332 and *Jackson* v. *Irwin* (1913), 18 B.C. 225.

Aikman, in reply.

Cur. adv. vult.

14th October, 1921.

MACDONALD, C.J.A.: The land in question was purchased by the late Mrs. Loewen by description according to registered plan. She subsequently sold and conveyed the lots to the appellant by the same description and without knowledge of error, if any, in the plan. The appellant gave a mortgage to secure the balance of the purchase-money and that mortgage being in arrears, the present action was brought by the executors of the late Mrs. Loewen for foreclosure.

The defence set up to the action is that the plan does not conform to a true survey of the land in question, which abuts on the shore of Shawnigan Lake. The alleged mistake was in the shore-lines, and which, if corrected, would, she alleges, deprive her of part of the land apparently embraced by the lots as shewn on the plan. The result of this alleged error, she alleges, is to deprive her of one half of a rocky point projecting into the water with a convenient bay for landing, and to cut down the acreage of her land by rather more than one-half. A resurvey would effect adjoining lot-owners, but no adverse claim has been made against the appellant by such, who have not disturbed or threatened to disturb her in the possession and enjoyment of the premises.

The appellant purchased the lots and entered into possession thereof in 1913, and shortly thereafter had notice of the alleged error through Mr. Harris while he was surveying an adjoining lot. Appellant's husband communicated this information to Mr. Jones, who had been Mrs. Loewen's agent. They consulted a solicitor who advised that the plan governed, and from that time to the issuance of the writ, appellant took no action in

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respect of the alleged error. The evidence does not disclose whether or not the solicitor consulted was the solicitor of the respondent, nor does it shew that Mr. Jones had any authority to represent Mrs. Loewen in such consultation or to receive and transmit to her the complaint made by appellant.

While fraud is pleaded, there is not a tittle of evidence to support it, and the learned judge below has so held. That issue was abandoned before this Court and appellant's case was founded upon mutual mistake, upon which she asks for rescission.

After careful review of the authorities, Malins, V.C. in *Allen* v. *Richardson* (1879), 13 Ch. D. at p. 541 said:

> "I do not think there is a more important principle than that a purchaser investigating a title must know that when he accepts the title, takes the conveyance and pays his purchase-money and is put in possession, there is an end to all as between him and the vendor on that purchase."

And he points out the consequences which would, in his opinion, follow if this were not so.

As early as 1794, in *Thomas* v. *Powell* (1794), 2 Cox 394, the Court refused to stop the payment out of Court of purchase-money to the vendor after conveyance, notwithstanding that the purchaser was threatened with eviction by a person claiming a superior title. In *Penrose* v. *Knight* (1879), reported, so far as I am aware, only in Cassels's Digest, 1875-1893, pp. 776-7, it was sought to rescind a contract perfected by conveyance, on the ground of fraud. The Court of Appeal for Ontario agreed with the trial judge that there was no fraud, but differed from him by holding that after conveyance the purchaser was confined to his remedy on the covenants. This was affirmed by the Supreme Court of Canada.

MACDONALD, C.J.A.

We were referred to a decision of the Supreme Court of the United States, which is of interest. The Court was dealing with a principle of the common law, namely, as to whether after completion there could be relief except upon the covenants. The Court said that it was the settled law of that Court that in the absence of fraud or actual eviction, the vendee in possession cannot controvert his vendor's title; that the rule was founded on reason and justice; that in such cases the vendor by his covenants, if there were such, agrees upon them and

not otherwise to be responsible for defects of title, and if there are no covenants, he assumes no responsibility but the purchaser takes the risk.

That a contract induced by fraud may be rescinded after conveyance is not open to controversy, and it is equally well settled that innocent misrepresentation or mistake is ground for relief before conveyance, but there is to be found in several cases, language to the effect that the contract may be rescinded even after completion upon the ground of mutual mistake. It was said that *Scott* v. *Coulson* (1903), 2 Ch. 249, was a case where relief was granted after completion on the ground of mistake, but I think, with respect, that the Court of Appeal decided the case on the ground of mistake followed by fraud before completion, and moreover, in that case the life insured had ceased to exist before the date of the contract, there being therefore a total failure of consideration. In *Debenham* v. *Sawbridge* (1901), 2 Ch. 98, freehold stabling, with dwelling rooms above were sold and conveyed, and a year later the purchaser discovered that the vendor was not the owner of some of the rooms nor of part of the cellar, yet, rescission was refused. I think it will be found that *dicta* to the effect that rescission may be decreed for common mistake after completion were spoken in reference to cases where money was paid or obligations assumed for which there was a total failure of consideration, *Cole* v. *Pope* (1898), 29 S.C.R. 291, or misapprehension as to the continued existence of the subject-matter or as to ownership, such as occurred in *Bingham* v. *Bingham* (1748), 1 Ves. Sen. 126, and *Cooper* v. *Phibbs* (1867), L.R. 2 H.L. 149.

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In *Kennedy* v. *Panama &c. Mail Co.* (1867), L.R. 2 Q.B. 580 at p. 587, Lord Blackburn said:

> "But where there has been an innocent misrepresentation or misapprehension, it does not authorize a rescission unless it be such as to shew that there is a complete difference in substance between what was supposed to be and what was taken, so as to constitute a failure of consideration."

The difference in substance there referred to cannot, I think, be a difference merely in value or *quantum* or area. It may, no doubt, be proper to say that if the difference between what

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was contracted for and what was taken were such as to render the balance valueless for the purpose for which it was to be used, that would be a difference in substance. In *Re Tyrell; Tyrell* v. *Woodhouse* (1900), 82 L.T. 675, Cozens-Hardy, J. said:

"Counsel have not been able to discover a single instance of setting aside a purchase after conveyance, except because of fraud or total failure of consideration."

And *Johnson* v. *Johnson* (1802), 3 Bos. & P. 162, distinctly affirms the applicability of the maxim *caveat emptor* to purchasers of land and the general rule that the purchaser must look to his covenants except where there has been fraud or total failure of consideration, *i.e.*, when an action will lie for money had and received.

It cannot, I think, be said in this case, that there was such a difference in substance as Lord Blackburn had in mind or that there was more than a partial failure of consideration. In her counterclaim the appellant makes an alternative claim for damages for the deficiency, which she places at $1,600, the whole contract price being $3,500.

MACDONALD, C.J.A.

The appellant has been in possession of the property since the year 1913; has made permanent improvements she claims in the erection of buildings and fences. Putting aside for the moment the question as to whether she was guilty of laches or not, it appears to me that the parties cannot be restored to their original respective positions. After eight years of possession and after extensive changes in the *corpus,* and when the market for such property may have materially fallen and the vendor is dead, there ought to be no rescission, even apart from what I have said above.

By anything I have said above, I do not wish to intimate that the appellant is, in my opinion, not entitled to the land as depicted on the registered plan. That is a question which may possibly arise in the future should appellant's title to the land she occupies be challenged by an adverse claimant.

The appeal should be dismissed.

MARTIN, J.A.

MARTIN, J.A. would allow the appeal.

McPHILLIPS, J.A.: I would dismiss the appeal for the reasons given by the Chief Justice.

Appeal dismissed, Martin, J.A. dissenting.

Solicitors for appellant: *Aikman & Shaw.*
Solicitor for respondents: *C. J. Prior.*

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Criminal law—Trial for murder—Evidence—Witness—Wife of accused—Married by Indian custom—Admissibility.

On a trial for murder a woman was called as a witness by the Crown who had married the accused according to Indian custom about 20 years previously and had had several children by him. The accused had been married by Indian custom to two other women who were still living but they had redeemed themselves, *i.e.*, purchased their release from marriage by Indian custom, before his marriage to the witness. The witness gave evidence to the effect that a short time before this trial she had redeemed herself according to Indian custom and left her husband.

Held, that her evidence was not admissible.

TRIAL of the prisoner at the Vancouver Fall Assizes, on the 20th of October, 1921, by GREGORY, J. The prisoner was indicted and placed on trial, charged with the murder of one Ernest Jack, who was alleged to have been murdered by the accused on the 2nd of September, 1914. The skull and some bones, alleged to be those of the deceased, were recovered by the police in 1921, and following an investigation the accused was committed for trial. On the second trial (the jury having disagreed on the first) the Crown proceeded to call as a witness, one Jennie Williams, and upon counsel for the defence objecting on the ground that Jennie Williams was the wife of the accused, a separate issue was ordered, to determine the question as to whether or not she was the wife of the accused.

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The evidence shewed that Jennie Williams and the accused were married according to Indian custom, about 20 years previously, at Kingcome Inlet, British Columbia. She bore him several children, one being now married, with children also, the children and grand-children all being recognized at Alert Bay as the Williams family. At the time of the marriage to Jennie Williams, the accused had previously married two other Indian women, according to Indian custom (who were still living), but, according to the evidence, had both redeemed themselves at the time he married Jennie Williams. In the spring of the year 1921, Jennie Williams went to see Mr. Halliday, the Indian agent, to complain of a beating given her by the accused and asked Mr. Halliday if she could leave the accused. Mr. Halliday advised her that she could. She then left the accused and her evidence is to the effect that she had first redeemed herself according to Indian custom. Mr. Halliday gave evidence to the effect that the Indians in his district, being the Alert Bay district, were mostly married according to Indian custom and very few according to Provincial laws. According to Indian custom an Indian woman was treated as a chattel and upon payment of a certain amount of money or goods or chattels by the bridegroom, was handed over by her father or guardian, or whoever had control over her, to the bridegroom. The Indian woman then became his wife, but she could, nevertheless, redeem herself. She redeemed herself by paying back to the husband a stipulated amount, usually two or three times the amount he gave for her, and upon this being paid she was free to leave him and the marriage, according to this Indian custom, was then dissolved. Mr. Halliday further gave evidence to the effect that the department of Indian affairs was obliged to recognize these marriages and did recognize them, but that five years ago instructions were sent out that the Indians must in future be married according to the marriage laws of the Province, and no marriage by Indian custom entered into since that time has been recognized by the department. Further evidence was given by Mrs. Cook, an Indian, the interpreter, who was born and raised at Alert Bay, in which she corroborated Mr. Halliday's evidence as to the

Indian custom and Indian marriages according to them. She also said the accused's marriage to Jennie Williams took place about 20 years ago and they were recognized by the Indians as man and wife, the said Jennie Williams still going by the name of Jennie Williams.

Maitland (*Remnant,* with him), for accused: The evidence cannot be admitted: see *Regina* v. *Nan-E-Quis-A-Ka* (1889), 1 N.W.T., No. 2, p. 21; 1 Terr. L.R. 211. With the exception of the previous wives it is identical with this case. According to the Indian custom in practice here, the marriage is dissolved by redemption. She was, therefore, the wife of the accused, according to the Indian custom in this Province, until she redeemed herself. The fact that she is not his wife now does not alter the position as to their relationship at the time. Argument

Tobin, contra: The *Nan-E-Quis-A-Ka* case does not support the defence, as it holds that if previous wives are living there is no protection as against the present wife. There is a marriage law in British Columbia and was at the time of this marriage, therefore they are not husband and wife, the ceremony being covered by a Provincial statute: see *Bethell* v. *Hillyard* (1888), 38 Ch. D. 220. This case is governed by the *Baralong* case. In any event she is now in the position of a divorced wife.

GREGORY, J.: I do not think the evidence is admissible, but I think the Crown should ask for a case stated. The matter is one of great importance and should be authoritatively settled. I cannot, in the middle of an assize, and in the middle of the case, give the question the consideration which it should have. Judgment

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NENO *ET AL.* v. VANCOUVER PORT MOODY FERRIES LIMITED.

Negligence—Fish-net damaged by steamboat—Damages—Finding of trial judge—Not unreasonable—Duty of Court of Appeal—Can. Stats. 1914, Cap. 8, Secs. 33 and 35.

The plaintiffs licensed to fish smelts in Burrard Inlet, took out an 80-fathom net at about 4 p.m. on a calm clear day just west of the floating wharf at Sunnyside. As one end of the net was held on shore two of the plaintiffs carried it straight out by boat and on reaching its other end took it east and on reaching the float the defendant's ferry-boat was approaching from the west intending to stop at the float. The men waved and called to attract the wheelsman's attention but failed. The ferry-boat continued on and went partially through the net causing damage to it. The captain of the ferry-boat who was at the wheel thought he saw driftwood as he approached the float but did not see that it was the floats carrying the net until he was within fifty feet of them. He then tried to stop but failed to do so in time. He knew net fishing was carried on in Burrard Inlet but had not seen any in this locality. An action claiming damages for negligence was dismissed.

Held, on appeal, affirming the decision of GRANT, Co. J. (MACDONALD, C.J.A. dissenting), that on the evidence the learned trial judge might reasonably find as he did, and the appeal should be dismissed.

Statement

APPEAL by plaintiffs from the decision of GRANT, Co. J., of the 22nd of December, 1920, in an action for partial destruction of a fishing-net and loss of profits occasioned thereby. The defendant Company ran two ferry-boats between Vancouver and Port Moody, stopping at way ports. The plaintiffs were fishermen and on the day in question were fishing for smelts a short distance west of the Sunnyside floating wharf. One of the men held one end of an 80-fathom net on the shore while the other two took it in a rowboat straight out and when it was all out they came around with the outer end to the floating wharf. As they landed with their end from the boat at about 4 o'clock in the afternoon on the 21st of October, 1920, on a clear day, a ferry-boat of the defendant Company which came from Ioco wharf came into sight intending to stop at the Sunnyside float. The men on the wharf called and waved

to the man at the wheel but the ferry-boat (the New Delta) continued on and ran into the net and partially destroyed it, depriving the plaintiffs of the use of the net for carrying on their avocation. The captain of the ferry-boat, who was at the wheel at the time, says he saw the floats of the net but that it looked like a string of bark in the water. He did not see the plaintiffs trying to warn him off. He had had seven years' experience on Burrard Inlet, knew that net fishing was carried on there, but had never seen any one fishing in this locality before. The trial judge dismissed the action.

Statement

The appeal was argued at Vancouver on the 21st of October, 1921, before MACDONALD, C.J.A., GALLIHER and MCPHILLIPS, JJ.A.

W. C. Brown, for appellants: The accident took place at 4 p.m. on a clear day. They admitted they knew that fishing was carried on in this locality. The captain was in charge of the wheel at the time. He must take reasonable care and use reasonable skill: see Beven on Negligence, 3rd Ed., pp. 1097-8.

Argument

Tufts, for respondent: The finding of the trial judge should not be disturbed as to the facts. As to burden of proof see *Ruddy* v. *Toronto Eastern Railway* (1917), 86 L.J., P.C. 95 at p. 96. It must be shewn that the trial judge was wrong.

Brown, in reply.

MACDONALD, C.J.A.: The facts of this case are clearly set out in the evidence and there is, on essential points, no conflict. The ferry-boat New Delta ran into the net of the plaintiffs and caused injury to it, and for that injury the plaintiffs have brought the action. If there were a conflict of evidence, the learned trial judge having found in favour of the defendants, it would have to be taken that he had believed the defendant's witnesses as against those of the plaintiffs, but I do not propose to treat this case as one of conflicting evidence since I accept that of the defendant, so that the finding of the learned judge does not enter into my decision.

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The captain of this boat had been navigating there for seven years. He was aware that fishermen used these waters, not

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at the very spot, perhaps, but within a quarter of a mile thereof, for the purpose of fishing in the manner in which these plaintiffs were fishing, namely, by drag-net, for smelts. On his way from his last landing-place to Sunnyside, where this accident occurred and, while some considerable distance from where this net was set, he saw what he says he took to be driftwood. There were some 400 cork floats of a diameter of 3½ inches attached to this net, which was stretched in a semi-circle upon the water. It is not contended by him that he did not see those corks—that he did not see anything; he saw something which he took to be driftwood and I think the fair inference from his evidence is that that driftwood, as he thought it was, was in the direct line of his course or practically so, if it was not across his course then there was less excuse for running into it.

Now, he seems to have been suspicious of it, because he did swerve at one point, but he watched this supposed driftwood very carefully as he says and the result was that instead of avoiding it altogether he went on until it was too late.

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Now, the only question is, on his own evidence, did he exercise reasonable care in the navigation of his boat, having regard to the circumstances to which I have just alluded. It seems to me that it was the duty of a reasonably careful navigator when he found something ahead of him of which he was suspicious and unable to determine the exact character of, to have avoided it, to have taken no chances. He did not choose to take that course. He went on until it was too late to avoid the injury which he caused. Under these circumstances, I find the captain was guilty of negligence and I draw that inference from his own evidence. Therefore I am not embarrassed by the judgment of the learned County Court judge. I would allow the appeal.

GALLIHER, J.A.

GALLIHER, J.A.: This case is one pretty close to the line, as I view it, and I proceed along the lines of the Chief Justice; that is, I would treat it as a case where we can draw inferences from the facts. The main facts are very little in dispute. The question then is: Can I say that the judge below drew

the wrong inference under all the circumstances of this case? The point at issue we are down to is, did the captain of the vessel exercise reasonable care in the navigating of his boat under all the circumstances? I quite agree with what the learned Chief Justice has said in regard to the fact of fishing going on in that neighbourhood at this place and that is a question which we must take into consideration in that regard, but I feel in connection with that, in order to test the question of reasonableness, I also must take into consideration that while fishing was going on and the captain knew fishing was going on in the neighbourhood for a number of years, yet not once in all that time was any fishing going on in the course he pursued while going from place to place on the inlet. Now, if it had been that at times, or frequently as the case might be, he had to look out for and dodge nets in the channel where he was navigating, it would place upon him—at least I would have so held—a greater degree of care. But never having had to do so in all those years of navigating, he had not in his mind, and I do not think it would be reasonable to say he should have had in his mind, when he saw what he took to be floating pieces of bark, that it was a net at all. With regard to his having watched this bark closely, he was watching it in order that it might not inconvenience or interfere with the propeller of the boat, or do some damage to the boat and without any reason for thinking it was a net.

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Under those circumstances, it seems to me that I can say he acted reasonably. He was looking after the safety of the ship from floating bark, or floating limbs, or whatever it might turn out to be, and keeping his attention on that and without having, in view of all the years of experience behind him, any thought in his mind that fishing was going on in that particular place, in the channel where he was navigating. Such being the case, I find myself unable to say that the learned judge below came to a wrong conclusion; that is, that he drew a wrong inference from the facts; and as I am not prepared to do that, I am not prepared to reverse him. The appeal should be dismissed.

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McPHILLIPS, J.A.: In my opinion the appeal should be dis-

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missed. I think, first of all, what we should have regard to is that which mariners are entitled to have in their minds when considering circumstances attendant upon navigation and fishing in the neighbourhood, and to bear in mind section 33 of The Fisheries Act, 1914, which the learned trial judge refers to in his judgment and which reads that

"seines, nets or other fishing apparatus shall not be set or used in such manner or in such place as to obstruct the navigation of boats and vessels . . . . ."

Now whilst, of course, that is the law, nevertheless if the mariner sees a fishing-boat or seines or nets, in defiance of the law, in his way, that would not entitle him to disregard them, and we start with that premise. Now, it was not reasonable, under the circumstances, considering the course the ferry-boat was taking—its usual course in going towards the wharf at which it was to land — for the captain of the ferry-boat to assume that he would meet with fishing-nets, especially in this particular case when, apparently, the fishermen were all upon the land and the net out in the water. Then what was the notification that the captain had? That is dealt with by the learned trial judge, who specifically deals with it. He said:

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"The evidence of the captain, as to what took place as he approached Sunnyside, at the time in question stands unimpeached and seems reasonable and discloses nothing upon which I can lay my fingers and say 'this is negligence.' He was, in his usual course, going at his usual speed, which is not shewn to be excessive, when he saw what he took to be a quantity of driftwood as he was approaching Sunnyside. There was nothing to indicate that a net had been placed across the boat's course other than the cork floats which rose some three inches above the surface of the water, and might easily be taken for driftwood at some distance away. The captain saw the floats when about 100 feet therefrom and mistook them for driftwood and changed her course slightly so as to avoid what he feared was a section of a partly submerged tree and when within about 50 feet of what he took to be floating debris he discovered that what he saw before him was a net across his course and though he then did everything possible to slacken the boat's speed and avoid running on to the net, he was unsuccessful and the net was damaged to some extent and the place where such damage was done was unquestionably in the fairway of the defendant's boat as it was pursuing its usual run on the route aforesaid."

Now, we have that specific finding upon the facts. I am not, with great respect, of the same view as the learned Chief Justice with reference to the evidence. I think there was rival

evidence. There was some evidence to shew that this obstruction was larger or more visible than the captain said, but that is not helpful to the appellant, because the learned trial judge had that evidence before him and has chosen to believe the captain.

In my opinion, the learned County Court judge came to a right conclusion. It was perfectly legitimate for him to come to that conclusion upon the facts established before him. The Court of Appeal, though, are not required to say it was a right conclusion. It is enough for us to say that the conclusion is not unreasonable, and can we say that it is unreasonable? I am constrained to say that it was reasonable. I would like to refer to what Lord Buckmaster said in *Ruddy* v. *Toronto Eastern Railway* (1917), 86 L.J., P.C. 95 at p. 96. He says on that point:

"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 rason to throw doubt upon the soundness of his conclusions."

The appeal should be dismissed.

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

Solicitors for appellants: *Ellis & Brown.*
Solicitors for respondent: *Gilling & Tufts.*

THE CITY OF VANCOUVER v. SMITH.

Survey—Reduction in size of lots—Compensation—Commissioner's finding—Varied by Attorney-General—Jurisdiction—R.S.B.C. 1911, Cap. 221, Secs. 14 and 26.

By reason of a survey directed by the Attorney-General under the provisions of the Special Surveys Act, two lots purchased by S. under a former survey were materially reduced in area. On the application of S. for compensation a commissioner appointed by the Attorney-General under section 6 of said Act decided after a hearing that S. was not entitled to any compensation. S. appealed to the Attorney-General who found that S. was entitled to $4,109.64 by way of com-

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pensation, and this finding was embodied in an order in council in accordance with the provisions of the Act.

Held, on appeal, MCPHILLIPS and EBERTS, JJ.A. dissenting, that the variation of the commissioner's finding by the Attorney-General was unauthorized and illegal, and the order in council should be made to conform with the commissioner's decision.

Statement

APPEAL by plaintiff from the decision of the Attorney-General of the 8th of July, 1921, on appeal from the finding of the commissioner appointed under section 6 of the Special Surveys Act on the claim of the defendant for compensation by reason of a special survey made by order of the Attorney-General of the 9th of May, 1919, for the purpose of correcting the former survey of blocks 1 and 2, subdivision E, district lot 183, group 1, New Westminster District. Mr. A. G. Smith purchased lots 38 and 39 in block 1, in December, 1909, for $21,000. A year later he had a survey made whereby the 7,589 square feet shewn on the original plan as the size of his lots was reduced to 6,100 square feet, his frontage of 99 feet on Powell Street was reduced to 82½ feet and his frontage of 64 feet on the railway right of way was reduced to 46½ feet. A special survey directed by the Attorney-General under the Special Surveys Act of blocks 1 and 2 shewed the lots to be substantially the same size as the survey made at the instance of Mr. Smith. Mr. Smith then wrote the Attorney-General asking for compensation and Samuel A. Moore, barrister, Vancouver, was appointed under section 6 of the Special Surveys Act to hear this and other claims for compensation. The commissioner found that Mr. Smith was not entitled to any compensation and Mr. Smith then appealed to the Attorney-General who, after a hearing, decided that Mr. Smith was entitled to compensation in the sum of $4,109.64.

The appeal was argued at Vancouver on the 26th of October, 1921, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Argument

McCrossan, for appellant: The commissioner sat to hear complaints including Smith's and made his report. The Attorney-General has no jurisdiction to sit in review or reverse the commissioner's report, or vary his findings.

Pattullo, K.C., for respondent: No such objection was taken below. This is compensation given by the Attorney-General under section 13 of the Act and under section 14 this Court is bound to hear the appeal. Everything preceding the order in council is merely a matter of procedure. The matter could be referred back to the Attorney-General under section 14 of the Act, for amendment, so that a regular appeal may be taken, otherwise a manifest injustice would be done.

MACDONALD, C.J.A.: On this preliminary point (which is strictly not a preliminary point, but was raised by Mr. *McCrossan* in order to shorten the argument since it may dispose of the whole question) I find myself somewhat embarrassed rather by the consequences of deciding it as moved than by the difficulty of the question of law involved. It arises in this way. The Attorney-General, in pursuance of section 6 of the Special Surveys Act, referred, as I think the notice says, not only the inquiry but the adjudication of the claim of Mr. Smith to Mr. Moore, as the tribunal to hear and determine the complaint. Mr. Moore did hear and determine the complaint. His adjudication then came to the Attorney-General, and in accordance with the statute it then became the duty of the Atorney-General to forward that adjudication to the Lieutenant-Governor in Council, as his own adjudication, to be embodied in the order in council if approved by that body. Now, instead of pursuing that course the Attorney-General undertook to review the adjudication of his delegate and to change it materially, which, so changed, was embodied in the order in council. Now Mr. *McCrossan* submits that the variation of Mr. Moore's determination was unauthorized and illegal, that the Court should on this appeal change it back to that pronounced by Mr. Moore, and I am inclined to think that that is true. It is unfortunate that the Attorney-General did not forward Mr. Moore's decision, as I think he ought to have done. In the result Mr. *Pattullo's* client was dissuaded from an appeal, since he is perfectly satisfied with the varied decision as it is embodied in the order in council. This mistake deprives respondent, though he may be responsible for it himself, of

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his opportunity to appeal from the decision of Mr. Moore, but at all events the only question that I have to determine now, is whether or not the decision of the Attorney-General, as it appears in the order in council, should be made to conform to the decision of Mr. Moore, and I think it should.

MARTIN, J.A.: My view of this matter has been so fully expressed during the course of the argument that it is unnecessary for me to add much more to what I have said. It is simply this, that all through, from the beginning, there is only one real legal decision in this matter, and that is the decision of the tribunal which the Attorney-General delegated to act for him under section 6 of this Act. I think I am entirely satisfied from a perusal of all the relevant sections that once that delegation is made, on such terms as it was made here, that delegated tribunal has all the authority that the Attorney-General has himself for the purposes of a full adjudication—just as full as the Attorney-General in every respect. Such being the case, when the adjudication is made by his delegate, that is to say by the Attorney-General in pursuance of the Act, he should, I say it with all respect, have embodied that adjudication in his report to His Honour in Council and it should have been embodied in the order in council under the section here. Now it comes before us in the position that the right adjudication has not been embodied in this order, and therefore what we have to do is to deal with the substance of this matter, as section 14 says, we have to consider it as it may be just and equitable, and the only just and equitable way to consider this matter is to consider that the appellant here is still in a position to have the right to have it changed, that is to say, to have the adjudication in its favour by the delegated tribunal, and therefore this matter, if it is to be further proceeded with, must be proceeded with on the assumption that one adjudication has been made and that adjudication is in favour of the appellant.

MARTIN, J.A.

GALLIHER, J.A.: I think I have expressed myself during the argument; it is not necessary to elaborate it again. It

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comes to the same substance as has been stated by both my learned brothers.

McPHILLIPS, J.A.: Well, I do not think there can be any doubt about the position, with all deference to any contrary opinion. I have no doubt about the position. There could be no appeal unless there is a decision of the Attorney-General. The decision of the Attorney-General is a matter of necessity, because without the decision of the Attorney-General there would be no order in council. To say that there was a commissioner appointed and that the commissioner did this or did that, in my opinion, means nothing, because after all the decision must be the decision as indicated in the statute—the decision of the Attorney-General. There is no interpretation clause, which we often find in statutes, which would give the commissioner the same power as the Attorney-General. This statute does not effectuate any such legal situation as that. Section 14 says:

"Any decision, order, or direction of the Attorney-General given or made under the last two preceding sections, [that is upon the complaint and the Attorney-General has to decide] and embodied in an order in council as provided by this Act, shall be subject to an appeal . . . . ."

Now the order in council has embodied in it a decision of the Attorney-General, and that is what is complained about, because in the absence of the order in council being displaced it is effective and will have the force of law, therefore the appellant must come here and say, what? He must come here and say that that decision embodied in the order in council is wrong, and the appellant must come here and accept the burden of establishing that that decision of the Attorney-General is wrong and certainly the appeal should not be heard upon any other footing.

MCPHILLIPS, J.A.

As for the action of the Attorney-General, with deference to all contrary opinion, I do not think that this Court has any right to pass upon what the duty of the Attorney-General was. I think it must be assumed that the Attorney-General discharged his duty and advised the Executive Council in accordance with the duties imposed upon him by statute, and the Executive Council accepted his recommendation and it was

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embodied in an order in council which will have the force of law until it is established that it should not have the force of law by being found here that that decision of the Attorney-General was not just and equitable. If it was just and equitable this Court should sustain it and there has been nothing shewn or even attempted to be shewn that the decision was not just and equitable, therefore it must stand.

EBERTS, J.A.

EBERTS, J.A.: I agree with the remarks of my brother MCPHILLIPS.

Appeal dismissed,
McPhillips and Eberts, JJ.A. dissenting.

Solicitor for appellant: *E. F. Jones.*
Solicitor for respondent: *J. B. Pattullo.*

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IN RE PROHIBITION ACT AND ROBINSON.

Criminal law — Prohibition — Search for liquor — Seizure — Forfeiture — Application for return — Refused — Certiorari — Appeal — B.C. Stats. 1916, Cap. 49, Secs. 48, 50 and 51.

IN RE PROHIBITION ACT AND ROBINSON

The police searched R.'s house and seized a quantity of liquor under section 50 of the British Columbia Prohibition Act. An application by R. to a police magistrate for a return of the liquor under section 51(4) of said Act was refused and the liquor declared forfeited. A motion by way of *certiorari* to quash the magistrate's order was dismissed.

Held, on appeal, affirming the decision of MORRISON, J. that irrespective of whether *certiorari* lies, the magistrate had to hear the evidence and it was his duty to draw the inference as to whether there had been a breach of the Prohibition Act. This is an inference of fact that the magistrate alone can draw and except in a case where there is no legal evidence at all, a Court of Appeal cannot sit in review as to the correctness of his conclusions.

Per MCPHILLIPS, J.A.: As there was no conviction *certiorari* does not lie.

Statement

APPEAL by respondent from an order of MORRISON, J. of the 23rd of June, 1921, dismissing a motion for a writ of *certiorari* to remove into Court an order of confiscation dated

the 18th of May, 1921, of 23 cases and nine bottles of liquor seized in the house of Walter Robinson on the 11th of April, 1921. Robinson had ordered and received 40 cases of liquor from Calgary in 1920, and in December of that year the house was searched by the police who found the liquor but they did not take any action. In April following the police again searched the house and confiscated what remained of the liquor, *i.e.*, 23 cases and nine bottles. Under section 51(4) of the Act the owner then applied for the return of the liquor on the 2nd of May, 1921, and the magistrate concluded that on the evidence Robinson was using the liquor unlawfully and the application was dismissed. On the motion for *certiorari* being dismissed, Robinson appealed.

Statement

The appeal was argued at Vancouver on the 26th and 27th of October, 1921, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

J. A. MacInnes, for appellant: There was no charge. A search was made and the liquor was seized. There was no conviction. The liquor was lawfully brought from Calgary.

Wood, for the magistrate, took the objection that *certiorari* is not the proper procedure in this case. There is no forfeiting order by the magistrate. He was merely satisfied that the liquor should not be returned: see *In re Sisters of Charity Assessment* (1910), 15 B.C. 344 at p. 346. In connection with licences the cases are *The King* v. *Licence Commissioners of Point Grey* (1913), 18 B.C. 648; *Freeman* v. *Licence Commissioners of New Westminster* (1914), 20 B.C. 438; *Fletcher* v. *Wade* (1919), 26 B.C. 477. [He also referred to *Rex* v. *Langlois* (1920), 35 Can. Cr. Cas. 98].

Argument

MacInnes, in reply: There is a provision in the Act that the liquor can be seized only after careful inquiry by an officer and a seizure should be carefully scrutinized by this Court: see *Rex* v. *Lemaire* (1920), 48 O.L.R. 475 at p. 479. First, the seizure and confiscation were not authorized. Second, if authorized there was no evidence to justify the seizure; and third, the finding of the magistrate shews on its face it was based not on proof of any charge but his own views of the matter.

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On the first point they misconstrue their duties and powers in connection with seizure and in the circumstance of this case there was no right to seize. If there was suspicion and careful inquiry first it might be justified but there was no evidence of this. The legal right of property in the liquor was in Robinson.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I think the appeal must be dismissed. The only question involved, assuming that *certiorari* lies, which, in the view I now take of the case, it is not necessary to decide, is, has a case of legal error on the part of the magistrate been made out? The magistrate had to hear the complaint of the appellant, the person claiming this liquor. He had to hear the evidence that was brought before him as to the legality of the keeping of the liquor in the appellant's house. Upon hearing of all that was said, it became his duty to draw the inference as to whether or not there had been a breach of the Prohibition Act as charged. That was an inference of fact; an inference which the magistrate alone could draw. We cannot review the correctness of that inference. We could interfere only on the ground that there was no legal evidence before him upon which he could draw an inference of breach of the Act; in other words, that the facts before him did not support an inference at all of that kind. If it be a question of whether one inference or another inference should have been drawn, that was for the magistrate to draw and not for this Court. I am clearly of the opinion that there was legal evidence to support the magistrate's inference of illegality.

MARTIN, J.A.

MARTIN, J.A.: I express no opinion as to whether or no *certiorari* would lie in such a case as this, which is very peculiar. We have not had any authorities cited to us covering this point, which is this: that we have here, not an adjudication by the magistrate upon a personal conviction, but an adjudication upon an impersonal right of property; that is all, or a claim of right to certain cases of liquor.

Now, I cannot recollect just for the moment any case of that description, so unless I should fortify myself with authority and make out that *certiorari* would lie—it is possible some authority might be found and I just simply guard myself

against expressing any final opinion upon it because this is not as though a right of property was associated with a conviction—but assuming that *certiorari* may lie, I just make two observations and the first is this. It is no part of the duty of the magistrate whatever to inquire into the circumstances which caused the officer to seize under section 51, subsection (4). That is the duty of the officer. Once the liquor is there and a claim is made to it, then the magistrate can investigate one thing and one thing only, and that thing is this: the magistrate must consider the proof of the claimant's right to the possession of such liquor, and his jurisdiction is restricted to that. He has no right to inquisition into the antecedent circumstances of the seizure in the preceding subsection. Then, viewing the matter in that light, what we find is this: that there has been evidence before this magistrate upon which he could come to the conclusion that he has reached. And, therefore, unless it can be said that there was no evidence at all upon which the magistrate could legally found his adjudication, we clearly have no right to interfere, because that is an inference of fact.

MARTIN, J.A.

GALLIHER, J.A.: I also do not find it necessary to determine the question as to whether *certiorari* will lie. As at present advised, I have grave doubt as to whether it will in a case of this kind. The only doubts I have in my mind are on the merits of this matter, as to the expression of the magistrate which has been referred to. I do not think, under all the circumstances as outlined in the judgment, we would be justified in giving to that expression, which I must say would have been better left out, that weight which would cause it to be regarded as something which the magistrate took into consideration, outside the evidence. I would dismiss the appeal.

GALLIHER, J.A.

MCPHILLIPS, J.A.: In my opinion the appeal should fail. In the first place I incline to the opinion that *certiorari* does not lie in a case of this kind. I think, as mentioned by my learned brothers, it is not perhaps necessary to really so decide in this case, and, of course, according to a good rule it is only that

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which is necessary to determine which should be determined with any finality. If you turn to section 53 of the Prohibition Act dealing with *certiorari* it says:

"No writ of *certiorari* shall issue for the purpose of quashing any conviction for any violation or contravention of any provisions of this Act . . . . ."

Now, there was no conviction in this case, and I would not think on that ground that *certiorari* would lie. Then the question arises, is there no recourse at all in law? We should hesitate to arrive at that conclusion, if there is a well-founded case. Turning to the Summary Convictions Act, R.S.B.C. 1911, Cap. 218, and we find section 72, and reference is made to other than a conviction. Section 72 reads:

"Unless it is otherwise provided in any special Act under which a conviction takes place, or an order is made by a justice for the payment of money or dismissing an information or complaint, any person who thinks himself aggrieved by any such conviction or order, the prosecutor or complainant, as well as the defendant, may appeal to the County Court, at the sitting thereof which shall be held nearest to the place where the cause of the information or complaint arose."

MCPHILLIPS, J.A.

If any right of review existed at all, it could only be in an appeal under section 72 of the Summary Convictions Act. That would be an appeal to the County Court or upon a case stated, neither of which courses has been adopted. Then coming to the merits, we start with section 36 of the Prohibition Act and there was a *prima facie* case of there being liquor more than was reasonably required by the person residing in this particular house, and commencing with a *prima facie* case, an absolute case was made out, in my opinion; an absolute case of unlawfully having liquor. In any case, if there is the right of review, there could be no disturbance of the magistrate's decision unless we were of the opinion that there was no evidence. I think there was ample evidence.

EBERTS, J.A.

EBERTS, J.A.: I express no opinion as to whether the right of *certiorari* would lie or not. Under the circumstances I would join in dismissing the appeal.

Appeal dismissed.

PALMER v. RICHARDS.

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Oct. 6.

PALMER v. RICHARDS

Sheriff — Execution — Moneys of execution debtor in sheriff's hands — Balance over from sale under previous execution—Chose in action—Return—Estoppel—Costs—R.S.B.C. 1911, Cap. 79, Secs. 13 to 16.

Surplus moneys in the sheriff's hands after an execution has been satisfied, are not available for seizure under an execution.

APPEAL by defendant from the decision of LAMPMAN, Co. J. of the 23rd of May, 1921, in an action against the sheriff of the County of Victoria for $279.70 as money had and received, or alternatively as damages. The circumstances upon which the plaintiff based his claim were as follow: Prior to the action, in December, 1918, two distress warrants against the goods of one George D. Davis were placed in the defendant's hands as bailiff, upon which he made a seizure and sold the goods for more than enough to satisfy the warrants. Before the surplus moneys were paid over to Davis, one Brethour obtained judgment against Davis in the Supreme Court and placed a writ of *fi. fa.* in the defendant's hands for execution. Shortly after, the plaintiff obtained judgment in the County Court of Victoria against Davis and placed a warrant of execution in the defendant's hands. No other executions were issued against Davis. A dispute then arose between the execution creditors and the defendant as to the amount of the surplus moneys in the defendant's hands payable to Davis. The defendant delivered a statement claiming he had only $138.70 surplus, after deducting various charges including one for $141 possession money. The plaintiff contested the defendant's right to this charge for possession money and after proceedings under the Distress Act and certain *certiorari* proceedings (reported 27 B.C. 485) succeeded in having the $141 charge disallowed. The plaintiff then claimed there was $279.70 seizable under the execution and demanded payment from the defendant of a proportion of this sum under the Creditors' Relief Act. This was refused by the defendant, and on the plaintiff's demand the defendant made a return

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stating the validity of the executions were disputed and that the amount to be distributed could not be arrived at until the result of an appeal in certain *certiorari* proceedings were determined. To obviate the objection that Brethour contested his claim, the plaintiff obtained from Brethour a release and assignment of the latter's rights under his execution and gave the defendant notice thereof. The defendant still refused to pay, and the plaintiff brought action to recover the sum of $279.70, claiming that if the defendant had seized this sum under Brethour's execution, the plaintiff was entitled by virtue of the assignment, that if the defendant had seized under the plaintiff's warrant, the plaintiff was entitled to the whole as there were no other execution creditors; and if the defendant had made no seizure, he was liable for his failure to do so, as he had the money available for seizure. The defendant's dispute note placed in issue the fact of seizure and on examination for discovery admitted having the surplus moneys in his hands at the time of receiving the executions but swore he had made no levies, because he had notice that the executions were disputed. At the trial the plaintiff put in the defendant's statement shewing a surplus of $138.70 and the *certiorari* proceedings to shew that this should be increased to $279.70. The defendant put in no evidence. It was not suggested at the trial that there was any doubt as to the defendant's legal power to seize the $279.70 but the issue was contested as one of fact.

Statement

The appeal was argued at Vancouver on the 6th of October, 1921, before MACDONALD, C.J.A., MARTIN, GALLIHER and EBERTS, JJ.A.

Mayers, for appellant: The question is whether money in the hands of the sheriff can be levied upon under a writ of execution. The judgment is for the amount so held. Generally anything of an incorporeal nature is exempt from seizure: see *Fieldhouse* v. *Croft* (1804), 4 East 510; Halsbury's Laws of England, Vol. 14, p. 47, pars. 95-6. The Judgments Act (1 & 2 Vict., Cap. 110), Sec. 11, is embodied in our Execution Act, R.S.B.C. 1911, Cap. 79. A case decided after the Judgments Act was *Harrison* v. *Paynter* (1840), 6 M. & W. 387.

Argument

D. M. Gordon, for respondent: The surplus was in the sheriff's hands and he can seize a chose in action. He made a return and is estopped by his return. The sum so held is subject to an action by the judgment creditor: see Halsbury's Laws of England, Vol. 14, p. 60; *Field* v. *Smith* (1837), 5 Dowl. 735.

Mayers, in reply: As to the return constituting an estoppel by record see Everest & Strode, 2nd Ed., p. 7; *Stimson* v. *Farnham* (1871), L.R. 7 Q.B. 175. The sheriff can shew the goods were taken away from him: see *Brydges* v. *Walford* (1817), 6 M. & S. 42. This alleged return was merely a statement. There was no admission on which estoppel could be based: see *Remmett* v. *Lawrence* (1850), 15 Q.B. 1004.

Argument

MACDONALD, C.J.A.: I think the appeal must be allowed. It is perfectly clear to my mind that the sheriff cannot seize a chose in action. Under what circumstances he may seize specie I need not discuss. Unless therefore there is something appearing upon this record against the sheriff asserting the contrary to what his so-called return has shewn, it is impossible to sustain the judgment below. Now, I do not think there was estoppel, for two reasons: the authorities seem to shew that the return made by a sheriff, even where it is a formal return, is not a conclusive estoppel. In a certain class of cases, as Mr. *Mayers* has pointed out, it may be regarded and has been regarded as an estoppel of record; but in a case of this character it has not been so regarded.

MACDONALD, C.J.A.

As to costs, Mr. *Mayers* has very properly and very frankly stated that he cannot ask for them in view of the attitude he has taken on this appeal. We are, therefore, not called upon to decide the question at all. As far as I am concerned, I do not decide it.

MARTIN, J.A.: My view is that moneys in the sheriff's hands in the circumstances of this case are not available to seizure at common law, quite apart from the Distress Act Amendment Act of 1915. As to the so-called return, I do not regard it in the proper sense of the word as being a return at all. It is simply a recital of certain facts and statements

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which are intended to explain the fact that the moneys are not available for the execution creditor. And, moreover, even if it were to be regarded as a return, it is self-contradictory, and shews upon its face such facts which would prevent its being regarded as a statement of a return that these moneys actually were seized and had become available to this execution, because the all-important statement is that these moneys which he purported to seize (which, as a matter of law could not be seized) were surplus moneys in his hands, and there is nothing at all to shew, and it is not necessary for me to shew, that they were in any way under the control of the judgment debtor.

MARTIN, J.A.

GALLIHER, J.A.

GALLIHER, J.A.: I agree.

EBERTS, J.A.

EBERTS, J.A.: I agree.

Appeal allowed.

Solicitors for appellant: *Hall & O'Halloran.*
Solicitors for respondent: *Crease & Crease.*

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Oct. 10.

ROTHERY v. NORTHERN CONSTRUCTION COMPANY.

Statute, construction of—Woodman's lien—Hauling logs—Teamster with horses—R.S.B.C. 1911, Cap. 243, Sec. 3.

ROTHERY v. NORTHERN CONSTRUCTION CO.

A workman hired with his team of horses for the purpose of skidding and hauling timber is within the purview of section 3 of the Woodman's Lien for Wages Act and is entitled to a lien for the amount agreed to be paid him for himself and his team.

Statement

APPEAL by defendant from the decision of SWANSON, Co. J., of the 8th of July, 1921 (reported *ante* p. 152), in an action to enforce a woodman's lien. One Cardon contracted with the defendant Company to take out ties and lumber from the Mount Olie District. Two men, Loveway and Wolstenholme,

were employed by Cardon to assist in the work, Wolstenholme being paid at the rate of $9 a day for himself and team of horses and Loveway at the rate of $7 a day for himself and one horse. Both Loveway and Wolstenholme obtained the horses they used on the work from the plaintiff Rothery under an arrangement with him. When they had finished their work they each assigned in writing to Rothery the amount due and payable to them from Cardon, of which due notice was given the defendant Company. Rothery then filed woodman's liens for the amounts so assigned to him.

Statement

The appeal was argued at Vancouver on the 7th and 10th of October, 1921, before MACDONALD, C.J.A., GALLIHER and EBERTS, JJ.A.

Reid, K.C., for appellant: The evidence shews Loveway and Wolstenholme were employees of Rothery and hired by him to drive his horses. Rothery was a sub-contractor and the two men were actually paid by him. The evidence is contradictory and the burden is on the plaintiff. In the next place under section 3 of the Woodman's Lien for Wages Act the lien can only be for moneys due Loveway and Wolstenholme and not for what was due Rothery for the horses. The two men were paid in full at the time of the assignment: see *Muller* v. *Shibley* (1908), 13 B.C. 343; *Stephens* v. *Burns* (1921), 2 W.W.R. 513.

Argument

P. McD. Kerr, for respondent: The labourer is entitled to include his team: see *Stephens* v. *Burns* (1921), 2 W.W.R. 513 at p. 516; *Re Western Coal Co., Ltd.* (1913), 4 W.W.R. 1238; *Stafford* v. *McKay* (1919), 2 W.W.R. 280.

Reid, in reply.

MACDONALD, C.J.A.: I think the appeal must be dismissed. I quite agree with what Mr. *Reid* has just said, that the Company is more or less at the mercy of the contractor, of the plaintiff and the other two men concerned in this proceeding. There is positive evidence on the part of the parties, that is to say, the contractor Cardon, Rothery, the plaintiff, and the two men in question, that the latter were the employees of Cardon and not the employees of Rothery; and there is evidence as

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to what their relationship was with Rothery in connection with the teams of horses. Looking at the whole case, it cannot, I think, be said that the judge who tried the action could not have reasonably come to the conclusion to which he did come. In other words, while there are inconsistencies in portions of the evidence of Loveway which, if looked at without reference to the rest of his evidence or the evidence of the other witnsses, might lead one to an opposite conclusion, yet it cannot be said that the learned trial judge, upon the whole of the evidence which was before him, could not find as he did.

MACDONALD, C.J.A.

As to section 3 of the Woodman's Lien for Wages Act, I think the true construction of that section is that a person who is hired with his team by another is within the purview of that section, and that he is entitled to claim a lien for the amount agreed to be paid him as hire for himself and his team.

GALLIHER, J.A.

GALLIHER, J.A.: I agree in dismissing the appeal. I would also say that, while there are some parts of the evidence that are inconsistent with the hiring of men and teams by Cardon, yet when you take all the evidence you may come to the conclusion, as I do, that this was simply a hiring of men and the teams by Cardon at so much per day—a stated sum of $9 and $7 per day. Now, they, not having teams of their own, went and procured teams from Rothery and agreed that out of that $9 a day they would receive from the sub-contractor they should be paid for their actual work as between Rothery and themselves $70 and $85 a month respectively. Now, on that view of the case, I think the evident inconsistencies are reconcilable, and I would have to, as the Chief Justice has said, come to the same conclusion on the evidence as the learned trial judge.

On the question of law, I have no doubt. I had no doubt whatever outside the authorities cited by Mr. *Kerr* that, where a man has a team and uses it to perform services such as in this case, the amount he receives for team and self is within the Woodman's Lien for Wages Act. In fact, as I put it myself (I see Mr. Justice Beck has it in his judgment), they are for the moment the tools with which the person is working, they

are the tools that he has to employ and without which he could not perform the work that he was engaged to do. Under these circumstances it does seem to me under the wording of our Act that there can be no question as to the right to a lien here.

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EBERTS, J.A.: I agree with my learned brothers to the effect that the contract was made by Cardon, Cardon with Loveway and Wolstenholme, and they in turn got the horses from Rothery to do the work they had agreed to do for Cardon. I would, therefore, dismiss the appeal.

EBERTS, J.A.

Appeal dismissed.

Solicitors for appellant: *Black & Dunbar.*
Solicitors for respondent: *Kerr & Parker.*

LOVEROCK v. WEBB.

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LOVEROCK v. WEBB

Trespass—Overhanging tree—Right of adjoining landowner to cut—Obligation to return cut portion to owner.

In the case of W. cutting off that portion of a tree overhanging his lot, the trunk of which is on L.'s lot, and it falls on his lot, although the ownership of the fallen portion is in L. and he has the right to enter on W.'s lot and take it away, there is no obligation on the part of W. to deliver the cut portion to L.

APPEAL by defendant from the decision of GRANT, Co. J., of the 13th of April, 1921, in an action for damages for cutting, retaining, and destroying a tree. The plaintiff claimed $165, and the defendant paid into Court $10. The parties owned adjoining lots and a tree on the plaintiff's lot overhung that of the defendant's. The defendant cut the tree where he thought it crossed the boundary into his own lot but he got four inches on the plaintiff's ground. The plaintiff sued and the defendant paid into Court $10, but neglected to pay the $1 in addition required by the Act for costs of writ. The

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Court below gave judgment for $10 but gave the plaintiff costs of the action.

The appeal was argued at Vancouver on the 28th of October, 1921, before MACDONALD, C.J.A., MARTIN, MCPHILLIPS and EBERTS, JJ.A.

Hamilton Read, for appellant: We did not pay in the additional one dollar for costs, and they were allowed $10, and costs, the judge referring to the fact that we did not put back the wood belonging to their side of the line. As to the judge's discretion as to costs see *Sykes* v. *Wesleyan and General Assurance Society* (1907), 76 L.J., K.B. 626; *Ritter* v. *Godfrey* (1920), 2 K.B. 47; *Higgins* v. *L. Higgins & Co.* (1916), 1 K.B. 640. There must be substantial material upon which the discretion is founded. There was no conversion of the branches. We are not compelled to put them back: see *Mills* v. *Brooker* (1919), 88 L.J., K.B. 950; Halsbury's Laws of England, Vol. 3, p. 127, par. 253; *Reed* v. *Smith* (1914), 19 B.C. 139; *Attorney-General for British Columbia* v. *Corporation of Saanich* (1921), 29 B.C. 268.

Argument

W. P. Grant, for respondent: A sufficient amount must be paid into Court to cover damages and it must be done in accordance with the rules: see Annual County Courts Practice, 1921, p. 127, section 107.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: This is a case in which one neighbour has brought an action in the County Court against another for an alleged wrong in cutting down that portion of a tree which overhung the boundary. The learned trial judge thought the defendant should have returned the loppings which he had cut, the value being found to be $10. It is a most trivial action in the first place to bring and in the second place to appeal. But we have to hear cases which are within our jurisdiction and if parties choose to come here with a case of this kind, we cannot properly and with propriety refuse to hear it, but I must now say that I am astonished this case has been brought to this Court and still more that it should have got into any Court. I have, however, to deal with the case now presented, and the first point, although perhaps not the most substantial

point in one sense, is the question of whether the learned trial judge was right in awarding $10 damages for not returning the portion of the tree and branches which fell upon the defendant's land. We have before us a map or plan which shews this tree as having its roots, apparently its whole trunk, wholly within the plaintiff's land. It is not a boundary tree. It leans very decidedly over the defendant's land and, if a horizontal line be drawn from the boundary line up, it would cut this tree at some distance above the ground. Now the defendant, in cutting it off, cut it a few inches below the point at which the trunk would be intersected by this horizontal line. In other words, if he had cut the tree a few inches higher he would have cut only that portion of it which was over his own land. Now the difference between those few inches, of course, is not a matter of compensation at all. The cutting of the tree at either point would result in destroying it. I think the Court would be drawing altogether too fine a line in finding that damages should be assessed because the tree had been cut a few inches lower than it might have been cut. The learned trial judge does not find damages for the trespass. He might have found that there had been a technical trespass, it is true. And there may be something in his reasons to indicate that he thought there was a trespass, but he assessed the damages entirely upon the ground that the defendant did not take the portion of the trunk and branches which he had lopped off and were on his land and deliver them to the plaintiff. I do not think there is any warrant for any such finding. The defendant was under no obligation to take these branches and the other portion of the tree back and deliver them to the plaintiff and as that omission was the basis of the learned trial judge's assessment of damages, the judgment must necessarily, in my opinion, fall. Therefore, as I see the case, the learned trial judge ought to have dismissed the action and ought to have dismissed it with costs. In that view of the case it becomes unnecessary to review the other branch; that is, whether an appeal would lie to this Court against the disposition of the costs below. I have already expressed my opinion during the argument that I thought on the assumption that the learned

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judge had exercised his discretion, that there was no appeal to this Court. I may say I do not find anything in the appeal book which shews that the learned trial judge did not exercise his discretion. In a case before us some time ago of *Young Hong* v. *Macdonald* (1910), 16 B.C. 133, we remitted a case to the trial judge for the purpose of dealing with the question of costs because in that case he had declared in express and implicit terms that he did not think he had any right to deal with the costs in the way proposed. We came to a different conclusion. Therefore, we said, the learned judge had not tried that question at all; had not fixed his mind upon it, but here there is nothing to indicate that the learned judge has not exercised his discretion with regard to the defendant's costs. However, so far as I am concerned, it is not necessary to decide that point. My judgment would be that the action should be dismissed with costs.

MARTIN, J.A.

MARTIN, J.A.: This is an action for trespass. It is important to understand what it is. It is an action for trespass brought for the destruction of a certain tree and nobody wishes shade ornamental trees to be destroyed by any person, therefore, it is not to be expected that a man finding his property is being destroyed, especially shade ornamental trees around his home, that he should not resent it and not regard it as a matter of substance. Such being the nature of the action, it comes before us in rather a peculiar way, because we are not furnished with the notes of evidence. But both sides have agreed that for the purposes of this appeal, we must take the statements made by the learned trial judge in his reasons for judgment as being the facts of the case upon which our judgment ought to be applied. But I say that because that being the case, I am not going to look at any other evidence or plans of any kind, because I would be only misled and it would not be proper for me to do so, after the parties have agreed what the evidence is. Looking then at the reasons of his Honour for the facts upon which he gave judgment, I find most distinctly laid down there that this defendant did trespass upon the plaintiff's property and cut down the tree which

the plaintiff had inside. Now, of course, the trespass is in plain terms found by his Honour. Such being the case what his Honour should have done under the circumstances, if there had been nothing more than that in the case, he should have found—if he was not satisfied there were substantial damages, for that trespass he should have awarded nominal damages. Nominal damages have always been regarded in the modern history of our jurisprudence as 40 shillings in the Old Country and $10 here. And upon the moment that was established, the plaintiff would be entitled to a verdict of $10 nominal damages for trespass to his property. Unfortunately, without especially allotting that damage, which would have been perfectly proper, his Honour proceeded to regard it from another aspect, which is, I think with all respect, erroneous in this respect, that his Honour seemed to think there was an obligation cast upon the defendant, after he had cut certain low branches, which he was entitled to do, to carry those branches off his property and give them to the plaintiff. Now, of course, I do not think there is anything to warrant his Honour, with all respect, taking the view that there was such an obligation put upon the defendant and, therefore, I think in that respect that his Honour's judgment cannot be upheld and the judgment of damages his Honour gave for that amount cannot be supported. But it just turns out coincidentally and happily, that the amount his Honour awarded would be precisely the amount he should have awarded for the trespass which he had undoubtedly found. Therefore, since the judgment cannot be supported upon his second view, it can and ought to be supported upon the primary view of the trespass and nominal damages, and therefore, pursuant to rule 868,—

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"The Court of Appeal shall have power to draw inferences of fact and to give any judgment and make any order which ought to have been made, and to make any such further or other order as the case may require."

Obviously the order which ought to have been made below is that judgment should have been entered for nominal damages. His Honour might have been able to give judgment for more, but at the least he should have given nominal damages. Therefore, as we ought to make the order the learned trial judge should make below, our duty is to make that order and that

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order in this case is, that damages should be recovered for this trespass of $10, and that would carry costs, and therefore his Honour's judgment could be supported in that respect also. In regard to the authorities that have been mentioned, they have been quoted in *Mills* v. *Brooker* (1919), 88 L.J., K.B. 950, in *Lemmon* v. *Webb,* in the House of Lords (1895), A.C. 1, and *Attorney-General for British Columbia* v. *Corporation of Saanich* (1921), [29 B.C. 268] 1 W.W.R. 471, where I go into the question of boundary trees and the rights of trespass, and cite numerous English and American authorities on the subject.

McPHILLIPS, J.A.: In my opinion the appeal fails. I am not at all embarrassed by anything that the learned County Court judge has found. The action is plainly one for trespass. The dispute note is a denial of the trespass. The payment of the $10 into Court is to meet the action and reads this way:

"Defendant says that if plaintiff has suffered any damage the same is amply compensated for with the sum of $10, and defendant brings the said sum of $10 into Court with a denial of liability, and says that the sum is sufficient to meet any damage or any cause of action as alleged by the plaintiff against the defendant."

Now, here is the cause of action which is alleged:

"On or about the 3rd day of March, 1921, the defendant caused to be cut down and destroyed without notice to the plaintiff one large alder tree. . . . . On Saturday the 5th day of March, 1921, the defendant caused without notice to the plaintiff to be destroyed by cutting and otherwise mutilating a medium-sized ornamental tree, situated and growing on the plaintiff's property."

MCPHILLIPS, J.A.

Therefore, the action was one of trespass and if proved entitled damages to be assessed. The plaintiff himself said $10 was sufficient for it. The fixing of the damages by the learned trial judge, in my opinion, was not a differentiation in the cause of action but was in compliance with the proof, when the cause of action had been established, and the learned trial judge says:

"While the tree may have been of no value as a shade it was of value as fuel and this value the plaintiff fixes at $10, a sum I cannot say is exorbitant."

And he concludes by saying:

"Judgment for plaintiff for $10 and costs."

Now, I cannot read that in that he disassociated the fixing of these damages from the trespass, because he could not have

fixed a dollar of damages unless he found trespass, no possibility of his doing so. What was the cause of action? The cause of action was trespass and there being a cause of action proved, his Honour gave judgment for the amount paid into Court. Now, what right was there to cut this tree over the area owned by this neighbour? That was a tortious act, a cause of action when well founded that the Courts favour. Why do they favour such causes of action? Why, because they are liable to give rise to breaches of the peace. Many men value ancient or ornamental trees beyond price — the sanctity of the home should not be invaded, and the Courts of law therefore, as a deterrent, favour such causes of action. Now in this case, admittedly, this defendant invaded that right of property and cut that tree. I do not propose to refine the question at all. If a cause of action is established, damages flow from it and, I think, in this case the learned trial judge has been very considerate in assessing the damages. When I was a student I remember thinking at that time that it was a very heavy verdict when the case was that of a man entering the front gate and going out of the rear gate of his neighbour's premises, I think the verdict was £50. He had not done any damage to the premises at all, but he did it contumaciously. He did it against that neighbour's privacy. Now, here there was no right to cut the tree, it was a clear case of trespass; the tree was upon a neighbour's land, the land of the plaintiff, the respondent in the appeal. The appeal should be dismissed.

MCPHILLIPS, J.A.

EBERTS, J.A.: I agree with the remarks of the learned County Court judge where he says:

"As to the trunk of tree number 1 even if the defendant had a right to have cut off the tree at a point above where it extended wholly into and over the defendant's property he had no right to cut beyond the line in the property of the plaintiff which he did for nearly one half of the diameter of the tree."

He committed a trespass. For that trespass his Honour has given nominal damages, and I agree in dismissing the appeal.

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

Solicitors for appellant: *Hamilton Read & Jackson.*
Solicitor for respondent: *W. Pollard Grant.*

MACDONALD, J. (At Chambers)

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IN RE DOUGAN ESTATE

IN RE DOUGAN ESTATE.

Will—Construction—Trustee Act—Petition under section 79—R.S.B.C. 1911, Cap. 232.

Section 79 of the Trustee Act is not intended to provide for the decision of any intricate questions as to the construction of the terms of a will.

Statement

PETITION under section 79 of the Trustee Act for an adjudication upon certain questions arising under the will of James Dougan, deceased. Heard by MACDONALD, J. at Chambers in Victoria on the 29th of September, 1921.

Stanier, for the Executors.
C. L. Fillmore, for Soldiers Settlement Board.

29th October, 1921.

MACDONALD, J.: The executors of the will of the late James Dougan, petition the Court, under section 79 of the Trustee Act, for an adjudication upon certain questions arising under the will and outlined in their petition. It is quite apparent, that this involves consideration of the will, which is peculiar in its language and difficult of construction.

Judgment

It was submitted that all the parties interested were either joining in, or had been notified, of this application to the Court for "its opinion, advice and direction" with respect to the will, and argument was presented at considerable length. All the parties, however, whose interests might be affected by the application, were not represented. I am met with the difficulty, that the section of the Trustee Act, under which the application is made, does not authorize the Court to construe the terms of a will. This section is taken from St. Leonard's Act (22 & 23 Vict., Cap. 35, Sec. 30) and a corresponding section in Ontario was held by Vice-Chancellor Mowat, in the case of *In re Williams,* 1 Ch. Ch. 372, not to entitle him to give an expression of opinion, as to the effect of a will, then under consideration. He stated that he was bound by the authorities to hold that "he could not express any opinion upon the ques-

tion suggested by this petition." The cases referred to in his judgment were: *In re Lorenz* (1861), 7 Jur. (N.S.) 402; 1 Dr. & Sm. 401; 9 W.R. 567, and *Re Hooper* (1861), 29 Beav. 656. In the former case, a portion of the judgment of Kindersley, V.C. is as follows (9 W.R.):

"In the first place, with regard to the construction of an instrument, if that construction was to affect the rights of the parties, his Honour's understanding and interpretation of the 30th section of Lord St. Leonard's Act was, that it never was intended to apply to such a case as this where the construction was doubtful."

Then in the latter case, where the section is referred to in the report at length, Sir John Romilly stopped the counsel supporting the petition and observed—

"that the object of this clause was to assist trustees in the execution of the trusts, as to little matters of discretion; and that this was not a case of that description. That when, as in this case, a question arose as to the effect of a limitation in an instrument, it ought, for the assistance of the Court, to be argued by the opposite parties."

Judgment

I expressed myself on this point, to the same effect, during the argument and feel that I should not give an opinion or advice upon any of the questions in the petition as they are correlated and involve a determination of the proper construction to be placed upon the will. I consider the section invoked by the trustees, was not intended to provide for the decision of any intricate questions as to the construction of a document, such as the will requiring consideration in this matter. See *In re Tyrell's Trusts* (1889), 23 L.R. Ir. 263. I think under the circumstances, costs of all parties should be paid out of the estate.

Order accordingly.

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HOOPER v. NORTH VANCOUVER.

HOOPER v. NORTH VANCOUVER.

Municipal law—By-law authorizing passenger ferry—Discounting of fares —Injunction—Irreparable injury—Interest of ratepayer—Right to enjoin municipal council—B.C. Stats. 1914, Cap. 52, Secs. 54(26) and 343.

Under the authority of a by-law passed by a municipal council authorizing the council to grant free transportation and authorize the issue of passes for a municipal ferry, the council passed a resolution granting each resident or ratepayer of the municipality twenty free passes per month. On an application by a ratepayer for an injunction to restrain the municipality from issuing free passes:—

Held, that the resolution of the Council is *ultra vires* as it exceeded the authority of the by-law. The resolution in reality granted a discount on the regular fares to the persons therein mentioned. The power to grant passes cannot be held to imply power to grant discounts on fares, as if it were intended to grant such powers express words would have been used.

If a ratepayer of a corporation operating a ferry, shews that such operation is likely to result in a deficit, in which case, he will be called upon to pay in proportion to his liability as a ratepayer, he comes within the term "irreparable injury" and the facts are sufficient to justify his obtaining an interlocutory injunction.

Statement

APPLICATION for an injunction to restrain the City of North Vancouver from issuing free passes for passage on the ferries plying between North Vancouver and the City of Vancouver. A resolution was passed by the City Council authorizing the issue of passes under the provisions of by-law No. 392 of the City, paragraph 3 thereof providing: "The control and management of the ferries and ferry system operating between the Cities of North Vancouver and Vancouver shall, except as herein set out, be administered by the City Council, which may, from time to time, make such further and other regulations in respect of the operation, regulation and maintenance of the same that may be deemed necessary," and paragraph 13 thereof further providing "The Council may by resolution from time to time grant free transportation and authorize the issue of passes to whom they may deem it advisable in the interest of the City so to do." The resolution in ques-

tion was in part as follows: "And resolved that whereas and by virture of by-law No. 392 one of the by-laws of the Corporation of the City of North Vancouver, authority is given to the Municipal Council of said City by a resolution from time to time to grant free transportation and to authorize the issue of passes upon the North Vancouver City Ferries, when said Council deems it advisable in the interests of the City so to do.

"And whereas the Municipal Council deems it advisable to grant free transportation and to authorize the issue of passes on the said North Vancouver ferries on, and from the 15th of November, 1921, to the persons and upon the terms and conditions hereinafter set out, namely, (1) Every *bona fide* resident or ratepayer of the City as defined in this resolution, who, having filed with the City Clerk during office hours at the City Hall, a statutory declaration in writing that he, or she, is a *bona fide* resident or ratepayer of the city, and who has received from the city clerk a certificate certifying that he or she is a *bona fide* resident or ratepayer of the city shall, upon delivery of said certificate to the city collector, be entitled to receive from, and the city collector shall deliver to said *bona fide* resident or ratepayer during office hours at the City Hall, free of charge, a book containing twenty single trip passes which shall be good on the ferries. Every such *bona fide* resident or ratepayer shall be entitled to one book of twenty (20) passes upon the presentation of the signed cover of a commutation book of passenger tickets (30 for $2) shewing serial number not lower than 15314 and each of such residents or ratepayers shall be entitled to receive not more than one book of passes each thirty (30) days."

Statement

Section 2 of the resolution provided for automobile passes and section 3 defined certain words in the resolution. Heard by MURPHY, J. at Vancouver on the 15th of November, 1921.

Davis, K.C., and *Burns*, for plaintiff.

Mayers, and *A. C. Sutton*, for defendant.

17th November, 1921.

MURPHY, J.: As to the first objection that plaintiff cannot succeed in obtaining an interlocutory injunction because he

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has not shewn irreparable injury, I am of opinion the objection should be overruled. "Irreparable injury" in injunction applications means an injury that cannot be adequately remedied by damages: Kerr on Injunctions, 5th Ed., 19, and authorities there cited. The case at bar is, I think, of this character. I am also of opinion that the material shews sufficiently that injury is threatened or intended to the plaintiff to justify his obtaining an interlocutory injunction. He is a ratepayer of defendant Corporation. The Corporation is operating the ferry in question. If such operation results in a deficit, plaintiff will be called upon to make same good in proportion to his liability as a ratepayer.

The third objection that plaintiff has no interest to maintain this action inasmuch as he has shewn no special injury to himself is one on which I have, with considerable difficulty, reached a conclusion adverse to its validity. *Robertson* v. *City of Montreal* (1915), 52 S.C.R. 30 is cited in support. In that case, however, if I understand it aright, the plaintiff, though a ratepayer, had no interest *qua* ratepayer different from the interest of any resident of the City. No financial burden could devolve upon the ratepayers because of the granting of the franchise in question. Here the contrary is quite within the realms of possibility. On the other hand, there is the case of *MacIlreith* v. *Hart* (1908), 39 S.C.R. 657, which decides that where the acts impeached may materially affect to their detriment the interests of the ratepayers an action such as this will lie. Further it is to be noted that Duff, J., in *Robertson* v. *City of Montreal, supra,* expressly reserves his opinion as to whether if the ground of attack be that the act complained of is *ultra vires* a ratepayer can or cannot bring an action impeaching same. *Ultra vires* is the ground relied upon in these proceedings.

Judgment

As to the main question, I am of opinion that the resolution in question is *ultra vires* because it goes beyond the authority given by by-law No. 392 to the Council. Section 13 of the by-law states:

"The Council may by resolution from time to time grant free transportation and authorize the issue of passes to whom they may deem it advisable in the interests of the City so to do."

What the Council has here done, in my opinion, in reality is not to exercise the power conferred by this section but to grant a discount on the regular fares to the persons mentioned in the resolution. This is the clear result of the resolution. It is urged that the greater includes the less and that the Council having power to grant passes must necessarily have the power to give discounts on fares. But it is, I think, unquestioned law that a municipal council passing a resolution by virtue of an authority conferred by by-law must find within the language of the by-law clear empowering language for the terms of such resolution. To my mind power to grant passes cannot be held to necessarily imply power to grant discounts on fares. If it was intended to grant such power express words doing so should have been used. This view, I think, is all the more cogent in the case at bar because I agree that the empowering section of the Municipal Act of 1914 for this by-law is subsection (26) of section 54 and not section 343. Said subsection (26) requires approval by the Lieutenant-Governor in Council as a condition precedent to any by-law passed thereunder becoming operative. Obviously very different considerations would arise when any particular by-law was being considered for approval by the Lieutenant-Governor in Council where the by-law authorized the granting of passes from where it proposed to empower a municipal council to grant discount on rates. The ferry in question, it was stated in argument, serves not merely the residents of defendant Municipality but the residents of several other municipalities. The Council of defendant Municipality might not unreasonably be expected to exercise its powers with an eye solely to the benefit of the residents of the defendant Municipality without regard to any unfavourable reaction on the interests of other municipalities forced to use the ferry. The Lieutenant-Governor in Council, however, being the Executive for the whole Province would, it would seem, be called upon to view the conferring of powers such as are in question here from the standpoint of all persons likely to use the ferry.

If, therefore, the Lieutenant-Governor in Council is said to have granted such discriminating powers as are contended for

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by defendant Municipality that, in my opinion, must be shewn to have been done by explicit language set forth in the by-law. As stated, I do not find this requisite in the by-law before me. The injunction is granted.

Injunction granted.

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RAINES v. B.C. ELECTRIC RY. CO.

RAINES v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY.

Assault — Damages — Passenger on street-car — Duty and power of conductor—Ejectment of passenger.

The plaintiff, a man 63 years of age, with a nurse who was in attendance on his wife, entered an eastbound Grandview street-car at the corner of Dunsmuir and Richards Streets in Vancouver, both having a number of small parcels. There being no seats available they took hold of straps supplied for the purpose in the open space at the entrance. More passengers got in at each stop and the conductor called to the passengers to move up, when the plaintiff remarked there was no use urging the passengers to move up as there was no room. At the next stopping the conductor told the plaintiff that if he did not move up he would put him off. The plaintiff did not move and on stopping at the next corner the conductor with the assistance of the motorman attempted to put the plaintiff off. The plaintiff resisted and, after some scuffling, he was allowed to stay on through the intervention of a policeman and some of the passengers. His clothes were torn and he suffered injury. In an action for damages for assault:—

Held, that the assault was unprovoked, that the plaintiff, considering his age, and the congested condition of the car, was violating no rule; that in the circumstances the conductor's request was an unreasonable one and the plaintiff was entitled to judgment.

Statement

ACTION for damages for injuries sustained by reason of a conductor on a street-car of the defendant Company attempting to put him off the car by force. The facts are fully set out in the reasons for judgment. Tried by MORRISON, J. at Vancouver on the 26th of October, 1921.

Kappele, for plaintiff.
McPhillips, K.C., for defendant.

19th November, 1921.

MORRISON, J.: The plaintiff, a man 63 years old, was taken on board an eastbound Grandview car of the defendant Company at the corner of Dunsmuir and Richards Streets in August last. With him was a lady who was in attendance on his wife as nurse. They were somewhat encumbered with small parcels. There being no seats available, they took hold of the straps at the open space at the entrance furnished by the defendant Company for the purpose. As the car proceeded more passengers entered so that the aisle and other spaces appeared to be filled. The conductor in charge of the car called out to those inside to move forward. The plaintiff thereupon remarked that it was no use urging people to move up as the car was full. The conductor, it appears, resented being given this bit of gratuitous information. When the car was approaching the Woodward Departmental Stores on Hastings Street and upon a number of passengers seeking to get on board the conductor came up to the plaintiff and told him if he did not move up he would put him off. The plaintiff remained where he was, and upon the car coming to the next stop the conductor came to the plaintiff, caught hold of him and attempted to put him off. A struggle ensued and in the fracas they both got into the vestibule. The motor-man not being able to come through the car owing to its congested condition, got off and came back by way of the street to the scene and courageously caught hold of the plaintiff and attempted to pull him off also. Some of the passengers approached the policeman who came along then and, apparently in consequence of what they said as to the incident, he ordered the car to proceed. The plaintiff resumed his former position in the car, which continued on its course. The plaintiff sustained certain injuries and his clothes were torn. Several of the younger men who witnessed all this and any one of whom the defendant might as well have picked on to move up, have given evidence fully corroborating the plaintiff's evidence, particularly as to the congested condition of the car. The main evidence for the defence is that of a

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young man by the name of Sidney Hopkins, an insurance agent, who said he was standing with his back to the door partition inside, and was calmly viewing the incident. He stated that it was when near Woodward's that the plaintiff made the statement in question, and that at that time there was room ahead of him in which to move up, and that a passenger entering would have to push him away. I do not accept the evidence of this witness, who, to say the least, was most disingenuous. Another witness was a Mrs. Perry, of Bellingham, and whose powers of observation were so defective that she insisted that she saw the motor-man come back to the scene of the struggle down the car aisle, the motor-man himself stating he came along the street from the front of his car. Her evidence, in my opinion, is not reliable and I reject it. On the whole, I accept the plaintiff's evidence and that of his witnesses. I find that the assault upon the plaintiff was wholly unprovoked; that the plaintiff, having regard to his age and the congested condition of the car, was violating no rule of the Company nor committing any act of misconduct in supporting himself by hanging on to the strap provided in that particular part of the car for passengers' support and convenience; that the plaintiff was not blocking any passage nor interfering in any way with the influx of passengers allowed by the conductor to enter the car, because as he stated that his instructions were that there would "always be room for one more." It was an unreasonable request for the conductor to demand that the plaintiff should, under the circumstances, relinquish the position he occupied, in which he was not preventing anyone from passing by him if they desired, and to resume one in which his comfort and perhaps his safety might be affected. Having seen the conductor in question, I cannot refrain from commenting adversely upon the fact of a young man of his physique treating an elderly inoffensive gentleman, such as I find Mr. Raines to have been on that occasion, in the manner alleged, not only by assaulting him but by humiliating him in the presence of fellow-passengers. There will be judgment for the plaintiff for $500 and costs.

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Judgment for plaintiff.

LITTLE v. ATTORNEY-GENERAL OF BRITISH COLUMBIA.

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LITTLE v. ATTORNEY-GENERAL OF BRITISH COLUMBIA

Constitutional law—Liquor imported into Province—Tax under Government Liquor Act—Validity—B.C. Stats. 1921, Cap. 30, Sec. 55—B.N.A. Act, Secs. 92 (No. 16) and 121.

The plaintiff, a resident of Vancouver, imported a case of whisky from Calgary in the Province of Alberta. The Liquor Control Board demanded from him $11 as a tax payable by him upon the whisky under section 55 of the Government Liquor Act. In an action for non-liability on the ground that said section is *ultra vires*:—

Held, that the tax is within the power of the Provincial Legislature.

Semble, there might be circumstances in which a Provincial Legislature might have jurisdiction to prohibit the importation of liquors into the Province, and for the effectual working out of the scheme of the Government Liquor Act prohibition of importation into the Province would be constitutionally justified.

ACTION for a declaration that the plaintiff is not liable for the tax imposed by section 55 of the Government Liquor Act on the ground that said section is *ultra vires*. Tried by CLEMENT, J. at Vancouver on the 17th of November, 1921. Statement

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

21st November, 1921.

CLEMENT, J.: The facts in this case are within a very narrow compass. The plaintiff, a resident of Vancouver, B. C., imported from Calgary, Alberta, a case of whisky manufactured in Toronto, Ontario. On its arrival in Vancouver, he notified the Provincial Government, asking that labels be sent him bearing the official seal prescribed by the Government Liquor Act (B.C. Stats. 1921, Cap. 30) in order that he might affix such labels to the 12 bottles contained in the case. These labels, so affixed, would indicate that the liquor was lawfully in plaintiff's possession. The Government, through the Liquor Control Board, established under the Act for its administration, in reply to the plaintiff's notification referred him to Judgment

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section 55 of the Act, and made a demand upon him for $11 as the tax payable by him under that section.

The plaintiff brings this action claiming a declaration that he is not liable for such tax, on the ground that section 55 of the Act is *ultra vires*. The section provides that with certain exceptions, within which the plaintiff admittedly does not fall,—

"Every person who keeps or has in his possession or under his control any liquor which has not been purchased from a Vendor at a Government Liquor Store shall, by writing in the prescribed form, report the same to the Board forthwith; and shall pay to the Board, for the use of His Majesty in right of the Province, a tax to be fixed by the Board either by a general order or by a special order in any particular case, at such rates as will in the opinion of the Board, impose in each case a tax equal to the amount of profit which would have accrued to the Government in respect of the liquor so taxed if it had been purchased from a Government Liquor Store, increased by the addition to that amount of an amount equal to ten per centum thereof."

Counsel on both sides admitted, and I therefore assume, without closer scrutiny of the Act in this regard, that this particular section strikes only at imported liquor, whether, as in the case at bar, from another Province or from abroad. Mr. *Davis* contends that this is a tax on importation, in disregard of section 121 of the British North America Act, which provides that—

"All articles of the growth, produce, or manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces."

Judgment

This contention, clearly, does not raise any question of conflict between Dominion and Provincial powers. Mr. *Davis* did, it is true, faintly contend that section 55 is an interference with "trade and commerce" but wisely, I think, refrained from arguing it. The point is often taken in these liquor cases and as often overruled. I need not dwell upon it here further than to say that it is directly opposed to the cases hereafter noted.

Before dealing with the real matter in controversy I may say that no general attack is made upon the scheme of the Government Liquor Act, which provides for the establishment throughout the Province of Government stores, at which alone liquor may be sold. Speaking broadly, no one is allowed to buy

elsewhere within the Province than at a Government store from a Government vendor.

In the Manitoba Liquor Act case (*Attorney-General of Manitoba* v. *Manitoba Licence Holders' Association* (1901), 71 L.J., P.C. 28; (1902), A.C. 73) the power of a Provincial Legislature to pass Acts in restriction or even prohibition of the liquor traffic was finally affirmed. It was, in the opinion of the Privy Council, "the better opinion" that this power is based on No. 16 of section 92 of the British North America Act, being legislation, that is to say, in respect of a matter of "a merely local or private nature in the Province." The Act then under scrutiny was characterized by their Lordships as "more stringent probably than anything that is to be found in any legislation of a similar kind." Their Lordships went on to say:

"Unless the Act becomes a dead letter, it must interfere with the revenue of the Dominion, with licensed trades in the Province of Manitoba, and indirectly at least with business operations beyond the limits of the Province. That seems clear."

Equally clear, to my mind, would be its interference with the importation of liquor, whether from another Province or from outside Canada. All objections on that score were, in their Lordships' opinion, removed by the judgment of the Board in the local prohibition case (*Attorney-General for Ontario* v. *Attorney-General for the Dominion* (1896), A.C. 348; 65 L.J., P.C. 26). The Manitoba Liquor Act did not extend to *bona fide* transactions in liquor between a person in the Province and a person in another Province or in a foreign country, so that their Lordships were relieved from the necessity for a pronouncement upon the broader question as to the power of a Provincial Legislature to prohibit the importation of liquor into the Province. But their Lordships quoted with apparent approval the report of the Board in the local prohibition case, *supra,* that "there might be circumstances in which a Provincial Legislature might have jurisdiction to prohibit the importation of such liquors into the Province." They added that for the purpose of the question before them it was immaterial to enquire what those circumstances might be. Evidently, in their Lordships' view, section 121 of the

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ATTORNEY-GENERAL OF BRITISH COLUMBIA

Judgment

British North America Act could not be invoked as decisive against such prohibition, for that section was, as appears in the reports, relied on by the respondents, though not expressly referred to in their Lordships' judgment. The point is not, strictly speaking, before me but even at the risk of being guilty of an *obiter* pronouncement, I venture to think that for the effectual working out of the scheme of the Government Liquor Act now in question, prohibition of importation into the Province would be constitutionally justified. Those inhabitants of the Province, who, for the reason perchance that they dislike the brands of liquor kept for sale at the Government stores or for any other reason, would like to import liquor, would be compulsorily put upon the same basis as the other inhabitants of the Province. So far as regards the source of their supply, section 121 of the British North America Act (a revenue section) would not, in my opinion, have any application. This prohibition of importation into this Province would not, in my opinion, be dealing with the traffic otherwise, constitutionally speaking, than as a Provincial matter. But the Act now in question does not directly prohibit importation. Section 55 says, in effect, that any person in the Province becoming possessed of imported liquor, must report the fact and pay to the Government such a tax upon the liquor so held in the Province as will, in the opinion of the Liquor Control Board, put the revenues of the Province in the position they would have been in if the holder of such imported liquor had patronized the Government stores. Such a tax, admittedly a direct tax, is, in my opinion, well within the power of the Provincial Legislature. Importation may be affected, it is clear, but the section was passed *alio intuitu,* in my opinion, as a way of working out the scheme of the Act. With its wisdom this Court has no concern.

I have carefully considered the recent judgment in *Great West Saddlery Co.* v. *Regem* (1921), 2 A.C. 91; 90 L.J., P.C. 102, and can find nothing therein which militates against the view I have just expressed.

The action will therefore be dismissed. Under our Crown

Costs Act I conceive that I have no jurisdiction to award costs. Under the circumstances, I regret this.

Having dealt with the main controversy, I refrain from expressing any opinion on the other points raised on behalf of the Attorney-General.

Action dismissed.

SIMPSON BALKWILL & COMPANY LIMITED *ET AL.* v. CANADIAN CREDIT MEN'S TRUST ASSOCIATION LIMITED *ET AL.*

Company law—Debenture stock—Trust deed—Receiver appointed—Position and remuneration of trustee.

The appointment of a receiver for a company does not discharge the trustee for the debenture holders.

The continuance of a trustee's remuneration after the appointment of a receiver is a question of contract to be arrived at from the provisions of the trust deed relative to the trustee's remuneration.

In re Anglo-Canadian Lands (1912), Lim. (1918), 87 L.J., Ch. 592 followed.

APPLICATION by the liquidator to disallow the remuneration of the trustee for the debenture holders of the Burrard Saw Mills Company Limited after the appointment of a receiver. Heard by MURPHY, J. at Chambers in Vancouver on the 23rd of November, 1921. Statement

McTaggart, for the liquidator.
A. D. Taylor, K.C., for the Company.

24th November, 1921.

MURPHY, J.: It seems clear from the cases, of which *In re Anglo-Canadian Lands (1912) Lim.* (1918), 87 L.J., Ch. 592, is the latest, that the mere appointment of a receiver does not oust the trustee. In Palmer's Company Precedents, 11th Judgment

MURPHY, J. (At Chambers)

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SIMPSON BALKWILL & CO. v. CANADIAN CREDIT MEN'S TRUST ASSOCIATION

Judgment

Ed., Pt. III., p. 106, it is stated that such appointment does not change the *status* of the trustee. It seems equally clear from the case cited and other cases referred to therein, that the question whether the trustee's remuneration continues after the appointment of the receiver is a question of contract to be arrived at from the provisions of the trust deed relative to the trustee's remuneration. In the deed before me the *quantum* of remuneration is, I think, fixed by section 3, at $100 per month. The duration of the trustee's employment is, I think, fixed by section 6. By this section the trustee is bound to carry out the trusts of the indenture, unless and until discharged therefrom by resignation or in some other lawful way. If I am right in the view that the mere appointment of a receiver does not discharge the trustee, then the applicant here remained bound to carry out the trusts imposed upon him in so far as he could, despite such appointment of a receiver. Admittedly, he has continued to act in that capacity in co-operation with the receiver. True, it is said he was requested to do so by the debenture holders, but this is an irrelevant fact if my construction is correct, that he was bound to do so in any event since he had not been discharged in any lawful way.

Having so acted, my view is the registrar was right in allowing him remuneration at the rate fixed by the trust deed for the period he so acted.

Judgment accordingly.

Judgment accordingly.

IN RE JAY SET.

MACDONALD, J. (At Chambers)

1921

Nov. 25.

IN RE JAY SET

Criminal law—Certiorari—Right taken away by statute—Depositions taken by magistrate—Right of judge to examine—Can. Stats. 1911, Cap. 17, Secs. 3 and 12.

On an application by the accused for *certiorari* to quash a conviction for unlawfully having opium in his possession, on the ground that no proper evidence was submitted to the magistrate upon which he could determine that the commodity found in the possession of the applicant was opium:—

Held, that as the right to *certiorari* has been taken away by section 12 of The Opium and Drug Act there is no right to examine the depositions to ascertain whether or not there was any evidence upon which the magistrate could properly find as he did and the application should be dismissed.

APPLICATION by the accused for *certiorari* to quash a conviction for unlawfully having opium in his possession. The main ground in support of the application was that there was no proper evidence submitted to the magistrate upon which he could determine that the commodity found in the possession of the accused was opium. Heard by MACDONALD, J. at Chambers in Vancouver on the 3rd of August, 1921.

Statement

Armour, K.C., for the accused.
Bond, for the Crown.

25th November, 1921.

MACDONALD, J.: Jay Set applies for *certiorari*, with the object of quashing a conviction, whereby he was fined the sum of $200 for unlawfully having opium in his possession, without having obtained the requisite licence from the minister, presiding over the department of health. The main ground in support of the application is, that there was no proper evidence submitted to the magistrate upon which he could determine, that the commodity found in the possession of the applicant was opium. In order to ascertain whether this contention is well founded, I would require to examine the depositions. Objection, however, is taken to my adopting this course, it

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being submitted that under The Opium and Drug Act the right to *certiorari* is taken away, and thus that neither the conviction nor the depositions are properly before me for consideration. If it be a fact, that there was no evidence before the magistrate, that the commodity, alleged to be opium, was a drug of that nature, then the right of the magistrate to adjudicate and decide might well be questioned. See *Rex* v. *MacKay* (1918), 14 Alta. L.R. 182; 29 Can. Cr. Cas. 194; 40 D.L.R. 37; *In re George Bailey* (1854), 3 El. & Bl. 606; *In re Authers* (1889), 22 Q.B.D. 345. Have I then the right to peruse and consider the depositions? Upon a similar application to quash a conviction under the same Act, it was decided by Walsh, J. in *Rex* v. *Featherstone* (1919), 1 W.W.R. 829, that the right to *certiorari* having been taken away by statute, he had "no right to examine the depositions to ascertain whether or not there was any evidence upon which the magistrate could properly find as he did." He then added, that this situation rendered him powerless to help the defendant, as it was only by a perusal of the depositions that he could find anything, upon which to found relief for the applicant, though he thought he had been rather harshly treated. It is desirable that there should be a uniformity of decisions throughout Canada in criminal matters. I think this principle is entitled to great weight especially when a crime has been created by statute and the effect of such legislation has been decided by the Superior Court of another Province. I feel that I should, under such circumstances, follow the decision—that the right to *certiorari* has been taken away under such Act. So the application is dismissed with costs.

Judgment

Application dismissed.

CARLIN & STRICKLAND v. McAUSLAND & SPENCE.

HUNTER, C.J.B.C.

1921

Nov. 10.

CARLIN & STRICKLAND v. McAUSLAND & SPENCE

Damages—Purchase of salt in store for cattle—Vendor gives wrong article by mistake—Poisoning and loss of cattle—Liability.

A entered B's store and asked for block salt for cattle. B said he had none but that he had loose salt and produced an 80-pound sack which had previously been opened and drew A's attention to the fact that the salt was dirty. A said that was all right and without further inspection took the sack away. He fed the contents, which were found afterwards to be nitrate of soda, to his cattle, and they died. In an action against the storekeepers for damages for loss of the cattle:—

Held, that although neither a question of warranty express or implied nor of negligence arose, in the circumstances of the case the defendants must be held responsible for the loss that resulted from their mistake in giving the wrong article to the plaintiffs.

ACTION for damages for the loss of cattle caused by eating nitrate of soda. The plaintiff Strickland went to the defendants' store and asked the defendant Spence for block salt for cattle. Spence told him he had no block salt but that he had loose salt and brought out an 80-pound sack of what he thought was loose salt which had previously been opened. Spence drew Strickland's attention to the fact that the salt was dirty, to which Strickland replied that it was all right and without further inspection took the sack away. Both assumed that it was salt but it later turned out to be nitrate of soda. The defendants had just taken over the business and there was nothing to shew that they had any nitrate of soda, none such appearing in the inventory nor did they know that there was any in stock. Strickland fed what he had received from Spence to his cattle and they died. Tried by HUNTER, C.J.B.C. at Kamloops on the 10th of November, 1921.

Statement

P. McD. Kerr, for plaintiffs.
H. C. DeBeck, for defendants.

HUNTER, C.J.B.C.: According to the evidence of one of the plaintiffs, on October 27th of last year he went into the defendants' store and asked Spence whether he had any block salt for

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1921

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cattle. His reply was that he had not, but that he had some loose salt, and that he went to the rear of the store and brought out 80 pounds in a sack—a sack which had evidently been opened before this particular occasion. I think that I must accept that statement as it accords with the natural probabilities of the case. There is no doubt that Strickland did go into this store for the purpose of purchasing salt for his cattle, and I think it is in the highest degree likely that he would have informed the storekeeper that it was cattle salt that he wanted, rather than table salt or refined salt.

On the other hand there is a discrepancy between his testimony and the testimony of Spence as to what passed when the salt was brought out. Strickland says that he did not look at it at all and did not handle it, and that he did not even see the colour of it, whereas Spence says that he drew his attention to the fact that the salt was dirty, to which Strickland replied that it was all right and took it away. However that may be, I am satisfied there was no real inspection by the buyer, and there is no gainsaying the fact that the salt was taken away and paid for. There is also no gainsaying the fact that the salt turned out to be a different substance entirely, namely, nitrate of soda; and there is also equally no doubt that by consequence of eating this stuff all these cattle perished.

Judgment

The question then is as to whether the plaintiffs have a good cause of action against the defendants. Now it seems to me that there are no questions whatever of warranty, either express or implied, involved in this case. It often happens that when people buy commercial articles the question whether there was a general or special warranty given arises in connection with the transaction; but it seems to me that this is not that kind of transaction at all. It is a case where a given article has been called for, and an article of an altogether different character has been supplied under mutual mistake, just as if a druggist were to supply nitric acid when the request was for vinegar. It seems to me that the plaintiffs were entitled to assume and did assume that it was salt that was being supplied; and no doubt it was a very unfortunate thing for the defendants to have supplied an article which they no doubt also

assumed was salt. I think that under the circumstances the defendants are responsible for what ensued.

I do not think that any charge of negligence can be attributed to either party in connection with the matter. The material, to ocular inspection, looks like loose salt. It is somewhat dirty in colour, but that does not protect the defendants, because one can easily imagine that salt that was dirty would have a very similar appearance; in fact, according to the evidence given on commission by one of the experts or chemists who was called on to examine the substance, it was, in his opinion, quite a likely thing for any ordinary person to mistake one substance for the other, and that the only easily ascertainable difference between the two was that the one substance has more affinity for water than the other. I therefore think that no question of negligence in the ordinary sense arises in connection with the matter. It was quite a natural thing for the plaintiffs to assume that it was salt, and salt fit for cattle, and equally natural for the defendants to suppose that it was that article that was being supplied. I do not think either that it was an imprudent act for the plaintiffs to go on feeding the stuff to the cattle after some three of them had died. There was nothing, I think, to warn the plaintiffs that it was this particular substance that was causing the trouble; in fact, it was evident that they themselves had no suspicion that that was the cause, because after two of the cattle had died Strickland had started using the substance for pickling pork for his own personal use and the use of his family.

Judgment

I think the defendants must answer in damages, and I will direct a reference to the registrar—the damages to be assessed at the market value of the cattle at the time of their destruction. That market value will, of course, be decided by considering what a willing purchaser would pay a solvent vendor.

Judgment for plaintiffs.

HUNTER, C.J.B.C.

1921

Nov. 17.

ADAMS RIVER LUMBER CO. v. KAMLOOPS SAWMILLS LTD.

ADAMS RIVER LUMBER COMPANY LIMITED v. KAMLOOPS SAWMILLS LIMITED *ET AL.*

Bulk sale—Sale of assets of sawmill except lumber—B.C. Stats. 1913, Cap. 65.

A sale *en bloc* of the assets of a sawmill except the lumber is not in contravention of the Bulk Sales Act.

Statement

ACTION to avoid a sale *en bloc* of the assets of a sawmill, except the lumber, as being in contravention of the Bulk Sales Act. Tried by HUNTER, C.J.B.C. at Kamloops on the 17th of November, 1921.

A. D. Macintyre, for plaintiff.
Archibald, for defendants.

Judgment

HUNTER, C.J.B.C.: I think that the Act applies only when the goods in question were kept for sale in the ordinary course of business. The raw material and the plant of a sawmill are not kept for sale, but for the purpose of manufacturing goods for sale. A stock of books kept by the owner for his private use would not be within the Act, but it would be otherwise if kept for sale by a bookseller. Had the lumber been included in the sale a different question would have arisen.

Action dismissed.

MURPHY, J. (At Chambers)

1921

Nov. 23.

CASTLEMAN v. JOHNSON

CASTLEMAN v. JOHNSON *ET. AL.*

Employee—In service of Liquor Control Board—Dismissal—Action pleading for remedy by mandamus.

An employee of the Liquor Control Board of the Province, having been dismissed, brought action against the members of the Board, the statement of claim asserting facts to shew only a right based on a contract of hiring and claiming a remedy by way of *mandamus*. On motion to dismiss:—

Held, that the statement of claim disclosed no cause of action and that the action should be dismissed.

Held, further, that if the plaintiff had any remedy by way of *mandamus* such remedy must be by application for a prerogative writ.

MURPHY, J. (At Chambers)

1921

Nov. 23.

CASTLEMAN v. JOHNSON

APPLICATION to dismiss the action on the ground that the statement of claim disclosed no cause of action. The plaintiff was an employee of the Liquor Control Board and having been dismissed brought action against the members of the Board claiming a remedy by way of *mandamus*. Heard by MURPHY, J. at Chambers in Vancouver on the 21st of November, 1921.

Statement

J. A. MacInnes, for plaintiff.

Mayers, for defendant.

23rd November, 1921.

MURPHY, J.: In my opinion the point of law is well taken that the statement of claim herein discloses no cause of action and in consequence these proceedings must be dismissed. I agree that on this application all statements of fact in the statement of claim must be taken as true. The facts asserted here, however, I think, shew only a single legal right in the plaintiff, *viz.*, that based on a contract of hiring. Plaintiff cannot, I think, by asserting as he does in paragraph 7 of the statement of claim that defendants have failed and neglected to perform their duty in regard to the plaintiff without setting out what duty known to the law defendants have failed and neglected to perform found an action for *mandamus* or for any other relief. Authority is not needed for the proposition that Courts only enforce rights known to the law. If I am correct in this view, the case is governed by the decision in *Gidley* v. *Lord Palmerston* (1822), 3 Br. & B. 275.

Judgment

In any event I do not consider an action for *mandamus* can lie on the facts set out in the statement of claim. If plaintiff has any remedy by way of *mandamus* such remedy must be by application for a prerogative writ. *Smith* v. *Chorley District Council* (1897), 1 Q.B. 532, particularly at p. 538. The action is dismissed.

Action dismissed.

MURPHY, J. (At Chambers)

1921

Nov. 23.

DAVY v. DAVY. (No. 1.)

Divorce—Petition for dissolution—Permanent alimony—Right to file petition for prior to hearing—Witnesses in support—Right to examine before trial—Divorce rule 26.

DAVY v. DAVY

A petition for permanent alimony may be filed in dissolution of marriage proceedings prior to the trial.

The proper construction of Divorce rule 26 is that it applies only to proceedings for alimony *pendente lite* in dissolution cases when it is sought to examine witnesses in support of an alimony petition previous to the hearing of the cause.

APPLICATION under rule 26 of the Divorce Rules by a wife to examine witnesses in support of her petition for alimony prior to the trial of her petition for dissolution of marriage. Heard by MURPHY, J. at Chambers in Vancouver on the 10th of November, 1921.

Statement

N. R. Fisher, for the petitioner.
Mayers, for respondent.

23rd November, 1921.

MURPHY, J.: Application under rule 26 of the Divorce Rules by wife to examine witnesses in support of her petition for alimony prior to trial of the cause. The petition herein is for dissolution of marriage. The petition for alimony is for permanent alimony, not alimony *pendente lite*. For the husband it is objected there is no authority to file a petition for permanent alimony as distinguished from alimony *pendente lite* previous to trial. In England permanent alimony petitions in dissolution cases can only be filed after a decree *nisi* has been pronounced. But this is owing to a special rule not in force in this Province. The decisions prior to the passing of this rule shew that it was the proper practice to file a petition for permanent alimony prior to the hearing. *Vicars* v. *Vicars* (1859), 29 L.J., P. & M. 20 and notes thereto; *Charles* v. *Charles* (1866), 36 L.J., P. & M. 17.

Judgment

Rule 24 is, I think, authority for so doing, since it does not distinguish between permanent alimony and alimony *pen-*

dente lite. But the English decisions are also clear that there is no jurisdiction to grant permanent alimony in dissolution cases until a decision to dissolve the marriage has been given. In addition to cases above cited see *Sidney* v. *Sidney* (1867), 36 L.J., P. & M. 73, and *Bradley* v. *Bradley* (1878), 47 L.J., P.D. & A. 53. Since this is so, I think the proper construction of rule 26 is to hold that it applies only to proceedings for alimony *pendente lite* in dissolution cases when it is sought to examine witnesses in support of an alimony petition previous to the hearing of the cause. Since the decisions above cited, if I understand them aright, decide that the Court's jurisdiction to grant permanent alimony or maintenance in dissolution suits arises only after a decision that dissolution is to be granted, it is, I think, at least doubtful that there is jurisdiction to allow witnesses to be examined touching matters with regard to which it may turn out at the hearing the Court has no power to deal. But whether there is or is not jurisdiction it seems unreasonable for a Court to order proceedings involving expense and in their nature peculiarly vexatious, which proceedings the Court may never have jurisdiction to take cognizance of. In the absence of authorities to the contrary, I construe rule 26 to apply in dissolution cases only to petitions *pendente lite.* Obviously such proceedings would be of a widely different scope from proceedings invoked to establish what should be the amount of permanent provision that should be made for a wife. The application is refused.

Judgment

Application dismissed.

HUNTER, C.J.B.C.

1921

Nov. 17.

THOMPSON v. HULL.

Trespass—Illegal distress—Action in Supreme Court for damages—Sum awarded within County Court jurisdiction—Costs.

THOMPSON v. HULL

In an action in the Supreme Court for damages for trespass arising out of the wrongful seizure of goods and chattels under a distress warrant, the plaintiff recovered a sum within the jurisdiction of the County Court.

Held, that in a case of this nature where a trespass is liable to result in a breach of the peace, an action in the Supreme Court is justifiable and although the damages awarded come within the County Court jurisdiction the costs should be taxed on the Supreme Court scale.

Statement

ACTION for damages for trespass, the defendant the owner of a hotel in Kamloops having distrained for rent, and carried off a portion of the goods and chattels of the lessee (plaintiff). Tried by HUNTER, C.J.B.C. at Kamloops on the 17th and 18th of November, 1921.

A. D. Macintyre, for plaintiff.
Fulton, K.C., for defendant.

Judgment

HUNTER, C.J.B.C.: It has come down to this, that the only question is as to the amount the Court ought to allow for damages. I have come to the conclusion that the trespass, so called, was of an unwitting character, that is, was owing to lack of information given to the solicitor, and that there was nothing in the shape of insults or reckless disregard of other people's rights in connection with the seizure. With regard to the value of the articles taken which should not have been taken, it is quite apparent that they were of little or no value. Mr. Thompson himself was offering $680 for Dobson's interest in the furniture, and after the seizure offered $400 for both that and what remained, so that in his opinion at all events the furniture so called was of little or no value. At the same time one cannot overlook the fact that it would have cost him some considerable amount to have replaced the furniture which ought not to have been taken in order to render the hotel useful

HUNTER, C.J.B.C.

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THOMPSON v. HULL

for the purpose for which it was leased. On the other hand, Mr. Thompson says that he estimates his damage at about $2,000. As far as I can see, on the evidence given, that is ridiculous. It is idle for the proprietor of this bug-house to present any such claim as that. On the whole, I think the sum of $250 will amply cover any possible loss that he proved.

With regard to costs, it is true enough that this action might have been brought in the County Court; at the same time I think that when rights of this character are invaded, with the possible result of a breach of the peace, it is proper enough to bring the action in the Supreme Court, even though the damages recovered may be small. I therefore think that I ought to give judgment for $250 and costs, and there will be a set-off against any rent that is overdue.

Judgment

Judgment for plaintiff.

STANDARD TRUSTS COMPANY *ET AL.* v. DAVID STEELE, LIMITED *ET AL.*

MURPHY, J.

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STANDARD TRUSTS CO. v. DAVID STEELE, LTD.

Landlord and tenant—Lease—Bankruptcy—Trustee in bankruptcy—Takes possession of premises—Forfeiture—Relief—Can. Stats. 1921, Cap. 17, Sec. 41—R.S.B.C. 1911, Cap. 126, Sec. 16.

A writ in an action by a landlord claiming possession included a claim for double the yearly value of the land until possession be given up.

Held, that as the claim for double yearly value can only be valid if the lease is at an end under section 16 of the Landlord and Tenant Act and is merely incident to the claim for possession, the writ is therefore equivalent in law to re-entry notwithstanding such further claim.

A landlord having re-entered in law and put in operation a proviso in the lease as to forfeiture of the term before a trustee in bankruptcy enters into possession, the trustee has no right of possession as his right under section 41 of The Bankruptcy Act Amendment Act, 1921, is only in respect to premises under a subsisting lease.

ACTION to recover possession of two lots known as No. 556 Granville Street, Vancouver, for a declaration that the lease dated the 30th of December, 1919, from the plaintiffs to the

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STANDARD TRUSTS CO. v. DAVID STEELE, LTD.

defendant was cancelled and the term thereby created has been forfeited, for double yearly value of such land and premises until possession be given and for damages. The writ was issued on the 28th of October, 1921. The parties concurred in stating the following case for the opinion of the Court:

"(1) On or about the 30th of December, 1919, the plaintiffs demised and leased to the defendant David Steele, Limited, certain premises in the said lease more particularly described, known as 556 Granville Street, Vancouver, B.C., a copy of which lease is hereunto annexed.

"(2) All the rents payable by the lessee under the said lease have been duly paid including the rent for the month of October.

"(3) On the 24th of October, 1921, and for some time prior thereto David Steele, Limited, was insolvent within the meaning of this word as used in the said lease and within the meaning of this word as used and defined in The Bankruptcy Act.

"(4) On the 24th of October, 1921, the plaintiffs gave to David Steele, Limited, a notice in writing that under the provisions of the hereinbefore recited lease, the said lease and the term thereby created had become forfeited and void, and the said plaintiffs by the said notice demanded possession of the said premises and payment of two months additional rent as provided in the said lease. A copy of the said notice with affidavit of service is hereunto attached.

"(5) On the 25th of October, 1921, the plaintiffs, through their agent, G. C. Tarr, demanded peaceable possession of the said premises from David Steele, Limited, and David Steele, Limited, through its secretary duly authorized in that behalf, refused to give up possession of the said premises.

Statement

"(6) On the 27th of October, 1921, David Steele, Limited, being an insolvent debtor within the meaning of The Bankruptcy Act did under and by virtue of section 13 of The Bankruptcy Act require in writing the Canadian Credit Men's Trust Association Limited, an authorized trustee, to convene at its office a meeting of the creditors of David Steele, Limited, to consider a proposal by David Steele, Limited, of a scheme for arrangement of its affairs under section 13 of The Bankruptcy Act and its subsections and amendments.

"(7) The said authorized trustee did by notice dated October 31st, 1921, convene the said meeting as required by said David Steele, Limited.

"(8) On the 3rd of November, 1921, David Steele, Limited, being an insolvent debtor whose liability to creditors provable as debts under The Bankruptcy Act exceeded $500 did make to the Canadian Credit Men's Trust Association Limited, an authorized trustee appointed pursuant to section 14 of The Bankruptcy Act with authority in the locality of the debtor, an authorized assignment of all its property for the general benefit of its creditors, and the said trustee is in occupation of the premises described in the lease hereinbefore referred to for the purposes of the trust estate, and has not given notice of intention to surrender possession, nor disclaimed.

"The questions for the opinion of the Court are:

"(1) Whether the lease herein described and the term thereby created became forfeited and void by reason of the facts hereinbefore recited as against David Steele, Limited, and the Canadian Credit Men's Trust Association Limited?

"(2) Whether the trustee of the property of the David Steele, Limited, a bankrupt, is entitled in the circumstances hereinbefore set out to elect to retain the premises described in the lease hereinbefore referred to for the whole or any portion of the unexpired term created by the said lease?

"(3) In the event of the first question being answered in the affirmative and the second question in the negative, whether the Court should relieve against the forfeiture?

"If the Court shall be of opinion of the affirmative of the first question and of the negative of the second and third questions then judgment shall be entered for the plaintiffs for possession of the said premises and the costs of the action, and such judgment shall contain a declaration that the lease aforesaid was cancelled and that the term thereby created has been forfeited and is void."

Statement

Tried by MURPHY, J. at Vancouver on the 18th of November, 1921.

Davis, K.C., and *Abbott*, for plaintiffs.

Mayers, and *F. R. Anderson*, for defendant.

24th November, 1921.

MURPHY, J.: As to the first contention that the writ herein is not equivalent in law to re-entry because it claims for double the yearly value of the land and premises until possession shall be given, I think the same invalid. *Moore* v. *Ullcoats Mining Co.* (1907), 77 L.J., Ch. 282, is authority for the proposition that a writ claiming possession *simpliciter* and any further relief which is incidental to a claim for possession is equivalent to re-entry. The claim for double yearly value can only be valid if the lease is at an end. The language of section 16 of the Landlord and Tenant Act is explicit on this point in my opinion. If so, the claim is one incident to a claim for possession. The main argument for defendant, however, is based on section 41 of Cap. 17 of The Bankruptcy Act Amendment Act, 1921. It turns on the meaning of the phrase "leased premises" in that section. The section repeals subsection (5) of section 52 of The Bankruptcy Act, Cap. 36, 1919, and enacts a subsection in substitution. The language of the original subsection is similar, so far as the question at

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bar is concerned, to the language of subsection (2) of section 34 of R.S.O. 1897, Cap. 170. The Ontario subsection was referred to in *Soper* v. *Littlejohn* (1901), 31 S.C.R. 572 at p. 579, in a way that inferentially supports defendant's argument. But the language of the new subsection (5) is markedly different from the old. The privilege given to the trustee thereby of election is only exercisable whilst he is in occupation of "leased premises for the purposes of the trust estate." Under the repealed section the trustee had this privilege of election during a limited time in reference to "the premises occupied by the bankrupt or assignor at the time of the receiving order or assignment." In the absence of authority, I feel bound to hold that the phrase "leased premises" means premises covered by a subsisting lease. In consequence, if the views hereinbefore expressed are correct, the lease was at an end before the trustee entered into occupation, for the facts in the case stated shew that the landlord had, previously to such entry, himself re-entered in law and thereby brought the proviso in the lease as to forfeiture of the term into operation. As to relieving against forfeiture, I adhere to the opinion expressed by me in *Hamilton* v. *Ferne and Kilbir* (1921), 1 W.W.R. 249.

Judgment

To question 1, I would answer: The lease and the term thereby created became forfeited and void as against both parties. To question 2: The trustee is not entitled to retain the premises either for the whole or any portion of the unexpired term. To question 3: The Court should not relieve against the forfeiture.

IN RE ESTATE OF W. L. TAIT, DECEASED.

MURPHY, J. (At Chambers)

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IN RE TAIT, DECEASED

Executors—Trustees—Request to trustees to pay annuity—Debt owing estate by annuitant—Set-off—Parol evidence—Marginal rule 765 (a) and (e).

In the case of an annuity payable by trustees, the trustees named being the same persons as the executors, and direction in the will that the necessary capital be set aside to produce, *inter alia*, the annuity in question and that until such capital is available the annuity be paid out of general income, though such capital, not yet being available, has not been set aside, the annuitant is entitled to be paid the annuity without the right of set-off because of the existence of a demand mortgage debt which was owing by the annuitant to the testator.

APPLICATION under Order LV., rule 3 (*a*) and (*e*), by Agnes Hurst, an annuitant under the will of deceased for directions that the executors pay the annuity to her notwithstanding the fact that she had executed a demand mortgage to the deceased in his lifetime which remained unpaid. The executors had made several monthly payments in accordance with the terms of the will and then ceased doing so and applied the annuity against the mortgage. Parol evidence of the intention of the testator was admitted, following *Eden* v. *Smyth* (1800), 5 Ves. 341 and *In re Akerman. Akerman* v. *Akerman* (1891), 3 Ch. 212, and the principle ennunciated in *In re Tussaud's Estate. Tussaud* v. *Tussaud* (1878), 9 Ch. D. 363. Heard by MURPHY, J. at Chambers in Vancouver on the 15th of November, 1921. Statement

Buell, for the applicant.
C. B. Macneill, K.C., for the executors.

1st December, 1921.

MURPHY, J.: The case which made me doubt my oral decision in this matter is *In re Taylor, Taylor* v. *Wade* (1894), 1 Ch. 671; 63 L.J., Ch. 424. I now have a copy of the will furnished me. The principle underlying the decision in *In re Taylor, Taylor* v. *Wade* (*supra*), is the executors' right of retainer. "The hand to pay and the hand to receive is the Judgment

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same." The will, however, shews that the annuity is payable by trustees and not by executors. That it happens these offices are filled by the same persons does not affect the matter. The case, therefore, I think, does not apply. A more important point is whether this annuity is payable out of the residuary estate or not. If it is the trustees can set it off against the debt due: Halsbury's Laws of England, Vol. 14, p. 268, and cases there cited; *In re Tinline, Deceased. Elder* v. *Tinline* (1912), 56 Sol. Jo. 310. But this is not so if it is not payable out of residue and the annuity has become vested in the trustees: *Ballard* v. *Marsden* (1880), 14 Ch. D. 374; 49 L.J., Ch. 614. There the trustees had actually set aside the capital to produce the annuity as they were directed to do by the will. A similar direction is contained in the will in question herein, but it is stated funds are not yet available and this duty has not been performed. But I think the language of the will on pages 2 and 4 thereof clearly directs that the necessary capital be set aside to produce, *inter alia,* the annuity in question before any residue is dealt with. True, when it lapses such capital falls into the residue but in the meantime it is ear-marked for this specific purpose and is not part of the residue. The case that has arisen is provided for on pages 5 and 6, where the testator directs payment out of general income of this annuity until capital to produce it is available. Clearly I think this is an express trust vested in the trustees. It is not contended that the general income is insufficient to pay this and the other annuities directed to be paid out of it. In fact, the trustees did for a time pay this annuity. Judgment that annuity must be paid without any right of set-off because of the mortgage debt. Costs of all parties out of the estate.

Judgment

Order accordingly.

DAVY v. DAVY. (No. 2.)

MURPHY, J. (At Chambers)

1921

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Divorce—Costs—Application for security by wife when petitioner—Jurisdiction—English rules—No application.

English rules and regulations concerning the practice and procedure of the Court for divorce causes do not apply to procedure in divorce causes in British Columbia.

There is no jurisdiction to order a husband to put up security for his wife's costs in a suit brought by the wife for divorce even if it be shewn the wife has no separate estate and the husband has means to comply with the order if made.

APPLICATION by a wife who is petitioner in a divorce action, for an order that the husband provide security for her costs. Heard by MURPHY, J. at Chambers in Vancouver on the 18th of November, 1921. Statement

N. R. Fisher, for the petitioner.
Mayers, for respondent.

8th December, 1921.

MURPHY, J.: Application by wife who is petitioner for divorce that respondent be ordered to pay into Court a sum of money to secure her costs of suit. Objection—no jurisdiction to make such order. Admittedly such orders have, at times, been made in the past, but enquiry has failed to shew that the point raised was ever argued, much less judicially passed upon by any judge. Such decisions are not binding, particularly when a question of jurisdiction is raised. See authorities cited in *Rex* v. *Gartshore* (1919), 27 B.C. 425; and *Watt* v. *Watt* (1907), 13 B.C. 281 at p. 290; *Osborne* v. *Rowlett* (1880), 13 Ch. D. 774 at p. 785. Where the wife is respondent and has entered an appearance, although she has filed no answer, the practice is governed by rule 58 of the Divorce Rules, which is taken, word for word, from the further rules and regulations concerning divorce practice made by the judges in England and effective as of January 11th, 1860, and is to be found in Vol. 29, L.J., P. & M., p. i, *sub.-tit.* "Further Rules and Regulations." In 1865, further rules were passed Judgment

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and by rule 158 thereof, a wife who had entered an appearance could have her costs taxed and get a report made by the registrar to the Court of what was a sufficient amount of money, to be paid into Court, to cover her trial costs. This rule, however, apparently, again dealt only with the case of a wife who was a respondent, since it speaks of her entering an appearance as a condition precedent to its operation. See 35 L.J., P. & M., p. 1, *sub.-tit.* "Rules and Regulations." This view is strengthened by the fact that on July 14th, 1875, this rule 158 was revoked and for the first time, so far as I can ascertain, power is expressly given by the new rule 158 to make such an application as this, where wife is petitioner.

I am indebted to Mr. *Mayers,* counsel for the respondent, for an exhaustive list of all English decisions on this question of security for costs before trial, reported from 1858 to 1875, when the new rule was passed. There seems to have been but one where wife was petitioner and the suit was for dissolution, where such an order seems to have been made, *viz., Hepworth* v. *Hepworth* (1861), 2 Sw. & Tr. 414, decided in 1861. That case does not deal directly with the question, but a writ of attachment was there directed to issue because the husband (respondent) did not put up security for his wife's costs, as ordered. It seems, therefore, that in one instance at any rate such an order as is here asked for was made in the interval mentioned. It is to be noted that in *Hepworth* v. *Hepworth* the question of jurisdiction is referred to and the position is taken that the words "or otherwise" in section 32 of the Matrimonial Causes Act, 1857, gives such jurisdiction. This decision seems somewhat inconsistent with the decision in *Weber* v. *Weber and Pyne* (1858), 1 Sw. & Tr. 218 at p. 221, where the practice of the House of Lords was imported into the Divorce Court practice, apparently on the ground that there was no jurisdiction otherwise to order security for the wife's costs. She was there a respondent. The argument before me rests on the contention that these words, "or otherwise," in section 32, gives jurisdiction. If the matter rested there I would be inclined to proceed with the enquiry as to whether the wife has separate estate and as to the ability of the husband to

Judgment

comply with such order, if made, particularly in view of the fact that such orders have been made by our Court in the past. But my attention has been called to the proceedings on March 7th, 1877, in *Sharpe* v. *Sharpe* (1877), 1 B.C. (Pt. I.) 25 (set out in *Sheppard* v. *Sheppard* (1908), 13 B.C. 486 at pp. 489-90), heard before all the then judges of the Supreme Court of British Columbia. There the Chief Justice expressly held:

"The rules and regulations of an English Court are not part of the law of England and are therefore not in force here."

This view must have been concurred in by the two associate judges, for the cause was ordered to stand over until the Court promulgated rules, governing divorce procedure. The point is emphasized by the fact that the same bench on a further hearing ordered the proceedings to be begun *de novo* under the new rules, which had been promulgated in the meantime, being, in substance, our present rules, and the previous petition was treated as a nullity. Such a decision cannot be ignored by a single judge, and, even if it could, the principle on which it is founded was not questioned in argument and, indeed, I think cannot be questioned. It follows, therefore, that English divorce rules, no matter of what date, have no application to our divorce procedure. Now, even granting that the words, "or otherwise," gave jurisdiction to the English Court, that jurisdiction, in so far as the matter before me is concerned, was to adopt a certain practice, *viz.*, the practice formerly followed in the Ecclesiastical Courts in cases of judicial separation. I do not see that such practice is of any higher statutory authority than the rules made by the English judges pursuant to section 53 and other sections of the Acts of 1857 and 1858. Both rest on the statute for validity. But, as stated, a bench of three judges has decided in *Sharpe* v. *Sharpe, supra,* that the rules so made are not in force in British Columbia. I fail to see how, in the face of this decision, it can be said (even granting that the Matrimonial Causes Act, 1857, imported the former ecclesiastical practice into the English Courts) that such practice is in force in this Province.

Judgment

Further, when the judges promulgated the divorce rules in

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1877 they, as above stated, when dealing under one set of circumstances with this matter of the wife's costs, adopted the English rule of 1860 (our rule 58), but they made no provision for such an application as the present one, although they presumably had before them rule 158 passed in 1875, which is the present English authority for such applications. It is contended that the circumstances covered by our rule 58 are not the circumstances under which this application is made. I agree, but the fact remains that the one rule was brought into force whereas the English rule 158, which does cover the facts at bar, was not. The decision in *Sharpe* v. *Sharpe* and the adoption by the judges of rule 58 of our divorce rules and the failure to adopt the English rule 158, despite its then existence for about two years in England, forces me to conclude that there is no jurisdiction in our Court to make the order asked for, even if it be shewn the wife has no separate estate and the husband has means to comply with the order if made. It is strenuously argued that it is against public policy not to follow the unconsidered practice hitherto adopted and reliance is placed on the language used in this connection in *Sheppard* v. *Sheppard, supra,* at p. 520 *et seq.* But, obviously, very different considerations, from the standpoint of public policy, arise in a case where it is sought to have declared nugatory decrees of absolute divorce granted over a long period of years, from those which arise when the point at issue is merely whether or not security for costs shall be ordered to be put up before trial by a husband respondent. The case of *Vernon* v. *Vernon* (1914), 6 W.W.R. 1047 shews that the wife's costs are not payable in any event, but are a matter to be dealt with by the trial judge. True, it decides that even where the wife is unsuccessful she may, in a proper case, recover costs from the husband, but the case, I think, is authority for the proposition that the wife's costs are not payable *de die in diem* as they were under the ecclesiastical practice and to that extent supports my view that such practice is not in force in this Province. The reason for the rule in the Ecclesiastical Courts is stated to have been the common law principle that the husband on marriage acquired all the wife's property, but that reason has dis-

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appeared as a result of the passage of the Married Women's Property Act.

A conclusive answer to this public policy argument is, I think, found when it is remembered that it has been decided that a wife in a proper case has the right to pledge her husband's credit to obtain a divorce and that such right is in addition to all provisions in reference to wife's costs under the divorce jurisdiction. *Ottaway* v. *Hamilton* (1878), 47 L.J., C.P. 725.

Judgment

The application is dismissed.

Application dismissed.

REX v. ROBINSON.

Criminal law—Evidence—Accomplice—Promise of recommendation for pardon—Judge's statement to witness—Improper warning—Substantial wrong—Criminal Code, Sec. 1019—New trial.

A trial judge may, even after a *prima facie* case has been made out, direct that an accomplice be examined on the understanding that if he gives his evidence in an unexceptionable manner he shall be recommended for pardon.

The trial judge in stating conditions to an accomplice about to give evidence as to his recommending a pardon, appeared to give witness the impression that unless he told the same story to the Court as he did previously to the magistrate a recommendation for pardon would not be given.

Held, on appeal, GALLIHER, J.A. dissenting, that by the statements made the witness was fettered in his answers so as to constitute the doing of "something not according to law" at the trial, within the meaning of section 1019 of the Criminal Code which resulted in a "substantial wrong or miscarriage" of justice entitling the accused to a new trial.

APPEAL by way of case stated from GREGORY, J. and the verdict of a jury in a trial for murder held at the Vancouver Fall Assize on the 2t4h and 25th of October, 1921. The case stated was as follows:

Statement

"That a murder had been committed, was not disputed and the only question was whether the accused was one of the guilty persons.

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"At the said trial the Crown first called all its corroborative evidence and I ruled it had made out a *prima facie* case against the accused. The accomplice Paulson was then called. Mr. *Sears* appeared for the witness and stated that he had advised the witness not to answer questions unless he was promised a recommendation for pardon. This counsel for the Crown declined to do, whereupon the hearing proceeded as follows:

" 'THE COURT: Now, the question I do not think is entirely free from difficulty. The language of the statute, with such consideration as I have been able to give it, by reference to our Act, does not in so many words say that this man is compellable or competent. However, I propose to carry out the practice as laid down by Roscoe. If the Crown is not willing to give an undertaking that the man be recommended for a pardon, I have no hesitation in saying that I will recommend it, if necessary. Subject to that I shall allow him to be called.

" 'Mr. *Sears*: I ask for the usual protection, that any evidence Paulson gives here will not be used against him.

" 'THE COURT: Yes, he shall receive the usual protection.

" 'Mr. *Sears*: He wants an interpreter.

" 'Mr. *O'Dell*: I think this witness can speak English.

" 'THE COURT: Just sit down. Now, Mr. *Sears*, of course you will not have to have any further part in this trial, but I want to make it perfectly clear as to whether you are withdrawing your objection or are you still insisting?

" 'Mr. *Sears*: As to answering the questions, my Lord?

" 'THE COURT: Yes.

" 'Mr. *Sears*: No, on the understanding that he is recommended for a pardon, and that the evidence will not be used against him.

" 'THE COURT: Well, I will give that undertaking.'

"Alexander Paulson, a witness called on behalf of the Crown, being first duly sworn, testified as follows:

"B. Protich, interpreter, sworn.

Statement

" 'THE COURT: Now, before the witness is examined I want you (interpreter) to tell him that it has been represented to us by counsel who is to defend him in his trial, that he does not wish to give evidence without an understanding, which I give, that is, he is examined on the understanding that if he gives his evidence in an unexceptionable manner, he shall be recommended for a pardon and the clemency of the Crown.

" 'The Interpreter: Yes, my Lord, I have told him that. He is willing to give evidence.

" 'THE COURT: And you thoroughly understand that by unexceptionable, I mean in a manner frank and fair, not necessarily that he is to give evidence against the accused, but is to tell his story freely, frankly, fully and fairly, as I judge it.

" 'The Interpreter: Yes, my Lord.'

"Later on in the course of the said Paulson's evidence, the following took place:

" 'THE COURT: Just let me ask a question first, please.

" 'You understand, do you, that I am only going to recommend you for a pardon if you tell your story freely and frankly and in an unexcep-

tionable manner? I am telling you exactly the story to the best of my recollection. He (witness) said I might have forgotten something.

"'You told the police all about the affair, did you not? Yes, my Lord.

"'Did you have an interpreter present or did you not? I told the story to the police but there were some words that I wanted explaining.

"'Did you have an interpreter there? Was there an interpreter there? No, my Lord.

"'Now, I have not seen the statements that you made the police, but of course I will look at it before I make any recommendation. Tell him that. I think, he says, I think that I am telling the same story.

"'Are you sure you did not have your revolver with you on the night of this affair? I did not have my revolver with me when this shooting took place, but before that I had my revolver. I told Robinson that I am going to put my revolver away in my room, put it away. Robinson made the remark, he said "you don't need to carry your revolver."

"'THE COURT: Please, gentlemen of the jury, pay particular attention to what I have said. I asked him the question about the revolver, and I have drawn his attention to the fact that I will make no recommendation unless he gives his evidence in a proper manner, and I have already told him, which is a fact, that I have not seen the statement which he made to the police. I do not want you to draw any inference from my question that I have seen the statement, whether it says anything about the revolver or not.'

Statement

"1. Was I right in giving my undertaking as above set out and as shewn by the evidence of Paulson herewith, in the presence of the jury, to the witness Paulson and to his counsel, that I would recommend him for a pardon?

"2. Was I right while the said Paulson was giving his evidence, in questioning the said Paulson in the manner shewn in the said evidence?

"Upon the above grounds or any of them, should there be a new trial?"

The appeal was argued at Vancouver on the 2nd of December, 1921, before MARTIN, GALLIHER and EBERTS, JJ.A.

Stuart Livingston, for appellant: In the first place the conversation as to Paulson giving evidence as to the Court's recommendation for a pardon should not have taken place before the jury. The proper proceeding is shewn in Roscoe's Criminal Evidence, 14th Ed., 155. Secondly, the manner in which the learned judge expressed himself to Paulson is ground for a new trial. The witness in the circumstances would give the same evidence as he did before the magistrate irrespective of whether it was true or not: see Russell on Crimes, 7th Ed., 2283; *Tonge's* case (1662), 6 How. St. Tri. 225. The judge's statement being made before them the jury would conclude that Paulson had to tell the truth to save his life and give more

Argument

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weight to his evidence than they would otherwise. In the circumstances if he fairly thought he should change the story given the magistrate he would not dare to do so. This is a substantial miscarriage and a new trial should be ordered: see *Allen* v. *Regem* (1911), 44 S.C.R. 331.

Argument

Tobin, for the Crown: The law as to admitting the evidence of accomplices is found in Best on Evidence, 11th Ed., 163; see also *Rex* v. *Rudd* (1775), 1 Cowp. 331. The giving of a recommendation for a pardon is in the discretion of the Court: see *Rex* v. *Garside and Mosley* (1834), 2 A. & E. 266; *Rex* v. *Brunton* (1821), R. & R. 454; Russell on Crimes, 7th Ed., 2283. As to being a competent and compellable witness see *Reg.* v. *Viau* (1898), 7 Que. Q.B. 362; *Ex parte Ferguson* (1911), 17 Can. Cr. Cas. 437 at p. 442. On the question of excluding the jury during the discussion with relation to Paulson's evidence see *Rex* v. *Aho* (1904), 11 B.C. 114 at p. 117. The judge has always had discretionary power as to a recommendation for a pardon. *Allen* v. *Regem* (1911), 44 S.C.R. 331 is in my favour.

Livingston, in reply.

Cur. adv. vult.

21st December, 1921.

MARTIN, J.A.

MARTIN, J.A.: This is a case reserved by GREGORY, J., from the recent Fall Assizes at Vancouver, whereat the appellant was convicted of murder. Upon the trial one Paulson, who was an accomplice of the accused, was called as a witness against him after "the Crown had called all its corroborative evidence and I ruled it had made out a *prima facie* case," as the learned trial judge states in said case.

The witness, though it is conceded he was a compellable one, objected to give evidence without the promise of a recommendation for a pardon, which promise the learned judge (not being clear, as he says in said case, that the witness was compellable) proceeded to give him, "if he gives his evidence in an unexceptionable manner," going on to explain to the witness, through the interpreter, what he meant by that expression, thus:

"You thoroughly understand that by unexceptionable, I mean in a manner frank and fair, not necessarily that he is to give evidence against

the accused, but is to tell his story freely, frankly, fully and fairly, as I judge it."

In so acting the learned judge relied upon the statement of the practice—based doubtless upon *Tonge's* case (1662), 6 How. St. Tri. 225 (see note at pp. 225-8 containing Kelyng's partial report, and Lord Hale's note); (84 E.R. 1061); *Layer's case* (1722), 16 How. St. Tri. 93 at pp. 153-63; and *Rudd's Case* (1775), 1 Leach, C.C. 115; 1 Cowp. 331, as set out in Roscoe's Criminal Evidence, 14th Ed., 155, as follows:

"The practice now adopted is, if a *prima facie* case cannot otherwise be made out . . . . for the Court to direct that he shall be examined on an understanding that if he gives his evidence in an unexceptionable manner he shall be recommended for a pardon. . . . ."

It is objected that the giving of such an undertaking is thus restricted to cases where a *prima facie* case cannot otherwise be made out, and therefore it cannot be given here, because the learned trial judge has certified that such a case had been made out. It is a strange thing that in the preceding (13th) edition of the same work, 1908, pp. 112-3, there is no mention of such a restriction, the language being:

"The practice now adopted is for the magistrate or the Court to direct that if he gives his evidence," etc.

No good reason has been suggested why, in general, there should be such a restriction upon the way the Crown may present its case, or be limited to a presentation of it in a way which would be less than its full strength; indeed, it would appear to be fairer to the accused that he should know as early as possible in the trial all the evidence that is to be adduced against him. I can find nothing in any of the authorities I have examined to conflict with this view and I am fortified in it by the following extract from that very high one, Chitty's Criminal Law (1826), Vol. 3, p. 768:

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"But, except in these cases [*i.e.*, by statute or proclamation] accomplices who are, according to the usual phrase, admitted to be King's evidence have no absolute claim or legal right to a pardon. A justice of the peace, before whom the original examination is taken, has no power to promise an offender pardon on condition of his becoming a witness against others. They cannot even control the authority of the judges before whom the prisoners are tried, so as to exempt the offender from prosecution; but if an attempt is made to try him, it will be for the Court to decide under the circumstances how far he is entitled to favour. Even the superior Courts have no power absolutely to assure

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him of mercy. He gives his evidence *in vinculis*, in custody, and it depends entirely on his own behaviour whether his confession will save or condemn him. There is, however, no doubt, that when an accomplice admitted by the magistrates or the Court to give evidence, appears, under all the circumstances of the case, to have acted a fair and ingenuous part, and to have made a full and true disclosure, he has an equitable claim to the mercy of the Crown, and the Court will, on application, put off his trial to enable him to apply for a pardon. These instances of pardon granted either expressly by statute and proclamation, or impliedly by usage, are derived from the old practice of approvement to which we have already alluded."

The Crown counsel has no control over the discretion of the Court to give such a promise, even though it may affect his presentation of his case, and the fact that said counsel has refused, as here, to give it (relying, presumably, on being able to prove his case without the necessity of extending clemency to a participant in a murder) does not affect the power of the Court to assume the very grave responsibility, in such circumstances, of so doing. It must be borne in mind that, as I pointed out in *Rex* v. *Hayes* (1903), 11 B.C. 4 at p. 17, "A judge of assize has powers of a very unusual and ample kind" which properly appertain to an office of such dignity and antiquity, representing as he does the King himself as the authorities cited shew.

I am of opinion, therefore, that the objection to the Court having done so here must be overruled, and the first question reserved answered in the affirmative.

MARTIN, J.A.

The second question reserved is still more difficult. It appears that after the undertaking was given, the examination of the witness proceeded and in the course of it the learned judge interpolated the following questions and observations, through the interpreter:

"THE COURT: Just let me ask a question first, please.

"You understand, do you, that I am only going to recommend you for a pardon if you tell your story freely and frankly and in an unexceptionable manner? I am telling you exactly the story to the best of my recollection. He (the witness) said I might have forgotten something.

"You told the police all about the affair, did you not? Yes, my Lord.

"Did you have an interpreter present or did you not? I told the story to the police but there were some words that I wanted explaining.

"Did you have an interpreter there? Was there an interpreter there? No, my Lord.

"Now, I have not seen the statements that you made the police, but

of course I will look at it before I make any recommendation. Tell him that. I think, he says, I think that I am telling the same story.

"Are you sure you did not have your revolver with you on the night of this affair? I did not have my revolver with me when this shooting took place, but before that I had my revolver. I told Robinson that I am going to put my revolver away in my room, put it away. Robinson made the remark, he said, 'you don't need to carry your revolver.'"

The necessity for this second warning to the witness does not appear, but what is specially objected to is the reference to some statement (evidently in writing) the witness had made to the police, which was not in evidence, and which the learned judge says he had not seen, but which nevertheless he must have had some knowledge of, otherwise he would not have introduced it, and moreover said that he intended to look at it before he gave the promised recommendation for a pardon to the witness, directing the interpreter to "tell him that."

It is submitted that the learned judge, in unmistakable and dread effect, gave the witness then and there to understand that if his statement in the box varied from that which he had given to the police, he would not be pardoned, and that the witness so understood the learned judge is shewn by his answer to him: "I think I am telling the same story."

This submission has occasioned me long and anxious consideration, with the result that I am forced to the conclusion that it is, having regard to all the delicate and dangerous surrounding circumstances, well founded. In cases of this description it must never be forgotten that, as Lord Chief Justice Mansfield pointed out in *Rudd's Case, supra,* at p. 121 (1 Leach, C.C.):

MARTIN, J.A.

"The accomplice is not assured of his pardon; but gives his evidence *in vinculis,* in custody; and it depends on the title he has from his behaviour, whether he shall be pardoned or executed."

It is obvious that if the witness did get the impression from the Court that unless he told the same story to the Court as he did to the police, he would be executed, then his testimony was tainted beyond redemption and could not, in a legal sense, be weighed by the jury, because the witness was no longer a free agent and there was no standard by which his veracity could be tested or estimated. This is not merely a matter going to the credibility of the witness, but something funda-

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mentally deeper, *viz.*, that by the action of the Court itself the witness was fettered in his testimony and put in so dire a position that the value of his evidence was not capable of appraisement, the situation being reduced to this, essentially, that while at the outset he was adjured to give his evidence freely and fully, yet later on he was warned that if it was not the same as he had already told the police he would be executed. Such a warning defeated the first object of justice, because what the witness should from first to last have understood was that, at all hazards, he was to tell the truth then in the witness box, however false may have been what he had said before in the police station. It is this element of uncertainty and the impossibility of determining the extent of it that makes this case so peculiar and unsatisfactory, and it cannot properly, in my opinion, be viewed as a question of credibility for the jury but one of frustration of their right to pass upon credibility. If the warnings complained of had taken place after the witness had finished his evidence, they could be said not to have had any harmful result, because they came too late to affect him, but unfortunately, if I may say so with all possible respect, the learned judge went on to question him about a crucial matter—what he did with his revolver at the time of the shooting. How can anyone say if he gave a truthful answer to that question, and as to what occurred between him and the prisoner concerning it, when, in his fear, he made a fettered reply which had necessarily to be "the same" as that which he had already told the police, if the shadow of the gallows was to be removed from him by his interrogator?

MARTIN, J.A.

It would seem that the learned trial judge realized quickly that something not according to law had been done, because he at once turned to the jury and addressed them thus:

> "THE COURT: Please, gentlemen of the jury, pay particular attention to what I have said. I asked him the question about the revolver, and I have drawn his attention to the fact that I will make no recommendation unless he gives his evidence in a proper manner, and I have already told him, which is a fact, that I have not seen the statement which he made to the police. I do not want you to draw any inference from my question that I have seen the statement, whether it says anything about the revolver or not."

I am, with all respect, quite unable to see the necessity or

advisability of saying anything to the jury in explanation of what had been said to the witness, or that the error was remedied at all by any observations to them, because the mischief had been done by those which were addressed to the witness, whereby his evidence had been illegally influenced beyond remedy, and no repetition of the warning, in a less objectionable manner, to the jury or any explanation could recall what had been said to the witness or remove its effect upon him. Therefore, I think the said observations to the jury should be disregarded as being irrelevant as well as irregular and hence without any bearing upon the question before us.

It cannot be denied that the accused was entitled, on every principle of natural as well as forensic justice, to this—that the witnesses brought forward against him should not have been influenced, least of all by the Court itself, however unwittingly, and that such a thing did nevertheless occur, comes clearly, in my opinion, within the expression "that something not according to law was done at the trial"—Criminal Code, section 1019.

It was recognized so far back as in the severe days of 1662, in *Tonge's* case, *supra* (at p. 227 [n.] of 6 How. St. Tri.) and so "advised" (*i.e.*, decided) by all the judges that there should not be "any threatenings used to them [accomplices] in case they did not give full evidence," even in cases of treason, which were specially relentless. With every respect, I can only regard what happened here as also coming within this prohibition; whether what was said to the witness may be euphemistically styled a warning or an admonition, nevertheless it was also minatory and hence, in its practical and legal effect, indistinguishable from a threat.

MARTIN, J.A.

Being then of opinion that "something not according to law was done at the trial," I have still to find, under section 1019, that in my "opinion . . . . some substantial wrong or miscarriage was thereby occasioned" before the conviction can be set aside and a new trial ordered as prayed. This question engaged our attention in the fourth case heard by this Court, *Rex* v. *Walker and Chinley* (1910), 15 B.C. 100; 13 W.L.R. 47, which is an unusual and instructive one in several respects. It must, I think, be apparent that if the view I have taken of

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the matter be correct, then undoubtedly a "substantial wrong," and hence a "miscarriage of justice," was "occasioned" at the trial and, therefore, the appellant is entitled to a new one. The interpretation placed upon said section 1019 by the Supreme Court of Canada, reversing the decision of this Court ((1911), 16 B.C. 9) in *Rex* v. *Allen,* 44 S.C.R. 331, and by which we are bound, is that if what has occurred (in that case the admission of evidence) "may have influenced the verdict of the jury," as the Chief Justice puts it at pp. 340, 341, then there must be a new trial, and the majority of the Court agreed with him, pp. 358 and 361, Mr. Justice Anglin drawing the distinction, in favour of the accused, between saying that the jury "must" or "may" have been influenced by what was done "not according to law" (p. 360), as follows (p. 361):

MARTIN, J.A.

"But it is said on behalf of the Crown that under section 1019 of the Criminal Code the conviction should not be set aside unless the Court is satisfied that the jury must have been influenced in reaching their verdict by the matter improperly put before them. There being other evidence sufficient to support the conviction, it is manifestly impossible to say that the jury must have acted upon, or were in fact influenced by, the matter which now forms the subject of the appellant's objection. On the other hand, it is equally impossible to say that the minds of the jury may not have been, or were not in fact, affected prejudicially to the appellant by matter so pertinent to the main issue before them—impossible indeed to say that it may not have been this matter which with some jurymen turned the scale against the defendant."

Applying this guiding principle to the case at bar, I am forced to the conclusion that what was done here "not according to law," in the unusual way I have indicated, not only may have, but probably did prejudicially affect the appellant, and therefore "some substantial wrong or miscarriage was thereby occasioned" within the meaning of the statute, and so the second question must be answered in the negative and a new trial ordered.

GALLIHER, J.A.: Two questions were reserved by the learned trial judge for the opinon of this Court: [already set out in statement].

GALLIHER, J.A.

In connection with these questions certain evidence and statements by the judge were subjoined which, as it is quite short, I will set out in full, with the exception of that part

of the discussion which deals with the request to recommend pardon, which summarized amounts to this, that the Crown having refused to recommend the witness Paulson (an accomplice) for pardon the learned trial judge undertook to do so on the understanding that he (Paulson) should give his evidence in an unexceptionable manner. With this exception, the evidence subjoined is as follows: [already set out in statement].

The learned trial judge seems to have had some doubt as to whether Paulson was a competent or compellable witness under our statutes. I think there can be no question that he was. The statutes seem to be clear upon that point, and see also *Ex parte Ferguson* (1911), 17 Can. Cr. Cas. 437.

With regard to the first question submitted to us, I would answer it in the affirmative.

There is little authority upon the subject, but we have been referred to what is known as *Tonge's* case (1662), a memorandum of which is reported in 84 E.R., pp. 1061 and 1062, and at length in 6 How. St. Tri. 225, which would seem to indicate that it was within the discretion of the Court to receive evidence of an accomplice on the understanding that he be recommended for a pardon. This is further dealt with in Roscoe's Criminal Evidence, 14th Ed., 155, in these words:

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"The practice now adopted is, if a *prima facie* case cannot otherwise be made out (for the magistrate—*Atkinson*, Mag. Prac. (1916), p. 174—or) for the Court to direct that he shall be examined on an understanding that if he gives his evidence in an unexceptionable manner he shall be recommended for a pardon or, as all the judges put it, he 'ought not to be prosecuted for his own guilt so disclosed by him' . . . ."

Mr. *Livingston*, counsel for the prisoner Robinson, dwelt on these words: "If a *prima facie* case cannot otherwise be made out," and pointed to the fact that the learned trial judge had stated, as appears in the case submitted to us, "at the said trial the Crown first called all its corroborative evidence and I ruled that it had made out a *prima facie* case against the accused," and urged that it was only where such *prima facie* case had not been made out that the judge could take the course taken here.

I do not think this limitation pertains nor do I find it

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borne out by the case I first referred to, nor in Best on Evidence, at pp. 163 and 164. The Crown is entitled to adduce all legal and proper evidence to place the facts fully before the jury. The evidence of an accomplice is legal and admissible, and it is for the jury to determine the weight to be attached to it. If it is within the province and jurisdiction of the trial judge to promise a recommendation for pardon, and it seems to me that it is, then I find nothing to warrant me in saying that promise may not be made at any time during the presentation of the Crown's case.

With regard to the second question submitted, I take it to mean not only the questions put directly to Paulson by the learned trial judge, but also to include the statements made by the judge in the presence of the jury in the course of such questioning.

The first statement made is a request to the interpreter to inform the witness that if he (the witness) will give his evidence in an unexceptionable manner, he (the judge) will recommend him for a pardon and the clemency of the Crown. There is nothing in this to which exception can be taken.

The Court then proceeds to explain what it means by unexceptionable, and that is "in a manner frank and fair, not necessarily that he is to give evidence against the accused, but is to tell his story freely, frankly, fully and fairly, as I judge it." I attach some significance to the words, "not necessarily that he is to give evidence against the accused," and I carry them through and bear them in mind where the judge later makes reference to the manner in which the witness is expected to give his evidence. There is nothing, I think, exceptionable in this statement of the learned trial judge. Then the judge proceeds and again draws prisoner's attention to the manner in which his evidence is to be given before he can expect a recommendation for a pardon, and the witness replies:

GALLIHER, J.A.

"I am telling you exactly the story to the best of my recollection, I might have forgotten something."

Up to this time, so far as the record before us shews, nothing had been said about any story told by the witness to the police. So I think it is proper to conclude that the witness, when he

says, "I am telling you exactly the story," means the story connected with the occurrence. Right up to this point I can see nothing objectionable. The learned trial judge, then, for some reason proceeded to ask the witness if he had not told the story to the police, and upon the witness replying that he had, the judge went on to say:

"Now I have not seen the statement that you made the police, but of course I will look at it before I make any recommendation,"

and the witness replied:

"I think I am telling the same story."

Counsel for the accused asks us to construe this as equivalent or that the jury might have thought it equivalent to a pressing upon the witness the fact that if he did not then tell the same story as he had previously told the police, he would swing for it. I do not take that view, nor do I think the jury would take that view, bearing in mind the words of the trial judge, where he says:

"You must give your evidence freely and frankly, not necessarily against the accused."

What I think the judge was trying to impress upon the witness and what I think is the correct conclusion was, that he (the judge) was going to look at the statement to the police in order that he might judge whether the witness had given his evidence in an unexceptionable manner, so that he might or might not recommend a pardon.

Whether these questions and remarks last alluded to were necessary or unnecessary (and I am inclined to think they were not necessary), it remains for us to decide first, was there anything done not according to law, as expressed in the Code, section 1019, and I find myself unable to say that there was, but should I be wrong in that view, I would still say, even in the light of the interpretation put upon section 1019 of the Code by the majority of the Court in *Rex* v. *Allen* (1911), 44 S.C.R. 331, that there was nothing in my opinion which occurred that might have influenced the verdict of the jury.

I would further remark that there is a great difference in the facts connected with the *Allen* case and in the case before us. Here I regard it as going largely to the credibility of the witness.

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The learned trial judge then proceeded to ask the witness as to whether he carried a revolver on the night in question, and on receiving a reply in the negative and evidently thinking that asking this question (which he undoubtedly had a right to) after having questioned the witness as to his having made a statement to the police, the jury might have inferred that there was some reference to a revolver in the witness's statement, the learned judge proceeded to disabuse their minds as to that, by reiterating that he had not seen the statement and that they should not draw the inference that the statement said anything about the revolver.

I would, therefore, answer the second question in the affirmative and against the accused.

EBERTS, J.A.

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

New trial granted, Galliher, J.A. dissenting.

Solicitors for appellant: *Livingston & O'Dell.*
Solicitors for respondent: *Pattullo & Tobin.*

CLEMENT, J.

SPENCER v. CITY OF VANCOUVER.

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Dec. 24.

Arbitration—Award—Action on—City fail to appoint arbitrator—Application under Vancouver Incorporation Act—"Persona designata"—B.C. Stats. 1900, Cap. 54, Sec. 133(9).

SPENCER v. CITY OF VANCOUVER

The plaintiff claiming compensation for damages resulting from the construction of a viaduct appointed an arbitrator and notified the City but the City made no appointment on its own behalf. Section 133(9) of the Vancouver Incorporation Act provides that if after 20 days' notice the party notified omits to appoint an arbitrator, a judge of the Supreme Court may appoint an arbitrator for the party in default. The plaintiff then proceeded under section 133(9) and entituled his proceedings "In the Supreme Court of British Columbia" and an order was made by MURPHY, J. similarly entituled appointing an arbitrator for the City. In an action on the award:—

Held, that the award must stand or fall on the order as it exists and having been made by one holding the office of judge of the Supreme Court and not *persona designata* it was made without jurisdiction and the award must fall.

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ACTION on an award. The facts are sufficiently set out in the reasons for judgment. Tried by CLEMENT, J. at Vancouver on the 8th of November and the 2nd of December, 1921.

Griffin, for plaintiff.
McCrossan, for defendant.

24th December, 1921.

CLEMENT, J.: Action on an award. On the 8th of July, 1915, the plaintiff notified the defendant Municipality that he claimed compensation for damage done to certain property of his by reason of the construction of the Hastings Street viaduct, and (by subsequent notice) that he had appointed Mr. F. G. T. Lucas as his arbitrator to act in the premises. The defendant Municipality made no appointment and the plaintiff thereupon invoked subsection (9) of section 133 of the Vancouver Incorporation Act, and made application to Mr. Justice MURPHY to appoint an arbitrator for the City. That subsection provides that such an appointment may, in default of appointment by the City, be made by a judge of the Supreme Court. The application was in fact made "before the presiding judge of this Court in Chambers," the material in support of the application being entituled "In the Supreme Court of British Columbia" and duly filed in the registry of that Court. The order itself (dated 27th June, 1918), similarly entituled, was "settled" by the registrar, and issued as a Chamber order of the Supreme Court. It was certainly not a consent order, and there is no warrant for saying that the defendant's counsel at any stage of the proceedings waived the objection which he now takes that the appointment was made without jurisdiction, and that in consequence no board of arbitration was ever properly constituted. The evidence would have to go so far as to shew that the statutory *in invitum* proceeding was by consent turned into an arbitration under voluntary submission.

Judgment

Were the matter *res nova* I should, I think, hold that the application was in fact made to, and the order made by, one holding the office of judge of the Supreme Court, and that the caption might well be disregarded an innocuous surplusage. But Mr. *McCrossan* strongly contended that the matter is not

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res nova and that I am bound by the decision of the Court of Appeal in *Chandler* v. *City of Vancouver* (1919), 26 B.C. 465, to hold the objection fatal. On consideration I think he is right. Mr. Justice GREGORY had held in that case that he could not hear the application to quash a by-law of the City because Mr. Justice MORRISON had granted the rule to shew cause and, being a *persona designata* (under a section similarly worded to subsection (9) of section 133), could alone hear the application on the return of the rule. He also refused to refer the matter to Mr. Justice MORRISON but, on the contrary, dismissed the motion. The Court of Appeal dismissed an appeal from Mr. Justice GREGORY's decision. The Chief Justice, at p. 469, said, amongst other things, this:

"The proceedings were wrongly taken in the Supreme Court. It was, therefore, I think, the duty of GREGORY, J. to dispose of the matter before him in the only way in which, in my opinion, he could have properly disposed of it, that is to say, by dismissing the motion and setting the rule aside. Had the matter been adjourned to be heard by MORRISON, J., I think that learned judge could only have dealt with the matter in the way I have suggested. He could not then have treated the proceedings as proceedings before him *persona designata*."

Judgment

In the case at bar the matter was, in this view, never before the *persona designata*. The award must stand or fall upon the order as it exists and that order being made by a tribunal having no jurisdiction the award must fall. This defence is open, I think, under par. 7, and also under par. 16 and par. 22. At all events, when the point was taken in argument, I allowed Mr. *Griffin* to re-open the case, and gave him every opportunity to meet it by evidence of waiver, etc.

I express no opinion upon the numerous other defences raised except to say that, in my opinion, the release relied upon does not operate to defeat plaintiff's claim, neither upon its true construction nor upon the evidence does it apply to the situation as it ultimately developed.

The action is dismissed with costs, against which the plaintiff should have a set-off of costs on the issue as to the release.

Action dismissed.

STAGG v. WARD AND WARD.

LAMPMAN, CO. J.

1921

March 9.

STAGG v. WARD

Resulting trust—Conveyance taken in name of defendant—Purchase price paid by plaintiff — Defendant cohabiting with but not married to plaintiff—No presumption of gift.

There is no presumption of a gift where a man buys real estate in the name of a woman with whom he is cohabiting. The bare fact of payment of the purchase price is sufficient to raise a presumption of resulting trust in his favour, which is not necessarily rebutted by his admission that he had the title put in her name "to keep peace in the house."

Where a gift is alleged, it must be shewn that the alleged donor fully intended to make a gift, and realized the legal effect of the transaction in question.

ACTION for a declaration that the defendant S. H. Ward held certain property on Savannah Avenue in Saanich as trustee for the plaintiff, and for an order compelling conveyance to the plaintiff. In 1913, the plaintiff, a brick-layer, came to Victoria from Niagara Falls, N.Y., accompanied by the defendant Mary Ward, then Mrs. Heywood but also known as Mrs. Stagg. The plaintiff purchased the property in question, and a conveyance was taken in the name of Mary Stagg. The plaintiff, assisted by the son and son-in-law of Mrs. Heywood, who were living with him, built a house upon the property. In 1914, the plaintiff and Mrs. Heywood quarrelled, and after a reconciliation she finally left him in 1915. The plaintiff retained the certificate of title to the property, which was in the name of Mary Stagg, and remained in possession of the property, but owing to her threats to sell he commenced an action for a declaration of title and filed a *lis pendens,* but the writ was never served.

Statement

Shortly after in 1915, the plaintiff returned to Niagara Falls but through his agent continued to rent the property until 1920, when his tenant was notified by the defendant S. H. Ward that the latter claimed the rents as owner. The plaintiff then ascertained that the defendant Mrs. Ward, who had in the meantime married her co-defendant, had obtained the can-

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cellation of the *lis pendens* by an *ex parte* application, and had induced the registrar-general of titles to issue her a duplicate certificate of title, by the use of a declaration purporting to prove loss of the original by fire. She thereupon conveyed the property to her husband who caused himself to be registered as owner in fee. The plaintiff commenced a second action in July, 1920. His plaint alleged that all moneys expended in the purchase of the lot and erection of the house were advanced by himself and claimed a resulting trust. No express trust was alleged. Mrs. Ward claimed that the property and materials for the house were paid for with her money. No plea of a gift was raised. The defendant S. H. Ward raised the defence of purchase for value without notice, but abandoned this at the trial. The plaintiff on discovery and at the trial gave as his explanation for allowing the conveyance to be made out as described, that he had done this "to protect his children and to keep peace in the house." Tried by LAMPMAN, Co. J. at Victoria, on the 1st and 2nd of March, 1921.

Statement

D. M. Gordon, for plaintiff.
Dickie, for defendants.

9th March, 1921.

LAMPMAN, Co. J.: This is an action for a declaration that the defendants held certain lands as bare trustees for the plaintiff.

The plaintiff, a married man, whose wife for 19 years has been in an asylum in Buffalo, New York, was living in Niagara Falls, N.Y., about the year 1909—he had three or four children. The defendant Mary A. E. Ward was a widow also living at Niagara Falls, and the plaintiff with his children went to board with her at her house. After one or two moves the plaintiff bought a house in Niagara Falls and he and Mrs. Ward (then Heywood) lived in it together as man and wife with his children and her daughter. In the fall of 1911 the daughter was married. In June, 1913, plaintiff moved to Victoria, bringing with him his three children and Mrs. Heywood. A lot was bought and plaintiff, assisted by Mrs. Heywood's son and her son-in-law, built a house on the lot and

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plaintiff and Mrs. Heywood lived in the house. In September, 1914, differences arose between them and she left but soon came back, but in March, 1915, she finally left him.

The conveyance was made out in the name of Mrs. Ward and also the certificate of title, and when Mrs. Ward left the house she left behind her her certificate of title which plaintiff kept. In 1920 Mrs. Ward obtained a duplicate certificate of title from the registrar-general of titles and the manner in which she obtained this did not help her case when it came to estimating the worth of her evidence. The explanations of her affidavits were not impressive.

Plaintiff says it was his money that paid for the lot and his earnings that paid for the lumber and materials put into the house. The defendant, Mrs. Ward, says she bought the house with her own money and she says it was her money that paid for the materials. On this sharp conflict of testimony I find in favour of the plaintiff. He produced cheques and receipts which confirm his story and the cheques and receipts of payments for the materials go to disprove Mrs. Ward's story. She said she gave Stagg the money to make these payments, but his bank book shews no receipts of such amounts as she said she gave him and she explained this by saying that he was a very crooked and crafty man, but at the time they were on good terms and if he was up to any trickery, it is not likely that he would have gone on working on the house.

The rule was stated by Chief Baron Eyre in *Dyer* v. *Dyer* (1788), 2 Cox 92 at p. 93 thus:

"The clear result of all the cases, without a single exception, is, that the trust of a legal estate, whether freehold, copyhold, or leasehold; whether taken in the names of the purchasers and others jointly, or in the name of others without that of the purchaser; whether in one name or several; whether jointly or successive, results to the man who advances the purchase-money. This is a general proposition supported by all the cases, and there is nothing to contradict it; and it goes on a strict analogy to the rule of the common law, that where a feoffment is made without consideration, the use results to the feoffor. It is the established doctrine of a Court of equity, that this resulting trust may be rebutted by circumstances in evidence. The cases go one step further, and prove that the circumstance of one or more of the nominees, being a child or children of the purchaser, is to operate by rebutting the resulting trust."

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See also *Rider* v. *Kidder* (1805), 10 Ves. 360; *In Re A Policy No. 6402 of the Scottish Equitable Life Assurance Society* (1902), 1 Ch. 282; *Kinsella* v. *Pask* (1913), 28 O.L.R. 393; *The Venture* (1908), P. 218, and *Dudgeon* v. *Dudgeon and Parsons* (1907), 13 B.C. 179.

When it is established that it was Stagg's money with which the lot was purchased and the house built, the presumption is that the trust of the legal estate results to him, as Mrs. Ward did not stand in such relation to him—as wife or child—as would meet the presumption. How does the defendant meet this presumption? The plaint alleges that the land was purchased with the plaintiff's money and the conveyance taken in defendant's name as a bare trustee for the plaintiff. The dispute note sets up a purchase by the defendant with her own money. This defence I have held failed and the decision depends on whether or not the facts indicate a gift by the plaintiff to Mrs. Ward. The only evidence on this point is

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that of the plaintiff himself, as Mrs. Ward scouts all idea of plaintiff giving her anything.

After considerable consideration, I have come to the conclusion that plaintiff never intended to give the property outright to Mrs. Ward. He did a very dangerous thing but he never realized at the time that his dominion over the land had ceased, and he did not intend that it should cease.

Mrs. Ward was married to her present husband two years ago, and he, for the purpose of protecting her, took, with full knowledge of the facts, a conveyance of the land.

The plaintiff is entitled to judgment as prayed.

Judgment for plaintiff.

ZEIGLER v. CITY OF VICTORIA.

MORRISON, J.

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Nov. 23.

ZEIGLER v. CITY OF VICTORIA

Master and servant—Municipal corporation—Dismissal of servant—B.C. Stats. 1914, Cap. 52, Sec. 25(d) and 54(3); 1916, Cap. 44, Sec. 5—Victoria City By-law No. 535.

A fire-truck driven to a fire by a duly-qualified driver and in charge of the plaintiff, a captain in the fire department of the City of Victoria, came in collision with a street-car resulting in material damage to both fire-truck and street-car. The plaintiff was subsequently dismissed from office by the fire chief. In an action for wrongful dismissal—

Held, that the dismissal by the fire chief after enquiry and after confirmation by the council was a due exercise of authority and the action should be dismissed.

When the conduct of a fire captain is investigated and passed upon regularly by the council, a Court must be guided not by what one would have done had one been charged with the duty of passing upon his conduct but were the council unreasonable in the conclusion to which they came having regard to all the circumstances.

The provisions of the Municipal Act as to powers of removal of servants should receive a liberal interpretation with a view to the departments of municipal governments functioning effectively and there is nothing in the Act or amendments thereto which is not in consonance with the principle of law, that from the reason of the thing, from the nature of corporations, and for the sake of order and government, the power to remove is one of the common law incidents of all corporations.

The powers given by section 5 of the Municipal Act Amendment Act, 1916, are confined to officers appointed for the carrying on of the good government of the municipality as distinguished from employees such as the plaintiff.

ACTION for a declaration that the dismissal or suspension of the plaintiff from his position as captain of the fire department is invalid or in the alternative for damages for wrongful dismissal. Tried by MORRISON, J. at Victoria on the 9th and 10th of November, 1921. On the 26th of July, 1921, the chief of the Victoria fire department dismissed the plaintiff on the ground of alleged reckless and improper conduct in the control and direction of a fire-truck. On the 19th of July, 1921, in answering a fire call, the fire-truck was being driven easterly along the narrow portion of Fort Street (known as

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the Dardanelles) behind an easterly bound street-car, being at that time on the left track. The street-car stopped suddenly at the wrong stopping place at St. Charles Street, and the driver of the fire-truck, in order to avoid a collision with it, turned quickly to the right, but upon doing so he was suddenly confronted by a westerly bound street-car coming at some speed and an unavoidable collision took place causing considerable damage to both street-car and the fire-truck. Although the fire-truck was in the plaintiff's charge, an experienced fire-truck driver was at the wheel.

J. R. Green, for plaintiff.
Jackson, K.C., and *Pringle,* for defendant.

23rd November, 1921.

MORRISON, J.: The plaintiff, at the time of the accident in question, was a captain in the fire department of the City, and after an investigation, which for the purposes of this case I find was sufficiently regular and adequate, he was dismissed. That is, assuming there was good cause for his dismissal, the action by the Council was in conformity to the letter and spirit of the Municipal Act and perfectly legal.

The section of the Municipal Act which was invoked is section 25, subsection (*d*), Cap. 52 of 1914, which defines the power conferred upon the Mayor but which powers are not exclusive.

Judgment

By section 54, subsection (3), of the same Act, the Council of the Corporation have power to pass by-laws for regulating the removal of its officers and servants. Pursuant to this power a by-law, No. 535, was passed authorizing rules in which provisions were made for the removal of members of the fire department. These rules were invoked by the fire chief on the occasion in question, by virtue of which he first suspended the plaintiff and later, after further inquiry, dismissed him, which acts were duly confirmed by the Council. Section 465 was also referred to by counsel on behalf of the defendant in his submission that the fire chief has the power to dismiss a subordinate officer or member of his department.

And last, section 49 of Cap. 52 of 1914 as re-enacted by

section 5 of Cap. 44, Municipal Act Amendment Act, 1916, which provides that:

"49. (1.) The Council may by by-law provide for the appointment and the method of appointment of officers of the corporation to fill or occupy such positions as may from time to time become vacant, or such positions as may be deemed necessary or expedient for the carrying-on of the good government of the municipality and the carrying-out of the provisions of this Act, and may also in the same manner provide for the appointment of a water commissioner and a commissioner or commissioners to superintend sewerage or drainage.

"(2.) Any person who has been properly appointed by the Council to any such office or position shall hold the same during good behaviour and efficiency: Provided, however, that, notwithstanding any contract or agreement to the contrary, the Council or the employee may terminate any engagement by giving to the other one month's notice in writing.

"(3.) Officers and commissioners of a municipality shall, in addition to any duties which may be assigned to them by statute, perform all other duties required of them by the by-laws and resolutions of the Council or by the instructions of the Mayor or Reeve or Board of Control."

The powers therein given would seem to be confined to officers appointed for the carrying on of the good government of the municipality, as distinguished from employees, such as I find the plaintiff to have been: *Speakman* v. *City of Calgary* (1908), 9 W.L.R. 264. As to the proviso in subsection (2), see *Vernon* v. *Corporation of Smith's Falls* (1891), 21 Ont. 331 at p. 334.

From the letter of the legislation appertaining to municipalities as well as from the philosophy underlying that legislation, I agree with the submission that the enactment dealing with these powers should receive a liberal interpretation to the end that the department may function effectively on behalf of the public.

Judgment

There is nothing in the Municipal Act or amendments thereto which is not in consonance with the principle of law that from the reason of the thing, from the nature of corporations and for the sake of order and government, the power to remove is one of the common law incidents of all corporations: Lord Mansfield in *Rex* v. *Richardson* (1758), 1 Burr. 517; Dillon on Municipal Corporations, 5th Ed., par. 240. I find there was no delegation of this power, as counsel for the plaintiff submitted there was, but rather that it was a due exercise by the defendants of the authority reposed in them by law.

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I now come to the question as to whether there was good cause for the plaintiff's removal. The gravamen of the complaint, it seems to me, is not so much that damage was caused to the property of the Corporation or to that of the British Columbia Electric Railway, but that by the alleged conduct of the plaintiff he disabled himself from attending to the prompt and effective discharge of his perilous duties, thus tending to endanger the public safety. One of the instructions given firemen by the chief was to exercise due care, to avoid collisions and accidents of any kind in circumstances such as obtained on the occasion in question, for as he stated, it would be better to arrive at the scene of a conflagration late than not to arrive at all. Whilst neither the danger nor the arduousness of the duties of firemen can well be miminized, nor their gallantry in discharge of those duties be gainsaid, yet when, as in this case, their conduct is investigated and passed upon regularly by the Council, a Court sitting as it were as a jury, must not be astute in nullifying the result. The test is not what one would have done had one been charged with the duty of passing upon his conduct, but were the Council unreasonable in the conclusion to which they came, having regard to all the circumstances:

Judgment

"It is impossible to give an exhaustive definition of neglect or misconduct which would justify dismissal. The particular act justifying dismissal without notice must depend upon the character of the act itself, upon the duties of the workman and upon the nature of the possible consequences of the act":

Channell, J. in *Baster* v. *London and County Printing Works* (1899), 68 L.J., Q.B. 622 at p. 623.

From the evidence which the Council apparently accepted, it would appear that the plaintiff was following too closely to and directly in line behind the tram-car—thus narrowing his field of vision; that had he taken due care under the circumstances, he should reasonably have expected the tram-car ahead of him would come to a stop either before or at the time it did, and that in all reasonable probability another car or vehicle would be approaching. Had he kept out in the fairway so as to have had a clear view ahead, he himself would be able to see approaching vehicles and as well would be giving the drivers

of such an opportunity of seeing him. This would be particularly so when proceeding along such a narrow thoroughfare and when approaching a curve or bend in the street, the existence of which he would be supposed to know.

There is, I suppose, no doubt that what made the plaintiff turn out when he did was the somewhat unexpected stop of the tram-car which he was following. That then brings one back to the plaintiff who should reasonably have anticipated such an imminent contingency, even though hurrying to a fire. The nature of the damage to the tram-car with which he collided would give a fair indication of the speed he was travelling. These are all matters for the Council to consider and if, in addition, they accepted the evidence of the deputy chief, who was trailing behind the plaintiff, as they apparently did, I cannot say they were not justified in finding that the plaintiff was not exercising due care; nor that they were wrong in considering the incident sufficiently serious, having regard to the maintenance of the strict observance of the rules promulgated for the safety of the lives and property of the citizens of Victoria, to justify his dismissal. As to whether the public safety would not have been as well safeguarded by his mere temporary suspension or by giving him another chance without even a suspension, are matters, it seems to me, again entirely for the defendants, who are trustees for the public in such cases. Without some hesitation, I venture the gratuitous opinion that the only semblance of a remedy or at least satisfaction which the plaintiff has, is the inalienable right of every citizen to try by constitutional method to alter the personnel of the Council.

I dismiss the action, again venturing upon a gratuitous suggestion, that as a tribute to the plaintiff's past services and conduct, they do not ask for the costs, of which, although I have the inclination, I fear I have not the power of depriving them in this particular case.

Action dismissed.

NOTE:—The plaintiff appealed from the above decision and contended (a) that the dismissal was by the fire chief and wardens only, not by the City Council; (b) that the Municipal Act does not provide for fire wardens or confer any powers on them; (c) that the mayor can only

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suspend and cannot dismiss, and the fire chief cannot do more; (d) that notice and hearing were essential to a valid dismissal and none was given; (e) that the rules and regulations of the fire department purporting to confer such power to dismiss on the fire chief were *ultra vires*, and (f) that there was no good cause for the dismissal.

After argument the action was settled, the City reinstating the plaintiff in his position as fire captain and paying his salary since his dismissal to date and costs.

COURT OF APPEAL

1919

June 11.

REX v. DUBOIS

REX v. DUBOIS.

Criminal law—Grand jury—Constitution of—Drafting done by sheriff and not by selectors—Proceedings void ab initio—Selector neglects to take oath—Preparation of case stated—B.C. Stats. 1913, Cap. 34, Secs. 10 and 29.

Upon selectors, appointed under section 29 of the Jury Act, B.C. Stats. 1913, Cap. 34, at Clinton, B.C., making their selection of Grand and Petit Jurors, the sheriff proceeded with the drafting of a panel cutting down the number so selected. On appeal from a conviction for cattle stealing:—

Held, that as the Grand Jury so drafted was not competent, the indictment should be quashed and a new trial ordered.

Per MACDONALD, C.J.A., and MARTIN, J.A.: The case stated should contain the facts upon which the questions are founded with the findings of the trial judge and all evidence except what is specially required should be excluded from the appeal book.

APPEAL by way of case stated from a conviction by MORRISON, J. at the May (1919) Assizes at Clinton on a charge of stealing a roan steer. Upon the accused being arraigned and required to plead his counsel moved to quash upon the ground set out in the case stated. Questions one and four of the reserved case were as follow:

Statement

"1. Counsel for the defence objected that the Grand Jury was not properly constituted in as much as Mr. Fraser one of the selectors of jurors had not taken the oath of office before entering upon his office as selector. The question for the Court is: Was the Grand Jury properly constituted and was I right in overruling the objection and refusing to quash the indictment?

"4. Counsel for the defence moved to quash the indictment on the

ground that the jury panel should have been drafted by the selectors of jurors instead of by the deputy sheriff. The question for the Court is: Was the Grand Jury properly constituted and was I right in overruling the objection and refusing to quash the indictment?

"If any or all of the above questions be answered in favour of the accused should the conviction be set aside or should there be a new trial ordered?

"The accused was then arraigned on the indictment and on the advice of counsel refused to plead and a plea of not guilty was entered. On his trial he was found guilty. Whereupon Mr. *A. D. Macintyre* one of the counsel for the accused intimated that a reserved case would be asked for. I intimated that this might be referred to again.

"On the 8th day of May, 1919, I sentenced J. F. DuBois to two and a half years in the penitentiary. On the 8th day of May, 1919, Mr. *A. D. Macintyre* asked for a reserved case and I intimated that this would be dealt with later. Subsequently at the Kamloops assizes, on the 19th of May, 1919, Mr. *Murphy*, of counsel for the accused, renewed the application for a reserved case which I granted."

Statement

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

Murphy, for appellant: One of the jury selectors neglected to take the oath of office before entering on his duties. Section 10 of the Jury Act, B.C. Stats. 1913, requires that this oath be taken and the contention is that there was no Grand Jury: see *Rex* v. *Hayes* (1902), 9 B.C. 574; 7 Can. Cr. Cas. 453; *Montreal Street Railway Company* v. *Normandin* (1917), A.C. 170; 33 D.L.R. 195. The jury being improperly selected had no constitution: see Murfree on Sheriffs, p. 179, par. 384. A substantial wrong has been done: see *Rex* v. *Churton* (1919), 27 B.C. 26. The jury panel should have been drafted by the selectors and not by the deputy sheriff. The selectors had selected 18 Grand Jurors and 60 Petit Jurors, and the sheriff cut the list down to 13 Grand Jurors and 40 Petit Jurors. The *Hayes* case applies here: see also *City of Victoria* v. *MacKay* (1918), 56 S.C.R. 524 at p. 527.

Argument

Carter, for the Crown: The fourth question comes within section 29 of the Jury Act: see also section 899 of the Code as to curing the action of the sheriff. Whether there has been substantial wrong or miscarriage see *Rex* v. *Morrow* (1914), 24 Can. Cr. Cas. 310; *Rex* v. *Brown and Diggs* (1911), 19 Can. Cr. Cas. 237.

Murphy, in reply.

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MACDONALD, C.J.A.: I think the fourth question ought to be answered in the negative. The question is:

"Was the Grand Jury properly constituted and was I right in overruling the objection and refusing to quash the indictment?"

I am of opinion, which I base upon section 29 of the Jury Act and upon the order in council appointing the two gentlemen who acted as selectors to that office, that it was the duty of the selectors not only to select the jurors for that particular assize at Clinton but to draft a panel, and having done that it was the duty of the sheriff to have summoned these jurors for that assize. The sheriff, apparently mistaking his duties, acted as if this case had fallen under the Jury Act and not under section 29, and the drafting was done by the sheriff instead of the selectors. The result is that the panel which was constituted by the selectors has not been summoned, only part of that panel has been summoned. Applying the case of *Rex* v. *Hayes* (1902), 9 B.C. 574; 7 Can. Cr. Cas. 453, it is quite clear that there was no Grand Jury at all and the indictment, of course, must be quashed.

I want to add that I have not considered what decision ought to be given with regard to any questions with the exception of question 4. They were not argued; it was unnecessary to argue them, because the answer to question 4 would decide the appeal itself, and therefore my judgment is entirely upon question 4. I express no opinion on any of the other questions.

MACDONALD, C.J.A.

I wish also to call attention, so that it may appear in the report, in case this decision is reported, to the manner in which the appeal case was drawn up. Instead of the facts being stated upon which these questions were asked, the objections have been stated and no finding made by the learned judge on facts. In my opinion, the manner in which the questions are framed and the statements made is not such as we should encourage. We have listened to arguments because in this particular case there can be no dispute as to what is meant, but the form of the case is very objectionable and unsatisfactory, and I want to reaffirm what we have affirmed on more than one occasion before, that sufficient care is not taken in the preparation of cases stated.

There has been no proper trial. There has been a pre-

tended trial on an indictment which was never properly founded, so the accused ought to be put back where he belongs.

The order should be to set aside the judgment, quash the indictment, and direct a new trial.

MARTIN, J.A.: I am of the same opinion. I agree with what the Chief Justice has said. We have 105 pages of evidence which is quite unnecessary and violates the directions we gave and reaffirmed, because they are of long standing, as to the preparation of these cases stated. I hope the judges below will confirm this. I make no reference to the first point, because we told Mr. *Carter* we did not wish to hear him on that.

MARTIN, J.A.

MCPHILLIPS, J.A.: I am of the like opinion and in connection with that view, I wish to state that as at present advised I would think question 1, as stated here, would be determinative of the case in appeal. That is, I consider that the taking of the oath was a mandatory provision in the statute, and if I were wrong in agreeing, as I have agreed, with what my brothers have said as to the steps that followed, I consider that there never was a commencement that would enable any of the subsequent acts being cured through any failure to perform them, that is, if they were only directory; but in my opinion they were mandatory, both in regard to question 1 and in regard to question 4, too, but certainly in regard to question 1. If that was a mandatory provision and was not complied with, there was no foundation on which to build a Grand Jury —*Montreal Street Railway Company* v. *Normandin* (1917), A.C. 170, and *City of Victoria* v. *MacKay* (1918), 56 S.C.R. 524, where the *Normandin* case was referred to by Mr. Justice Anglin on page 537. After considering the *Normandin* case he quotes:

MCPHILLIPS, J.A.

"It would be quite too dangerous to permit conditions imposed by statute to be thus evaded."

I think it would be quite too dangerous in this case. Under section 10 it says: "every selector of jurors shall, before entering upon the duties of such office, make a statutory declaration," and no argument can meet that point. If that statutory declaration was not made, it seems to me that the foundation of the selection of a Grand Jury is not present at all.

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REX v. DUBOIS

EBERTS, J.A.: I do not purpose expressing an opinion with reference to question 1. I do not think counsel for the Crown took the opportunity of arguing as to whether or not it was legal or just. Nor as to questions 2 or 3. Under question 4 I agree with the remarks of the Chief Justice and I think the fourth should be answered in the negative.

Conviction quashed and new trial ordered.

MARTIN, LO. J.A.

1921

Dec. 14.

MARTIN v. THE SEA FOAM

MARTIN v. THE SEA FOAM.

Admiralty law—Jurisdiction of Admiralty Court—Claim for repairs of vessel seized by mortgagee — Vessel not "under arrest" when writ issued—The Admiralty Court Act, 1861, 24 Vict. (Imperial), Cap. 10, Sec. 13.

A vessel was seized by a mortgagee thereof when it was being repaired by plaintiff in plaintiff's yard. Plaintiff brought action in the Admiralty Court claiming a lien for repairs done at the time the vessel was in possession and repairs previously executed on her last trip.

Held, said Court had no jurisdiction to entertain the action, as the vessel was not "under arrest" within the meaning of section 13 of The Admiralty Court Act, 1861, 24 Vict. (Imperial), Cap. 10, at the time the writ was issued.

Statement

THE gas-boat Sea Foam was under repairs by plaintiff when Balfour, Guthrie Co. seized it under a mortgage. It was sold by Balfour, Guthrie Co. to one Cole. Plaintiff brought action in the Admiralty Court claiming a lien for, (a) repairs done at the time the boat was in possession; (b) repairs previously executed on her last trip. The defence was: (a) No jurisdiction; (b) no lien attached as the boat was not in his possession (merely tied to another man's wharf); (c) plaintiff had lost lien for previous repairs, as the ship had been taken out on further trip after they were executed. Tried by

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Argument

MARTIN, Lo. J.A. at Vancouver on the 13th and 14th of December, 1921.

Hume B. Robinson, and *O'Neill,* for plaintiff.

Hossie, for defendant, took the point that there was no jurisdiction under The Admiralty Court Act, 1861, 24 Vict. (Imperial), Cap. 10, Sec. 4, which provides for jurisdiction "in a claim for the repair of any ship if at the time of the instituting of the cause the ship or the proceeds thereof are under arrest of the Court." [He cited *Momsen* v. *The Aurora* (1913), 18 B.C. 353; 25 W.L.R. 241; 15 Ex. C.R. 27.]

MARTIN, Lo. J.A.: It is clear to me after examining the authorities cited this morning, and in the light of those cited yesterday, that this Court has no jurisdiction to entertain this action, because the vessel was not "under arrest" within the meaning of section 13 of The Admiralty Court Act, 1861, 24 Vict. (Imperial), Cap. 10, at the time the writ was issued herein.

The cases of *The Northumbria* (1869), L.R. 3 A. & E. 24; 39 L.J. Adm. 24; 18 W.R. 356; and *The Normandy* (1870), L.R. 3 A. & E. 152; 39 L.J. Adm. 48; 18 W.R. 903, which Mr. *Robinson* has drawn to my attention are instructive, and if I must say so, the latter goes further than I am inclined to think it should have gone. It is an expansion of the principle laid down in *The Northumbria* to this extent, that sections 13 and 34 "must be construed together, and so construed they shew the purpose of the Legislature to have been to give jurisdiction to this Court whenever it was substantially seized of a suit against the vessel," and the learned judge of the Admiralty Court goes on to explain his decision in *The Northumbria* by saying that, "there a *caveat* warrant having been issued, and the arrest of the vessel prevented, and bail having been given by the owners in pursuance of their undertaking, I held that, for the purposes of the present section, there was a constructive arrest," and he proceeds to say that he is prepared, though not till "after I confess, much hesitation, to take the step further," that he did take, subject to a condition which he imposed. In *The Northumbria* case he had observed that:

Judgment

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"Looking to the whole scope and tenor of the Act, this Court was intended to have jurisdiction in suits of this description, when it is in possession of the bail which represents the *res*, whether the *res* has been released on the giving of bail after the arrest, or whether the arrest has been prevented, as in this instance, by such a *caveat* as has been issued in this case."

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But all that has been done in the case at bar is that the vessel was seized by the mortgagee when it was being repaired in the plaintiff's yard and no proceedings of any kind have been instituted in this Court, and so I do not feel prepared to take still another step further and hold that the pursuance of a private remedy is at all analogous to the taking of public proceedings in this Court, and hence there is no jurisdiction to entertain this action in this Court and it must be dismissed.

Judgment

Action dismissed.

QUINN v. WALTON.

COURT OF APPEAL

1921

Feb. 3.

QUINN v. WALTON

Statute, construction of—Motor-vehicles—By-law fixing rules for street crossing—Validity—"Rule of the road," meaning of—R.S.B.C. 1911, Cap. 99, Sec. 17; Cap. 169, Secs. 36 and 37—B.C. Stats. 1920, Cap. 32, Sec. 2; Cap. 62, Secs. 16 and 17.

A by-law regulating the right of way at street crossings is *intra vires* of the Council of the City of Victoria and is not within the term "rules of the road" in section 37 of the Motor-traffic Regulation Act.

APPEAL by plaintiff from the decision of LAMPMAN, Co. J., of the 3rd of December, 1920, in an action for damages for negligence. The defendant was driving his Studebaker car southerly on Richmond Avenue, Victoria, on the 28th of September, 1920. On coming to the intersection with Leighton Road he came into collision with the plaintiff's motor-truck coming from the east on Leighton Road. Both car and truck were damaged. The question arose as to the validity of by-law No. 1133 as amended by by-law 1989 of the City of Victoria, which was as follows:

"3A. Every person driving or propelling or in charge of any vehicle or motor-vehicle or riding any animal, upon or along any street in the said City, shall observe and comply with the following requirements, namely:

"(a) He shall, when approaching any intersection or junction with another street or streets, give the clear right of way to any person driving or propelling any vehicle or motor-vehicle or riding any animal, and approaching such intersection or junction from the left side of such first-mentioned person; unless such last-mentioned vehicle, motor-vehicle, or animal, is so far distant from such intersection or junction as to exclude all reasonable danger, apprehension or likelihood of a collision taking place."

Statement

It was held by LAMPMAN, Co. J. that as the by-law made a rule of the road it was invalid, but if it were held that the by-law were valid, then on the facts the plaintiff would be entitled to judgment.

The appeal was argued at Victoria on the 2nd and 3rd of February, 1921, before MACDONALD, C.J.A., GALLIHER and MCPHILLIPS, JJ.A.

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Hankey, for appellant: The by-law was passed in 1918 under section 37 of the Motor-traffic Regulation Act (R.S.B.C. 1911, Cap. 169), section 36 setting out the rules of the road. These sections are substantially re-enacted by sections 16 and 17 of the Motor-vehicle Act, 1920, but the 1920 Act was not in operation and we must go back to the section in the revised statutes. All the sections must be considered together, and we say the by-law is a regulation within section 37 and does not interfere with the "rules of the road" as set out in section 36 of the old Act. A repealed statute in *pari materia* with an existing one may be referred to: see *Ex parte Copeland* (1852), 2 De G.M. & G. 914; *Dickenson* v. *Fletcher* (1873), L.R. 9 C.P. 1 at p. 7; *Hodgson* v. *Bell* (1890), 24 Q.B.D. 525 at p. 528; *Committee of London Clearing Bankers* v. *Commissioners of Inland Revenue* (1896), 1 Q.B. 222 at p. 227; *Attorney-General* v. *Earl of Powis* (1853), Kay 186; *Lion Insurance Association* v. *Tucker* (1883), 12 Q.B.D. 176 at p. 186. Rules of the road and traffic regulations are two distinct matters. This is merely a regulation as to meeting at cross roads and does not conflict with the Act.

Argument

Harold B. Robertson, for respondent: This is more than a regulation and becomes a rule of the road. We are not confined to the three rules set out in section 36, and we say this is a rule of the road at common law, and a municipality cannot deal with it. The question is whether the Act limits "rule of the road" to what the Act refers to itself. Under the heading in the statute "Motor-traffic Regulation" follows "rules of the road": see *United Buildings Corporation, Limited* v. *City of Vancouver Corporation* (1915), A.C. 345 at p. 351. The first words of section 17 of the Highway Act, R.S.B.C. 1911, Cap. 99, as re-enacted by section 2 of 1920, shew "rule of the road" is a "regulation of traffic." In any case the plaintiff was guilty of contributory negligence as he was driving in violation of section 13 of the Motor-vehicle Act, B.C. Stats. 1920, Cap. 62. Had he acted prudently with his heavy truck the accident would not have happened: see *Fraser* v. *B.C. Electric Ry. Co.* (1919), 26 B.C. 536; *Smith* v. *Boon* (1901), 84 L.T. 593; *Mayhew* v. *Sutton* (1901), 86 L.T. 18.

Hankey, in reply.

The judgment of the Court was delivered by

MACDONALD, C.J.A.: I think the appeal should be allowed. The first question argued was the question of law, as to the validity of the by-law which lays down the rules for crossing at intersections of streets. I think the by-law was *intra vires* of the Municipal Council.

The Motor-vehicle Act, B.C. Stats. 1920, Cap. 62, deals with the subject-matter of regulation of traffic, under the caption "Motor-traffic Regulation," being sections 10 to 17 inclusive. The statute deals with the regulation of street traffic, and takes particular notice of what is called therein the "rules of the road." It sets forth in section 16 that every person who drives, or operates, or has charge or control of a motor-vehicle or trailer, on any highway, shall comply with all rules of the road, and provisions as to traffic.

Now, if we look at the items which are designated rules of the road, we find that they are three, *viz.*:

"(1.) Drive always on the left-hand side of the road; (2.) On meeting a vehicle, keep to the left; and (3.) On overtaking and passing a vehicle, pass on the right."

Those are the only three things that are ear-marked in the Act as rules of the road. Section 17 proceeds: "In addition to the provisions for motor-traffic regulation contained in this Act" (I am not quoting the exact words) the Municipality shall have power to make regulations, "save as to the rules of the road and rate of speed." Mr. *Robertson's* contention is that rules of the road there referred to are not confined to the three rules which I have just mentioned, but that there is a fourth rule of the road, well recognized at common law, which has to do with crossing at intersections of the streets, and that the Municipality therefore had no power under said section 17 to make a rule or regulation in relation to that subject.

Judgment

Now my interpretation is that rules of the road, as mentioned in the statute, mean the three rules which are set out there. And as the by-law does not encroach upon these rules it is *intra vires* of the Municipality.

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The facts, then, are that the driver of the plaintiff's motor-truck was approaching Richmond Avenue at the rate of from 10 to 12 miles an hour; his duty, under this by-law, was to keep watch to his left to see that no vehicle was coming, since vehicles coming from the left would have the right of way, and it was his duty therefore to guard against colliding with them. The defendant was coming towards Leighton Road from the right, and it was his duty under the by-law to keep a lookout for any vehicle entering that street, as the plaintiff's motor was.

Now, I think the plaintiff's driver was entitled to assume that persons coming from the right on Richmond Avenue would observe the provisions of the by-law, and take care not to collide with him. His particular attention would be directed to the other side of the street, though not exclusively. I am unable to say on the evidence to which our attention has been directed, that there was any breach of duty or any want of reasonable care on the part of the plaintiff's driver when approaching or crossing this street. On the other hand, I think there is clear evidence not only of breach of the by-law but of negligence outside of such breach, on defendant's part; that is to say, there was want of care, perhaps even a reckless want of care, in defendant's approach to the crossing.

Judgment

I, therefore, think that the defendant was guilty of negligence, and that the plaintiff's driver was not guilty of negligence. The result is that the plaintiff is entitled to succeed in his action, and that the defendant fails in his counterclaim. The plaintiff's appeal, therefore, should be allowed, and the defendant's cross-appeal dismissed.

Appeal allowed.

Solicitors for appellant: *Wootton & Hankey.*

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

COURT OF APPEAL

1921

Jan. 4.

ROPER v. HULL

ROPER v. HULL AND THE ROYAL TRUST COMPANY.

Husband and wife—Gift—Mortgages held by husband on wife's property —Evidence—Corroboration—Costs.

The plaintiff, after consultation with her husband, purchased in 1911, by agreement for sale, a parcel of land on Lulu Island. She borrowed the money for the cash payment which was secured by a mortgage on a property in Kamloops and the first instalment was paid by money borrowed on the security of another property in Kamloops. The three remaining instalments on coming due and the taxes, were paid by her husband and the property was registered in the plaintiff's name. On the mortgages coming due the husband paid them and they were assigned under his direction to his agent who later assigned them to the husband. The plaintiff did not pay and was not charged with interest on the mortgages after the assignment to the husband's agent. The husband died in 1916, and by his will gave an immediate legacy of $5,000 to his wife and an annuity of $5,000 a year. A former action by the executors under the husband's will to recover from the wife the amount of the instalments paid by the husband on the Lulu Island property was dismissed. In an action for a declaration that the deceased had made a gift of the amount of the mortgages to the plaintiff it was held by the trial judge that the transaction implied and was in fact a gift.

Held, on appeal, reversing the decision of MORRISON, J. (MCPHILLIPS, J.A. dissenting), that the evidence does not justify the finding that there was a gift to the plaintiff and the appeal should be allowed.

Held, further, that the action is not one of the class in which costs are made payable out of the estate.

APPEAL by defendants from the decision of MORRISON, J., of the 3rd of May, 1920, in an action for a declaration that the defendants, the executors and trustees of the estate of W. J. Roper, deceased, are not entitled to deduct the amount of two certain mortgages from the moneys payable to the plaintiff under the will of the said W. J. Roper. The facts relevant to the issue are that in October, 1911, Mrs. Roper purchased under agreement for sale a parcel of land on Lulu Island for $7,000. She borrowed $2,200 from F. B. Pemberton to make the cash payment which was secured by a mortgage on certain property she owned in Kamloops and on the first instalment coming due she borrowed a further sum of $1,400 from Mr.

Statement

COURT OF APPEAL

1921

Jan. 4.

ROPER v. HULL

Statement

Pemberton which was secured by another property she owned in Kamloops. The three remaining instalments were paid as they came due by Mr. Roper and the property was registered in Mrs. Roper's name. When the two mortgages came due they were paid off by Mr. Roper who had them transferred to one R. M. Palmer who held them in trust for Mr. Roper and in November, 1914, Palmer assigned the mortgages to Mr. Roper. Mr. Roper paid the taxes on the Lulu Island property from the time of the purchase by Mrs. Roper, and after paying off the two mortgages he did not collect from Mrs. Roper or charge her with any interest. Mr. Roper died in August, 1916, and by his will directed that his wife be paid a legacy of $5,000 at once and that she be paid an annuity of $5,000 for her life in equal quarterly payments each year. The plaintiff's evidence was that although her husband had not actually said that he had released her from the mortgages, from the conversations that took place between her and her husband she always understood that he had released her and that she held her Kamloops property free from encumbrance. Previous to this action the executors had brought action against Mrs. Roper to recover the payments made by Mr. Roper on the Lulu Island property and another property on Douglas Island that she had purchased, but it was held by the Court that the payments were gifts to Mrs. Roper. It was held by the trial judge that there was sufficient corroboration that Mr. Roper intended to release his wife from payment of the mortgage and that she should succeed. The defendants appealed.

The appeal was argued at Vancouver on the 29th of October, 1921, before MACDONALD, C.J.A., GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Argument

Mayers, for appellants: The learned judge below found that the deceased husband had made a gift of the two mortgages to his wife. I submit, first, there is no evidence of a gift at all; secondly, there is no corroboration; thirdly, assuming there was a gift not perfected the Court will not perfect an imperfect gift; and fourthly, there being an improper admission of evidence we are entitled in any case to a new trial. There is nothing in the evidence to justify a finding of cor-

roboration: see *Milroy* v. *Lord* (1862), 4 De G.F. & J. 264. The only way Mr. Roper could get rid of the mortgages was either by a release or assignment to Mrs. Roper: see *Richards* v. *Delbridge* (1874), L.R. 18 Eq. 11; *In re Breton's Estate. Breton* v. *Woollven* (1881), 17 Ch. D. 416; *In re Richardson. Shillito* v. *Hobson* (1885), 30 Ch. D. 396; *Ledingham* v. *Skinner* (1915), 21 B.C. 41 at p. 49. In the former action with relation to instalments paid by Mr. Roper for Mrs. Roper on a purchase of certain property it was decided that the payments were a gift to Mrs. Roper, but it has no connection with the mortgages in question here and is a totally different case. The evidence taken at the former trial was put in, and my submission is that it was not admissible: see *Sintzenick* v. *Lucas* (1793), 1 Esp. 43; *Green* v. *Alston* (1857), 1 F. & F. 12; *Kemp* v. *Neville* (1861), 10 C.B. (N.S.) 523 at p. 547.

Davis, K.C., for respondent: In the last action all the items dealt with were found to be gifts and included all money transactions between husband and wife except these two mortgages. Mrs. Roper was led to believe she was released from the mortgages and the gift of $5,000 for her immediate use would only be made in the event of his intention to release her from the mortgages. There is corroboration in the evidence of Palmer who held the mortgages as trustee for Mr. Roper before he transferred to Mr. Roper, and Palmer and Roper held the properties for four years without charging or mentioning interest, which is strong evidence of corroboration, to which is added the fact that Roper paid the taxes on the property without charging them against Mrs. Roper. On the question of corroboration see *Grant* v. *Grant* (1865), 34 Beav. 623; *Sharman* v. *Sharman* (1892), 67 L.T. 834; *Radford* v. *Macdonald* (1891), 18 A.R. 167; *Dillwyn* v. *Llewellyn* (1862), 31 L.J., Ch. 658. As to payment of costs out of the estate see *Ryall* v. *Hannam* (1847), 16 L.J., Ch. 491; *Lee* v. *Delane* (1850), 4 De G. & Sm. 1; *Prendergast* v. *Prendergast* (1850), 3 H.L. Cas. 195; *Powell* v. *Imperial Life Insurance Co.* (1919), 27 B.C. 135; *Peden* v. *Abraham* (1912), 8 D.L.R. 403.

Argument

Mayers, in reply.

Cur. adv. vult.

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MACDONALD, C.J.A.: At the close of the argument, I was clearly of opinion that the appeal should be allowed, and further consideration has not changed it.

It appears to me that the action is not one of the class in which costs are made payable out of the estate. The appellant should have the costs here and below.

GALLIHER, J.A.

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

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: In my opinion the appeal should stand dismissed. The action is in its nature peculiarly one for disposition by the trial judge, and Mr. Justice MORRISON arrived, as I view it, at the right conclusion.

I cannot say that the evidence is by any means overwhelming, nor can it be said that the necessary corroboration is as precise as one would wish, but the Court of Appeal is not entitled to disagree with the learned trial judge upon questions of fact, if it can be said that there is evidence upon which the learned trial judge could reasonably proceed (*Ruddy* v. *Toronto Eastern Railway* (1917), 86 L.J., P.C. 95, Lord Buckmaster at p. 96). All the surrounding facts and circumstances may be looked at in establishing corroboration. There is not disclosed upon the evidence one fact or circumstance indicating that the late William James Roper ever intended to hold his wife liable to him for the mortgage moneys now sought to be collected by the appellants—the executors and trustees—from the respondent or deducted from the moneys payable to the respondent under the will of the late William James Roper. That the mortgages executed by the respondent to Pemberton should have, in the course of things, been transferred to Palmer, cannot be said to be a circumstance importing that respondent's husband intended to place the transaction in any other category than that in which it originated, as Palmer was only a trustee and later assigned the mortgages to the husband of the respondent (the late William James Roper). It is clear to me, upon the evidence, that the husband made a gift to his wife of the moneys necessary to acquire the Lulu Island land, and the *modus operandi* in obtaining the necessary moneys was the

suggestion of the husband to the wife, everything points to this.

I do not intend to in detail enumerate all the significant matters which impel me to reject the submission of the appellants that the husband intended to look to his wife as his debtor in respect of the mortgages; everything that occurred is consistent with the reasonable conclusion that a gift was made. It is to be noted that the interest and taxes were always paid by the husband and this ran throughout the whole time that elapsed from the inception of the transaction until the husband's death. It is patent that the husband well knew and well understood his obligation in the matter and faithfully discharged his duty. It is inconceivable that the husband ever intended to look to his wife for reimbursement for any of the moneys paid out, or would have enforced payment of the mortgages made by his wife and eventually got in by assignment to himself. The position taken up by the appellants is not founded upon any evidence of any nature or kind, or covered by any explanation or instructions left for the guidance of the executors or trustees. The mortgages had matured and were long overdue before the death of the husband, but no demand for payment thereof was ever made; on the contrary, there is the positive evidence of the respondent that her husband advised her that he was taking over the mortgages, *i.e.*, becoming the assignee thereof from Palmer, to protect her and preserve to her the property covered by the mortgages. It is significant that when the husband was in his last illness and anxious for the welfare of his wife, he called her to him and he said to her that "he had some loose money in the bank, in fact there was $5,000 there, I was to make use of immediately, I might be stranded or in difficulties for any money until the estate was settled up, and he said there is loose money there for you at the bank." This rebuts, in the most positive way, the contention advanced by the executors and trustees, the appellants, that the respondent is to be deemed to be a debtor to the estate in respect of the mortgage moneys or any of the out-goings. The conclusion is an irresistible one that the husband never intended that his wife should be deemed or held to be a debtor to the estate. The husband would appear at all

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times most anxious for the welfare of his wife, and that she should be totally free of debt. In truth, upon all the facts and surrounding circumstances, it is unthinkable, and I do not hesitate to say unconscionable, that she should be held to be a debtor to the estate, with every respect for all contrary opinion. (See *In Re Winn; Reed* v. *Winn* (1887), 57 L.T. 382; *Marshal* v. *Crutwell* (1875), L.R. 20 Eq. 328; *In re Young. Tyre* v. *Sullivan* (1885), 28 Ch. D. 705; *Re Lulham; Brinton* v. *Lulham* (1885), 53 L.T. 9; *Thomas* v. *Thomas* (1855), 2 K. & J. 79; *Gray* v. *Dowman* (1858), 27 L.J., Ch. 702; *Clinton* v. *Hooper* (1791), 1 Ves. 173; *Gardner* v. *Gardner* (1859), 1 Giff. 126; *Bartlett* v. *Gillard* (1826), 3 Russ. 149; *Beresford* v. *The Archbishop of Armagh* (1844), 13 Sim. 643; *Hale* v. *Sheldrake* (1889), 60 L.T. 292; *Rowe* v. *Rowe* (1848), 2 De G. & S. 294; *In re Flamank* (1889), 40 Ch. D. 461; *Alexander* v. *Barnhill* (1888), 21 L.R. Ir. 511; *Foley* v. *Foley* (1911), 1 I.R. 281; *In re Eykyn's Trusts* (1877), 6 Ch. D. 115; *Colohan* v. *Condrin* (1914), 1 I.R. 89).

EBERTS, J.A.

EBERTS, J.A. would allow the appeal.

Appeal allowed, McPhillips, J.A. dissenting.

Solicitors for appellants: *Crease & Crease.*
Solicitors for respondents: *Griffin, Montgomery & Smith.*

BODNAR v. STUART AND STUART.

COURT OF APPEAL

1922

Jan. 10.

Trial—Jury disagree—Motion to dismiss action refused—Appeal—Agreement of counsel to accept verdict as if jury were out three hours—Right of judge to act thereon—B.C. Stats. 1913, Cap. 34, Sec. 45.

BODNAR v. STUART

An application by the defendant for an order dismissing an action for damages for negligence after the jury had disagreed was dismissed.

Held, on appeal, affirming the order of MACDONALD, J., that as there was a dispute as to whether the defendant observed a rule of the road in making a turn that resulted in the accident upon which the complaint was founded and as this was a question that a jury should decide the appeal should be dismissed.

Per MARTIN, J.A.: An appeal from an order refusing to dismiss an action upon the trial of which the jury disagreed, is premature. A trial judge should not, in pursuance of an agreement by counsel to "consider" that a jury has given a full three hours' consideration to its verdict when in fact it has not done so, charge the jury that it may at once return a verdict of three-fourths thereof. This course is contrary to section 45 of the Jury Act.

APPEAL by defendants from the refusal of MACDONALD, J. to dismiss an action for damages for negligence, the jury having failed to agree as to the evidence at the end of the trial. At about 11.30 p.m. on the 1st of August, 1920, on a clear but dark night, the defendant and his wife were driving south in his motor-car along Granville Street intending to turn west on Connaught Drive on their way home to Kerrisdale. As they neared Connaught Drive Mrs. Stuart held her hand out on the right-hand side shewing they were about to turn west. As they were turning there appeared a motor-cycle about 225 feet away coming north down the hill on Granville Street at a high rate of speed driven by a boy of about 19 years of age with a girl of about 17 years of age sitting behind him. He appeared at first to be about to swerve over to the right with the intention of going behind the motor-car as it turned, but he turned back to the left side of the road and crashed into the forepart of the defendant's machine. The motor-cycle was going at from 40 to 60 miles an hour. The boy and girl were thrown some distance and both died shortly afterwards from injuries sustained. After the jury had been out two hours they returned, the fore-

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man saying they could not agree. The Court then asked him if he thought they could agree if they were out three hours and he replied that he did not think so. The Court then asked counsel if they were willing that the jury be considered as having been out three hours to which they replied in the affirmative. The Court then told the jury that they would be considered as having been out three hours, but the jury then indicated that there would be no advantage on their again retiring on that basis, so they were then discharged. An application for nonsuit made after the plaintiff's case and a further application to dismiss at the end of the whole case were allowed to stand, pending the verdict of the jury, and were heard on the 3rd of June, and dismissed on the 30th of June, 1921.

Statement

The appeal was argued at Vancouver on the 27th of October, 1921, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

O'Brian (*W. C. Brown,* with him), for appellant: The mother of the boy killed brings the action. They say (1) We should have rung a bell or sounded a horn. (2) We should not have attempted to cross. (3) We were on the wrong side of Connaught Drive. We held out our hand when about to cross. We did not act in contravention of any Act or by-law. They were going at nearly a mile a minute and exceeded the statutory limit of 30 miles an hour. No jury could find for the plaintiff in these circumstances: see *Tait* v. *B.C. Electric Ry. Co.* (1916), 22 B.C. 571 at p. 573.

Argument

McPhillips, K.C., for respondent: The important question here is that the rule of the road is to the left and we say the motor-cycle had the right of way. There is, therefore, evidence upon which a jury should pass. On the question of contributory negligence see *Brooks* v. *B.C. Electric Ry. Co.* (1919), 27 B.C. 351 at pp. 355 and 360.

Brown, in reply.

Cur. adv. vult.

10th January, 1922.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I would dismiss the appeal. There is, *inter alia,* a dispute as to whether the defendant, Whitfield

Stuart, observed the rule of the road in making the turn and this is a question for the jury to decide.

There is also the question as to whether he should, in the circumstances, have waited before turning until the deceased had passed. How he should have acted knowing that the deceased was coming at a high rate of speed, that is to say, whether he acted with reasonable care in the circumstances known to him, is also a question for the jury to answer.

I would, therefore, dismiss the appeal.

MACDONALD, C.J.A.

MARTIN, J.A.: I agree that the appeal should be dismissed, but I think it desirable to add that I strongly disapprove of the course which was adopted by consent of agreeing to "consider" the jury as having been out for three hours, though in fact they had not been, and therefore the learned judge charged them that a verdict of three-fourths of them could by law be returned. Such a course is unprecedented and is contrary to the statute (section 45 of the Jury Act, B.C. Stats. 1913, Cap. 34), which provides that:

". . . . . It shall be lawful to receive the verdict of three-fourths, or of any proportion equal to or greater than three-fourths, of the jury empanelled . . . . after the expiration of three hours from the time when such jury shall have retired to consider their verdict, in case at the end of such three hours they shall not in all respects be unanimous."

To agree to "consider" that the jury have given a full three hours' consideration to their verdict when in fact they have not done so is to frustrate the obvious intention of the statute that it is only at the end of the period fixed for due consideration—three hours—that "it shall be lawful" to receive a discordant verdict. What further happened here is shewn by the official stenographer's report:

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"THE COURT [to the jury]: Gentlemen, you are considered as having been out three hours. Will there be any advantage now of you retiring on that basis?

"[Jurymen indicate in the negative.]

"THE COURT: Under the circumstances then I am forced to discharge you and accept your decision that you are unable to agree."

I have grave doubts regarding the effect of this attempt to evade a very salutary statute, and it is open to very plausible argument at least that the jury had not in law disagreed, and therefore the judgment that was given on the motion to dismiss

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the action on the basis that they had disagreed cannot stand. But I do not think it proper to express a final decision upon the question, because it was not raised nor argued before us, and so I leave it open for future consideration.

There is, moreover, the further question, also not argued, as to the propriety of our hearing this appeal from the order refusing the motion to dismiss the action. I am inclined to think such an appeal is premature, and the present result shews the unfortunate consequences of appealing from such an order, because the case will now have to proceed to trial in the ordinary way before a new jury, since there has been no verdict so far owing to the disagreement, and yet, though the order refusing to dismiss was interlocutory (and upon its refusal the trial should have proceeded as above), we have this appeal coming up to us in the middle of an unfinished trial with nothing finally determined and with the prospects of a second appeal after verdict in the usual way. Such a course adding so greatly to the expense and delay of litigation, is to be deprecated, and I note it now so that in future if it comes before us again, the legality of it may be raised and determined.

MARTIN, J.A.

GALLIHER, J.A.: The learned trial judge refused to withdraw the case from the jury at the end of the plaintiff's case and the jury disagreed.

GALLIHER, J.A.

I am of opinion that the course pursued by the learned judge in refusing to enter judgment for the defendants is right, and would dismiss the appeal.

MCPHILLIPS, J.A.

EBERTS, J.A.

MCPHILLIPS and EBERTS, JJ.A. concurred in dismissing the appeal.

Appeal dismissed.

Solicitors for appellants: *Ellis & Brown.*
Solicitor for respondent: *I. I. Rubinowitz.*

McMULLEN v. THE DISTRICT REGISTRAR OF TITLES AT NELSON.

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McMULLEN v. DISTRICT REGISTRAR OF TITLES

Real property—Registration—Conveyance from Crown to railway—Tunnel under land conveyed—Valuation in respect of fees—"Market value"—R.S.B.C. 1911, Cap. 127, Secs. 174 and 175—R.S.B.C. 1897, Cap. 144, Sec. 113.

Sections 174 and 175 of the Land Registry Act provide for the payment of registration fees calculated upon the market value of the land at the time of application for registration. A district registrar of titles refused to register two conveyances of land from the Crown to the Canadian Pacific Railway because the applications for registration did not disclose the value of a tunnel constructed by the Company through said land. On petition of the Company the registrar was ordered to register the conveyances in accordance with the applications.

Held, on appeal, affirming the decision of MORRISON, J. (MACDONALD, C.J.A. dissenting), that the "market value" within the meaning of the Act, was that of the land including the tunnel as it would be if detached from the railway system and that the tunnel in such circumstances would not increase the value of the land at all.

Re Bell Telephone Co. and City of Hamilton (1898), 25 A.R. 351 applied.

Per MACDONALD, C.J.A.: The principle upon which the valuation should be made is the sum which the railway company might reasonably be expected to pay for the land for the purposes of its railway, *London County Council* v. *Churchwardens, &c. of Parish of Erith and Assessment Committee of Dartford Union* (1893), A.C. 562 applied.

APPEAL by the District Registrar of Titles at Nelson from the decision of MORRISON, J., at Chambers, of the 17th of June, 1921. The matter arose through the refusal of the Registrar to register title to certain lands for the Canadian Pacific Railway near Field, B.C., where the tunnel runs under the surface. The Canadian Pacific Railway declared the land's value was $5. The Registrar claimed the actual value of the tunnel should be added as an "improvement" to the land in question. It was ordered by the trial judge that the Registrar of Titles register the Canadian Pacific Railway as owner of the lands in question in the indefeasible fees register free of encumbrance in accordance with the application without demanding further fees.

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The appeal was argued at Vancouver on the 6th of October, 1921, before MACDONALD, C.J.A., GALLIHER and EBERTS, JJ.A.

Carter, for appellant: They say the tunnel adds no value to the lands and dispute the right to charge fees for registration on a valuation including the tunnel. We say this is an "improvement" within the Act. There are two cases dealing with land and improvements: *Re Municipal Clauses Act and J. O. Dunsmuir* (1898), 8 B.C. 361; *In re Vancouver Incorporation Act* (1902), 9 B.C. 373; see also *Mersey Docks* v. *Cameron* (1865), 11 H.L. Cas. 443; *The Queen* v. *School Board for London* (1886), 17 Q.B.D. 738. As to beneficial occupation see *Mayor, &c., of Burton-upon-Trent* v. *Assessment Committee of Burton-upon-Trent Union* (1889), 24 Q.B.D. 197; *Metropolitan Railway Co.* v. *Fowler* (1893), A.C. 416; *London County Council* v. *Churchwardens, &c. of Parish of Erith and Assessment Committee of Dartford Union, ib.* 562; *New River Company* v. *Hertford Union* (1902), 2 K.B. 597; *Metropolitan Water Board* v. *Chertsey Assessment Committee* (1916), 1 A.C. 337.

Argument

McMullen, in person, respondent: The money spent in the tunnel does not affect the market value of the land in any sense. The cases cited arise from the poor laws and do not apply. The value as an operating institution is not a proper basis of taxation. As to the basis of valuation see *Re Bell Telephone Co. and City of Hamilton* (1898), 25 A.R. 351 at p. 355; *The Consumers Gas Co. of Toronto* v. *The City of Toronto* (1897), 27 S.C.R. 453; *In re London Street Railway Co.* (1900), 27 A.R. 83; *Re Queenston Heights Bridge Assessment* (1901), 1 O.L.R. 114; *In re Toronto Electric Light Co. Assessment* (1902), 3 O.L.R. 620. The theory of the hypothetical tenant has come up clearly under the Ontario Act. In a case of expropriation see *Green* v. *Canadian Northern R. Co.* (1915), 22 D.L.R. 15. A tunnel is not an "improvement" to land. It must be a structure of some nature. The word "erected" must not be overlooked.

Carter, in reply.

Cur. adv. vult.

10th January, 1922.

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MACDONALD, C.J.A.: An application was made to register two conveyances of land from the Crown to the Canadian Pacific Railway Company by Mr. *McMullen,* the company's solicitor, respondent in this appeal. The District Registrar refused to register the conveyances on the ground that the applications did not disclose the value of a tunnel constructed by the railway company through the lands mentioned in the conveyances.

The facts stated in the case are meagre but the point in dispute is not in doubt. It is not disputed that the lands form part of the railway company's right of way, and that it constructed a tunnel through them which it is today using as part of its railway. The Land Registry Act, Cap. 127, R.S.B.C. 1911, sections 174 and 175, provide for the payment to the Registrar on application to register a conveyance, of a fee calculated upon the market value of the land for which registration is applied and that in case of dispute the value shall be settled by the Registrar upon such proof as he may deem to be sufficient.

The petition to the learned judge against the refusal of the District Registrar to register the conveyances, and the affidavit supporting the same, shew no more than this, that in the opinion of the deponents the tunnel is of no market value. It was conceded in the argument that the tunnel is a part of the railway and cost the railway a large sum of money to construct. The sole question argued was, had it in connection with the land a market value in the sense in which those words are used in the statute?

MACDONALD, C.J.A.

Respondent's counsel relied upon *Re Bell Telephone Co. and City of Hamilton* (1898), 25 A.R. 351, an Ontario decision which was the foundation of several others which followed it, while the appellant's counsel relied upon several English decisions, amongst others, *London County Council* v. *Churchwardens, &c. of Parish of Erith and Assessment Committee of Dartford Union* (1893), A.C. 562. In the Ontario case, Burton, C.J. brushed aside the English decisions as being inapplicable, on the ground that they were decisions upon a statute essentially

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different from the statute of Ontario then under consideration, and in this opinion the other members of the Court of Appeal seem to have acquiesced. It is essential to examine the English statute and our own to see whether there is any distinction in principle between them. Market value is the value which a purchaser might reasonably be expected to pay for the lands. In the *Erith* case, *supra,* Lord Herschell, L.C., delivering the judgment of the House of Lords, interpreting the statute there in question, said:

"'The annual rent which a tenant might reasonably be expected, taking one year with another, to pay for a hereditament,' is the same thing as 'the rent at which the same might reasonably be expected to let from year to year.'"

The question there was one of annual value, but the point decided was whether or not the owner might be regarded as a hypothetical tenant, and therefore one who might want premises which might be of no use to any one else. The submission here is that no matter what sum of money it cost to construct the tunnel, no matter how necessary it may be to the railway company, yet because if the road were abandoned no one would pay more for the land than if the tunnel were not in it, therefore, the tunnel is of no market value. In other words, that the land as land has not been improved by the construction of the tunnel.

MACDONALD, C.J.A.

Now, it seems to me that if we adopt the principle adopted in the *Erith* case, and regard the railway company as a possible purchaser if the land were offered for sale, the land has a value beyond its ordinary value by reason of the existence of the tunnel. Counsel for the respondent argued that a bridge or a railway station did not enhance the value of the land beyond the value of the material when taken down, and this appears to have been the view adopted in *Re Queenston Heights Bridge Assessment* (1901), 1 O.L.R. 114. There is a difference in words between our statute and the Ontario statute which may account for the conclusion arrived at there, but in my opinion there is no distinction between the principle to be applied here and that applied in England.

It will be noticed that Lord Herschell emphatically affirms *The Queen* v. *School Board for London* (1886), 17 Q.B.D.

738. In the statement of that case it is admitted that if the schools were then in the market to be let to a tenant as schools, a tenant could not be found who would be willing to take them, yet the Court held that the school board ought to be treated as a hypothetical tenant and that the annual value of the property would be the rent which the board might reasonably be expected to pay for the premises for use as schools.

It was contended that to put a value upon the tunnel would be to tax the franchise of the railway company. This contention seems to me to be baseless. The value of the land in question is not to be ascertained by estimating the value of the tunnel as part of the railway system, nor yet on its actual cost; it might have cost more than its worth to the railway company, or it may be worth more than its cost. Either method of estimating its value would be erroneous. No doubt the cost may be looked at for the purpose of ascertaining the value, but if circumstances should appear which would either take from or add to the value of the tunnel, that would be a matter for the person making the valuation. With that we are not asked to deal in this appeal, but only to fix the principle upon which the valuation is to be made. That principle is the one adopted in *London County Council* v. *Churchwardens, &c. of Parish of Erith and Assessment Committee of Dartford Union, supra.* It is the sum which the railway company might reasonably be expected to pay for the land for the purpose for which it is being used.

MACDONALD, C.J.A.

The appeal should be allowed.

GALLIHER, J.A.: I would dismiss the appeal. The English cases we have been referred to by Mr. *Carter,* counsel for the respondent-appellant, the District Registrar of Titles at Nelson, are all in respect of the construction of English Acts dealing with the levy of poor rates and are, as I view it, of little use to us in dealing with the provisions of our Land Registry Act, Cap. 127, R.S.B.C. 1911.

GALLIHER, J.A.

The question to be decided here is: What fee, if any, should be paid the Registrar in respect of a tunnel constructed under lands of the Canadian Pacific Railway Company, and through

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which a portion of their line runs, upon an application to register such lands in fee.

The section of our Act dealing with the question (section 175) is as follows:

"The percentage to be paid on the registration of a fee, shall be calculated on the market value of the land at the time of application for registration. . . . . ."

The tunnel in question is run under a mountain and is an integral part of the company's system with no possibility of connection with an other enterprise, absolutely useless and valueless except for the purpose for which it is now used in connection with the railway. It is merely a hole in the ground. It has absolutely no market value to any one, except the company and only to them as a part of their system.

In the Appeal Court of Ontario, in *Re Bell Telephone Co. and City of Hamilton* (1898), 25 A.R. 351, in determining the proper mode of assessing telephone poles and wires within certain assessment divisions, the head-note in that case, which is borne out in the judgment, is:

"In assessing for purposes of taxation, the poles, wires, conduits and cables of a telephone company, the cost of construction or the value as part of a going concern, is not the test; they must be valued, in the assessment division in which they happen to be, just as materials which, if sold or taken in payment of a just debt from a solvent debtor, would have to be removed and taken away by the purchaser or creditor."

GALLIHER, J.A.

Burton, C.J.O., at p. 354, puts it thus:

"I am of opinion that as real property the poles, etc., are simply to be valued as they would sell irrespective of the fact that they form part of a going concern."

And Osler, J.A., at p. 356:

"It is the property itself, whether real or personal, which is to bear the burden of taxation, and circumstances which may make it of an adventitious value to its possessor only, but which must necessarily cease to attach to it if it passes into other hands, must be excluded in estimating its cash value."

Now, while the tunnel here is a part of the land owned by the company and cannot be detached from it as could the telephone poles, etc., in the Ontario case cited above, and other cases in Ontario adopting the principle there laid down, as an adjunct to the land as land it has no value. Its value is in connection with the railway as a going concern and as in the Ontario cases it is said that it is not the proper method to apply

in assessing. To that extent I make those cases applicable here and say the percentage to be paid on the market value here is, not the market value as applied to and in connection with a going concern, but the market value of the land which includes the tunnel as it would be if detached from the railway system. In other words, if the road-bed was switched so as not to go through the tunnel and therefore land including the tunnel formed no part of the system, would the tunnel construction increase the value of the land one iota, no matter what it cost? And there can only be one answer—it would not.

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EBERTS, J.A.

EBERTS, J.A. would dismiss the appeal.

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

Solicitor for appellant: *W. D. Carter.*
Solicitor for respondent: *J. E. McMullen.*

KITCHIN AND KITCHIN v. THE KING.

Mining law—Mineral claims—Cash payments in lieu of assessment work—Payment on erroneous advice of mining recorder after expiration of year—Claims relocated—Refusal to accept further yearly payment—Right of action—R.S.B.C. 1911, Cap. 157, Secs. 27, 48, 50 and 51.

The plaintiffs (father and daughter) made cash payments in lieu of assessment work on two mineral claims for three years. Before the expiration of the fourth year the mining recorder erroneously advised the father that he could make his payment in lieu of assessment work any time within 30 days after the expiration of the year by paying an additional $10 for each claim. He made his fourth annual payment in accordance with the advice after the year had expired, but before the expiration of the additional 30 days. The claims were subsequently relocated and on tendering a cash payment in lieu of assessment work at the expiration of the fifth year the mining recorder refused to accept it. On petition for a refund of the four years' cash payments owing to the loss of the claims by reason of the mining recorder's erroneous advice, judgment was given in his favour.

Held, on appeal, reversing the decision of HUNTER, C.J.B.C., that section

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27 of the Mineral Act which provides that " no free miner shall suffer from any acts of omission, or commission, or delays on the part of any Government official," etc., does not apply to a case where a claim has lapsed as a result of the mining recorder wrongly advising a miner as to the requirements of the Act even in the case of his subsequently accepting money tendered by the miner in pursuance of said advice.

Held, further, that even if such a case came within said section an action does not lie for the return of fees paid while the claim was in good standing, but for damages suffered for the loss of the claims which, if the claims are of no value, would be nothing.

APPEAL by the Crown from the decision of HUNTER, C.J.B.C. of the 27th of May, 1921, in an action by way of petition to recover $840 being moneys paid to the mining recorder by the plaintiffs (father and daughter) on two mineral claims in lieu of assessment work. The plaintiffs duly paid $200 and record fees on the two claims in each of the years 1908, 1909 and 1910. Before the time was due for the payment or record of assessment work in the year 1911 the father asked the gold commissioner and mining recorder if he would have 30 days extra time for payment in under the Act by paying an additional $10 on each claim. The mining recorder said he could under section 50 of the Act and the $100 and extra $10 was paid on each claim after the year had expired but before the expiration of the additional 30 days. Before the expiration of the annual period for the year 1912 the mining recorder told Kitchin he had made a mistake and he could not accept his money for the assessment work for the year ending in 1912. The plaintiffs then tendered the necessary money in lieu of the assessment work for that year with the record fees but the mining recorder refused to receive it. The claims were then relocated by others. The plaintiffs sued for the recovery of all moneys paid in for preservation of the claims since their location. The defendant paid into Court $240 to cover the amount that was paid into the mining recorder's office by the mining recorder's mistake in 1911. The Chief Justice gave judgment for the plaintiff under section 27 of the Act.

Statement

The appeal was argued at Vancouver on the 4th, 5th and 6th of October, 1921, before MARTIN, GALLIHER and EBERTS, JJ.A.

Carter, for appellant: Section 50 of the Act provides for 30 days' grace but only in case the work is done. It does not apply to payment in lieu of assessment work, so they are out of time: see *Lawr* v. *Parker* (1900), 7 B.C. 418; (1901), 8 B.C. 223; 1 M.M.C. 456; *Tanghe* v. *Morgan* (1904), 11 B.C. 76; 2 M.M.C. 178. The respondent bases his claim on section 27 of the Act but that section does not create any rights against the Crown, it merely provides protection for the miner. The section refers to acts of "omission or commission on the part of a Government official." This does not apply to advice voluntarily given but to acts within his official duties. Assuming he has the right to have his claim preserved the section cannot be so construed as to give him the right to the return of his money.

Argument

V. B. Harrison, for respondent: We were not aware of the facts until six weeks before the 1921 payment was due. *Lawr* v. *Parker* (1901), 8 B.C. 223, and *Tanghe* v. *Morgan* (1904), 11 B.C. 76 are both in our favour. The money was tendered for the assessment work in 1912. If the advice given by the mining recorder were within the scope of his duties damages would arise.

Carter, in reply.

Cur. adv. vult.

10th January, 1922.

MARTIN, J.A.: This is an action to recover from the Crown $840, being certain fees paid for certificates of work and recording the same, on two mineral claims, on the ground that owing to the wrong advice on the statutory requirements given them by the mining recorder, the plaintiffs, in 1911, failed to pay in due time the necessary $100 on each claim in lieu of assessment work, in consequence of which, under section 51 of the Mineral Act, R.S.B.C. 1911, Cap. 157, their claims lapsed and were located by a stranger as "vacant and abandoned" ground under section 49 of said Act. It appears that the statutory time had expired by nearly a month, yet the mining recorder on May 6th, 1911, accepted from the plaintiffs the sum of $225, which was the proper sum to pay in lieu of the work and for recording and extension of time fees, and he had

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before that mistakenly told the plaintiffs that they were entitled under the statute to an extension of time for 30 days within which to make said payments if they paid an additional fee of $10 per claim for that privilege, and in consequence of what they were told the plaintiffs took advantage of the extension and made the payment to the recorder on said May 6th, within the supposed legally extended time of 30 days, and received from him and recorded the proper receipts under section 51.

The action is based on section 27 of the Mineral Act as follows:

"No free miner shall suffer from any acts of omission, or commission, or delays on the part of any Government official, if such can be proven."

Now, what is really complained of here is the giving of the bad advice upon the statutory requirements when the plaintiffs went to inquire if they could get the extension. Whatever they "suffered" was because of that alone—they did not "suffer" anything from the subsequent taking of their money and recording the receipt, because the mischief had been already done and their claims had lapsed unless they were protected by section 27. I should have thought that obviously the simplest and safest course for them to have adopted, if they intended to rely upon section 27 to enforce their rights, was to have remained in possession of their claims upon the defensive, asserted their rights to them as valid ones against the new adverse over-locator and invoked section 27 to protect them in that assertion, as was done in *Lawr* v. *Parker* (1901), 7 B.C. 418; 8 B.C. 223; 1 M.M.C. 456, and *Tanghe* v. *Morgan* (1904), 11 B.C. 76; 2 M.M.C. 178. That would have been the strongest and most logical and cheapest position to take instead of, as here, abandoning the claims and giving up possession to the over-locator and resorting to the expensive and dilatory method of presenting a petition against the Crown, at the outset at least. But the matter must be dealt with as we find it, and I have come to the conclusion that the objection taken by the Crown that section 27 does not apply to this case should prevail. It is submitted that it should be restricted to "acts" which come within the duty of the "Government official" in question, and that it is no part of his duty to advise people upon the construction of statutes. What was done by the

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mining recorder here is in no true sense an "act of omission or commission"—he had no duty whatever to discharge or discretion to exercise in the matter, either in the way of allowing (in the exercise of his discretion) assessment work on one claim to be applied to another (as was the case in *Lawr* v. *Parker, supra*) or otherwise; in *Tanghe* v. *Morgan, supra*, the gold commissioner actively and illegally prevented the recording of the claim. Here he voluntarily undertook to advise them when they inquired as to their right of extension of time under the statute, and his subsequent act of taking their money after they had taken his advice does not alter the original complexion of the matter. If he had within the 30 days' extension, instead of after it, found out his mistake and refused to take their money, the result, *viz.*, the lapsing of the claims, would have been the same. On this ground, therefore, I am of opinion that the action should be dismissed.

But further, it must also be dismissed because the plaintiffs have not shewn that they have "suffered" any damages by the loss of these claims. There is no evidence whatever to shew their value, and for all we know they may have been valueless like so many other mineral claims. Nor can they recover in any event the amount of the fees that were properly paid while the claims were in good standing. Under section 18 their interest in them was

"a chattel interest, equivalent to a lease for one year, and thence from year to year, subject to the performance and observance of all the terms and conditions of this Act." MARTIN, J.A.

The principal "term" of their "lease" was that they should make the said annual payment of $100 (in lieu of assessment work), and upon what principle can they possibly recover rent, or its equivalent, paid for a period for which they have had all the various benefits of quiet enjoyment, extraction of minerals, cutting of timber, etc., under sections 17 and 23 of the Mineral Act?

With respect to the $225 received by the mining recorder after the claims had lapsed, there is no controversy about that, because the Crown in its defence brought that sum into Court, and also the further sum of $25, for costs up to the time, and it is unfortunate that the offer was not accepted.

It follows that the appeal must be allowed.

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GALLIHER, J.A.: I would allow the appeal. The petitioners who were free miners located two mineral claims in April, 1907, known as the "Copper King" and "Cameron," near Cameron Lake, in the Province of British Columbia, and in the years 1908, 1909 and 1910 respectively, in lieu of work on said mineral claims, paid within the year, as they were entitled to do under the Mineral Act, the sum of $200 in each year, together with the sum of $5 for recording certificate of work and recorded such certificate of work in the office of the gold commissioner. In the year 1911, the petitioner, Thomas Kitchin, according to his evidence, interviewed the gold commissioner in his office some six weeks before the money was due in lieu of work and asked if he could have an extension of time for 30 days in which to pay the money by paying $20 extra. The gold commissioner informed him that he could and within the 30 days, but not within the year, accepted the sum of $200 together with the sum of $5 for recording certificates of work, the sum of $20 extra for extension being paid before the year expired. These certificates of work were recorded.

In 1912 the petitioner, Thomas Kitchin, again applied to the gold commissioner for an extension of time for paying the money and was at first informed that it would be all right but in the meantime and before the year had expired, the gold commissioner informed Kitchin that he could not accept the money, that the inspector had been up and informed him that he was wrong in granting an extension of time where money was paid in lieu of work, that he should not have accepted it in 1911, and that the claims had lapsed.

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Subsequently these claims were re-located by other parties, but it does not appear whether these locations were before or after Kitchin was informed his claims had lapsed. The first question we are asked to decide is whether the 30 days' extension applies where money is paid in lieu of work. The sections dealing with the doing and recording of work and the payment in lieu of work are 48, 50 and 51 of Cap. 157, R.S.B.C. 1911. From a perusal of these sections there is no doubt in my mind that the extension of 30 days in no way applied to the payment of money in lieu of work.

The next question is, Is the petitioner within the protection of section 27 of the Act? Section 27 reads:

"No free miner shall suffer from any acts of omission, or commission, or delays on the part of any Government official, if such can be proven."

The learned Chief Justice below has held that the petitioner is within the protection of that section. With every respect, I take a different view. What the gold commissioner did, no doubt under a misapprehension of the effect of the Act, was to inform the petitioner wrongly of such effect. I do not think that it is any part of the duties of a commissioner to give advice as to the meaning of the Act, and if the party chooses to rely on that advice and it is wrong, he must suffer the consequences. It is not, I think, the class of acts of omission or commission referred to in section 27. Supposing the commissioner had said, "you have 60 days within which to pay your money after the year expires?" Evidently that would be wrong, as the statute contains no such provision, neither does it contain any provision that any extension can be granted where money is paid in lieu of work. Both would be acts done by the commissioner, and if it were to be held these were within the protection of section 27, any commissioner desiring to assist a friend might protect that friend by doing acts he had no power or authority to do. But if this view is wrong, I still think the petitioners cannot recover.

The action is for a return of the moneys paid during the years 1908, 1909, 1910 and 1911. The Government has paid into Court the amount paid in in 1911, $225, and the further sum of $25, which they say is sufficient to cover petitioners' costs up to the date of payment in. This is the amount which they say the commissioner should not have accepted and for which the petitioner received no benefit or protection. That narrows it down to the three payments made in 1908, 1909 and 1910, all within the statutory year and amounting to $615.

Under the Act the interest of a free miner in his mineral claim is declared to be equivalent to a lease from year to year. Now the rental, if I may so put it, is either the doing of $100 work on the claim, or the payment of $100 in lieu of work, and when either is done and the certificates of work recorded, the lease, so to speak, is extended another year, and so on. The

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free miner, either by his work or payment of money has secured to himself the right of possession, right to mine and extract minerals and to hold title for another year. Now during the three years he paid these moneys he received this protection, he received what he paid for and he cannot complain, and it seems to me the only complaint he can make is that he lost his claim by reason of the acceptance of the money by the commissioner in 1911, or in other words, by the act of commission on the part of the Government official.

What would then be the damages he would be entitled to? Not, I think, the return of the moneys he paid and for which he received value during those years, but the loss he suffered by reason of the commissioner's act in 1911, which occasioned the loss of the claims. That might be nothing if the claims were of no value, or it might be considerably greater than the moneys now claimed, but that would depend upon the proof, of which we have not a tittle.

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If the petitioners have any claim against the Crown, which, as I view the statute, they have not, it cannot be recovered under the petition as framed and in the absence of proof of actual loss.

EBERTS, J.A.

EBERTS, J.A. would allow the appeal.

Appeal allowed.

Solicitor for appellant: *W. D. Carter.*
Solicitor for respondents: *Victor B. Harrison.*

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Negligence — Pedestrian struck by motor-car — Damages — Contributory negligence—Quantum of damages—B.C. Stats. 1913, Cap. 46, Sec. 17.

B., while walking with two companions on the left-hand side of a paved road, within four feet of the curb, and nearing a crossing over which there was an arc light, at about 9 o'clock on a foggy night in December was struck from behind by a motor-car driven by S. The road which was on the outskirts of the City of Victoria was subject to considerable traffic and had a sidewalk on the right-hand side but not on the left. S., who had his sister and father in the car, was moving on a slightly down grade on the wet pavement at from 9 to 10 miles an hour and sounding his horn at intervals. He did not see B. until about four feet away when he turned sharply to the left but his right fender struck her on the leg. She suffered a fracture and severe nervous shock. In an action for damages the trial judge awarded the plaintiff $300.

Held, on appeal, affirming the decision of MORRISON, J., that in the circumstances it was the duty of the driver to go very slow and as he was approaching an intersection it was his duty under section 17 of the Motor-traffic Regulation Act, 1913, to have his car entirely under control.

Held, further, that in travelling on a highway, whether it be pedestrians, or a person driving a horse and carriage, or on horseback, if going with the traffic there is no duty cast upon them to look behind at short intervals, as they are entitled to expect that those following will not run them down.

APPEAL by defendants from the decision of MORRISON, J. of the 13th of December, 1920, awarding the plaintiff $300 in an action for damages owing to the defendant's negligence. On the 20th of December, 1919, the plaintiff and two companions were walking home proceeding along Douglas Street. They turned down the Gorge Road and walked along the wooden sidewalk in front of the Centennial Methodist Church. They then proceeded on the left-hand side of the Gorge Road (there being a sidewalk on the right-hand side but not on the left), the plaintiff being nearest the curb and about four feet away from it. When they had proceeded about 70 feet from the church and were nearing Rock Bay Avenue the defendants' car coming in the same direction from behind struck the plaintiff,

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breaking her left leg. The defendant was driving the car, his sister sitting beside him and his father behind. He was driving about 9 miles an hour. The night was very foggy, the road was wet and slippery and he states his lights were on and he was continually sounding his horn, in which he was corroborated by his father and sister. On seeing the plaintiff and her companions about four feet ahead he endeavoured to avoid them by turning in to the curb at the left but his right fender struck the plaintiff who was nearest the curb. The speed of the defendants' car at the time and the evidence of his sounding his horn was corroborated by a witness who was driving a car immediately behind him.

The appeal was argued at Victoria on the 4th of February, 1921, before MACDONALD, C.J.A., GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Argument

D. S. Tait, for appellants: We say the learned trial judge misdirected himself and erred in law. There was considerable traffic on this road and in walking on the left side of the road when there was a sidewalk on the right side they did so at their own risk. The rule of the road only applies to vehicles: see *Williams* v. *Richards* (1852), 3 Car. & K. 81. Plaintiff was obviously in a place of danger and should have been cautious but she was not: see *Hawkins* v. *Cooper* (1838), 8 Car. & P. 473; *Cotton* v. *Wood* (1860), 8 C.B. (N.S.) 568; *Allen* v. *North Metropolitan Tramways Company* (1888), 4 T.L.R. 561. It is not a question of the plaintiff's right to be on the road. The law is that there is a duty imposed on a person who enters into a place of danger to look out and beware of the danger whatever it is. The question is whether there was danger in going on the road. To relieve the plaintiff there must be a finding that there was no danger. These women blocked the road on the left side going down: see *Fraser* v. *B.C. Electric Ry. Co.* (1919), 26 B.C. 536.

W. J. Taylor, K.C., for respondent: They admit the accident could have been avoided by turning to the right and he should have done so. The accident was at the intersection of the two streets which disposes of the charge of contributory negligence: see *Cotterill* v. *Starkey* (1839), 8 Car. & P. 691. As

to *quantum* of damages see *McHugh* v. *Union Bank of Canada* (1913), A.C. 299 at p. 309; *Toronto Ry. Co.* v. *Toms* (1911), 44 S.C.R. 268.

Tait, in reply.

MACDONALD, C.J.A.: I would dismiss the appeal. The case is of some importance; it is an exceptional case. We have been referred to no authority where the circumstances and the facts are similar to those in the present case. The plaintiff was walking upon the street, that is, the travelled portion of the roadway. There was a sidewalk on the right-hand side, but she was proceeding along the left-hand side of the right of way, walking on the travelled portion of the street. It was a foggy night and the defendant, driving a motor-car, overtook her at the point where this unfortunate occurrence happened. It was on a down grade and the street was wet from the effect of either rain or fog. The evidence of the defendant himself (when I speak of the defendant, I mean the driver in particular of the car, who is one of the defendants), his evidence shews that he could have seen a distance of 10 feet in advance of the front end of the car through the fog. His evidence also shews that he was travelling at the rate of from 9 to 10 miles an hour, and that he was approaching the intersection of another street. It is also clear from the evidence that the unfortunate plaintiff, at the time of the impact, was directly under the arc light. There is some dispute as to whether she and her companions were walking forward along the street, or, as Mr. *Taylor* contends, were in reality crossing the street. The defendant driver says they were walking forward; in other words, they were walking along the line of traffic, with the traffic, on the street. I think it is fair to the defendants to accept their story.

Now, it is said that she was guilty of negligence in not turning round from time to time to ascertain whether some person was about to run her down. It is contended that the defendants were guilty of negligence in proceeding in the circumstances, that is to say, in a fog, down grade, on a wet street, at a rate of from 9 to 10 miles an hour. I have no hesitation at all in saying that, in my opinion, the defendants were guilty

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of negligence. It is clear from the driver's own statement that he would cover double the distance in bringing his car to a stop than that which would have been required under other and more favourable conditions. If he had been travelling on a level with a good footing for his wheels, he could have stopped in half the distance that he could have stopped in as conditions then were. That is equivalent to saying that he was creating as great a danger upon that highway on this night as under ordinary conditions he would have created if he had been running at 20 miles an hour. I think it was the duty of the driver, driving in a dense fog such as he claims he was driving in that night, to have gone very slow indeed. It was his duty also under the statute, in approaching an intersection of another street, to have had his car entirely under control. If he had been looking out he could have seen her, according to his own story, 10 feet ahead, and even going at the rate he was going that night, he could have stopped in half a length of his own car. Under those circumstances I do not see how we can interfere with the finding of the learned trial judge, particularly as he saw the *locus in quo*.

MACDONALD, C.J.A.

Now, referring to the alleged negligence of the plaintiff, it is practically conceded that she had the right to be walking where she was. What precautions could she have taken? It is idle to say she might have gone across the street and walked on the sidewalk—it is practically begging the question, because it is conceded she had the selection as to where she walked. She could not be charged with negligence unless, as I suggested during the argument, she was guilty of negligence in not turning round, since she would have had to turn backwards to guard against being run down. It is my idea that, in regard to travelling on a highway in such conditions as that, whether it be pedestrians or a person driving a horse and carriage, or on horseback—if he is going with the traffic on the proper side of the street, it is no business of his to be looking behind at every short interval. He is entitled to expect that those who are following will do their duty and not run him down. It is different from a street crossing, where a person proposes to cross the stream of traffic;

there he must look in all directions and take all due precautions; that is a different situation to what we find here, where the person is going with the stream of traffic. She must look ahead to see if there is anything coming, and look for anything crossing, but I do not think she can be charged with negligence because she does not either walk backwards or turn from moment to moment to see if some person is endangering her safety from behind.

Under these circumstances I think the appeal must be dismissed, and the decision of the trial judge as to liability affirmed.

On the question of damages, while it is always a difficult thing to interfere with the *quantum* of damages allowed by a judge or jury, yet I have no hesitation in expressing my opinion upon the inadequacy of the sum allowed by the learned judge. I think we have no power to do more than this—to say that either there should be a new trial, or to make it a term of avoiding a new trial that the defendants should consent to the increasing of the amount. I have, however, ascertained from the other members of the Court that there will not be a majority in favour of ordering a new trial, or making it a term for avoiding a new trial that the defendants should consent to an increase in the amount of damages. But it does seem to me unfortunate that this woman who had her leg fractured in two or three places, spent several weeks in hospital, suffered great pain, and went through suffering of no ordinary kind—that she should have been thought to be sufficiently compensated by the sum of $300. The result is that the appeal is dismissed. The cross-appeal also goes by the board. The costs of the appeal follow the event, the costs of the cross-appeal also follow the event.

MACDONALD, C.J.A.

GALLIHER, J.A.: This is an unfortunate case—unfortunate from two points of view; unfortunate as to the poor woman who met with the accident and had her leg broken; unfortunate to the defendants in this way: that certainly I cannot find in the evidence anything of recklessness in the manner in which they were driving their car that night. Now, of course,

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a person need not always be reckless to be negligent, but I speak of them not being reckless in this sense, that I feel that probably apart from any damages that might be assessed against them, they felt very much for the poor woman in meeting with this accident. I do not regard this as I would where people were going along having a good time and paying no attention to the safety of anybody. In that respect I think it has an aspect which I have termed unfortunate from the defendants' standpoint.

Then getting to the case of the defendant's negligence. I think we may take it that the learned judge must have taken into consideration that he was negligent considering the fog that night. I do not think he should have been held negligent under ordinary conditions. Now, of course, the learned trial judge is entitled to take that into consideration, and as I have before intimated, I am not prepared to say he was wrong in taking that view; I might not have taken the same view myself.

Then we come to the question of contributory negligence. I am by no means prepared to go as far as the trial judge has in that respect, that is, I would, I am satisfied, take a different view to what the trial judge did, if I were trying the case, and I do not feel I can go as far as the Chief Justice has gone in dealing with the question of plaintiff's negligence. If the fog which hung over the vicinity on that night was such a contributing factor in bringing about the negligence of the defendant, then the same fog, to my mind, was a contributory factor to call upon the plaintiff to exercise more than ordinary care in walking along that road under the circumstances. I think it has not been shewn that any really measurable care was exercised by the plaintiff other than she would have on an ordinary night, or in the day-time, for that matter. The three were going down that road chatting, which, of course, they had a perfect right to do. But when one attempts to walk down a street which is befogged, as we may say, a heavy thick fog hanging over it, and vehicles likely to be moving along it, I think there is something more required of a person than simply to say: We can go on, and other persons must look out. I think there is a duty cast on persons under those circumstances,

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to look after themselves, just as it is on other persons to exercise care. On that branch of the case I am free to say that if I were trying the case I would not come to the conclusion that the learned trial judge did. But I cannot say there is no evidence on which he might not have come to such conclusion, and such being the case our hands are more or less tied, because, after all, we must come—as Mr. *Tait* put it—we must come to the conclusion that the learned trial judge misdirected himself. The result is the appeal is dismissed.

GALLIHER, J.A.

Under the head of damages, holding the view I do, I do not feel inclined to increase the damages, or to say that there should be a new trial if the parties cannot agree as to some higher amount of damages.

McPHILLIPS, J.A.: It is not without some hesitation that I come to the conclusion that the judgment of the learned trial judge cannot be disagreed with; that is, in coming to the conclusion that a case was not made out for the disturbance of the judgment. I do so, upon the peculiar facts of the case, rather than anything else.

One thing to be remembered is this, that because there is an accident, it does not follow that there is necessarily a liability in law upon someone for that accident. That is, there may be accidents and there may be no liability in law for the occurrences. This case is very close to the line as being one of that character. Here we have a night, dark and foggy, and a roadway slippery and wet. The plaintiff undertook to do that which certainly put her in great jeopardy—to walk upon the left-hand side of the carriage-road upon which there was no sidewalk, and upon the right of way ordinarily used by vehicular traffic. That was a great responsibility to take, and further, the evidence discloses that the plaintiff and the other ladies accompanying her could have been upon the other side of the street and upon a sidewalk. That situation calls for particular attention, when you come to consider the question of liability, and as to whether or not there is liability. Sir Frederick Pollock, in his work on Torts, 11th Ed., 447, says:

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"Nothing can be inferred, for example, from the bare fact that a foot-passenger is knocked down by a carriage in a place where they have an equal right to be, or by a train at a level crossing. Those who pass and re-pass on frequented roads are bound to use due care, be it on foot or on horseback, or with carriages; and before one can complain of another he must shew wherein care was wanting. 'When the balance is even as to which party is in fault, the one who relies upon the negligence of the other is bound to turn the scale.'"

In this particular case I find it necessary to have the scale turned, because in the absence of that, this action cannot succeed. Now, how is the scale turned? It seems to me it is turned upon one point, and that is this, that in view of the special circumstances that night, the driver of the defendants' motor-car failed to exercise ordinary care when he drove his motor at the pace of 10 miles an hour, considering all the surrounding circumstances; that is, he must have known, and he admits he did know, that people passed along that roadway upon that side, although there was no sidewalk, that is, they walked upon the part used for vehicular traffic. Being acquainted with that fact and knowing the situation well, it is reasonable to say that he should have had his car under more control than it was. Were it not for that one thing, I think the plaintiff would fail upon the law.

MCPHILLIPS, J.A.

Sir Frederick Pollock bases his enunciation of the principle of law that I have just read in the main upon the case of *Cotton* v. *Wood* (1860), 8 C.B. (N.S.) 568, and at p. 571, Chief Justice Erle said this:

"According to the evidence here, the plaintiff's wife, on a dark night, and in a snowstorm, proceeded slowly, accompanied by another female, to cross the crowded thoroughfare, whilst the defendant's omnibus was coming up on the right side of the road, and at a moderate pace, and with abundant time as far as I can judge, for the women to get safe across if nothing else had intervened; but, in turning back to avoid another vehicle, they returned and unfortunately met the danger. What, then, is the ground for imputing negligence and breach of duty to the defendant's servant? One of the plaintiff's witnesses stated that the driver was looking round at the time to speak to the conductor. That alone clearly would be no affirmative proof of negligence. The man was driving on his proper side, and I do not find it imputed to him that he was driving at an improper pace. As far as the evidence goes, there appears to me just as much reason for saying that the plaintiff's wife came negligently into collision with the defendant's horses and omnibus as for saying that the collision was the result of negligence on the part of the defendant's servant."

In this particular case I cannot come to the same conclusion, that is, that the driver of the motor was proceeding at a moderate pace, in view of all the circumstances; on the contrary, I am driven to the conclusion that he was proceeding at an immoderate pace, and if that be so, then that turns the scale and the plaintiff is entitled to recover.

Mr. *Tait* laid great stress upon the judgment of this Court in *Fraser* v. *B.C. Electric Ry. Co.* (1919), 26 B.C. 536. I do not think that the judgment that I am now pronouncing is in any way departing from the principles enunciated in that case. In that case, it is true, the railway company admitted negligence, *i.e.*, that the street-car was proceeding at an immoderate pace; but the difference is this, it was at a street crossing, and as indicated by my brother the Chief Justice, the plaintiff would have greater difficulty in establishing her case if the accident had occurred at a crossing. The *Fraser* case was a crossing case and it was held that there was no right to succeed there, even although the car was going at an immoderate pace; but the differentiation is this—you cannot take the street-car away from the steel rails, it must proceed along the right of way, but no doubt the motorman is not entitled to run down people. But in this particular case there was a motor-car not upon fixed rails and there was opportunity to gauge speed better and check way quicker and many things different from operating a street-car on the highway, and opportunity to turn from side to side. I do not think that the *Fraser* case is at all decisive of the case at bar, especially upon the point that in that case the plaintiff did see or should have seen the street-car, and acted recklessly at a known dangerous crossing.

MCPHILLIPS, J.A.

I am also aware that in the case of *Allen* v. *Metropolitan Tramways Company* (1888), 4 T.L.R. 561, Lord Justice Lindley did say:

> "There was some evidence that the car was going fast, and there was evidence that the plaintiff did not hear the car coming, owing, perhaps, to the ground being covered with snow. It was clear from those facts that the plaintiff had only himself to blame for the accident."

That also was a crossing case and Lord Justice Lindley further said:

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"Having carefully read the evidence through, they came to the conclusion that the view of Mr. Baron Huddlestone was right . . . . . and the plaintiff, when endeavouring to cross the road, looked only in one direction, and not in the direction from which the car was coming."

Again, if this was a crossing case, the plaintiff would certainly have difficulty in recovering, in fact, in my opinion, could not recover at all.

Then, on the question of damages, I think, of course, that we are controlled and bound by the decision I referred to during the argument, in the Privy Council, of *McHugh* v. *Union Bank of Canada* (1913), A.C. 299. Lord Moulton, at p. 309, lays stress upon this:

"The tribunal which has the duty of making such assessment, whether it be judge or jury, has often a difficult task, but it must do it as best it can, and unless the conclusions to which it comes from the evidence before it are clearly erroneous, they should not be interfered with on appeal, inasmuch as the Courts of Appeal have not the advantage of seeing the witnesses—a matter which is of grave importance in drawing conclusions as to *quantum* of damages from the evidence that they give."

MCPHILLIPS, J.A.

The learned trial judge had the opportunity of seeing the lady who suffered the injury in this case, and I do not think it is necessary for the Court of Appeal to unduly delve into that which, after all, is more or less the inscrutable. We have not seen the lady and all we have got is evidence in cold type, and certainly in view of what Lord Moulton has said, this is not a case of error; it has not been established that the learned trial judge arrived at an erroneous conclusion when he fixed the damages as he has fixed them, therefore I am not in favour of disturbing them, and on the whole I am of opinion that the appeal should be dismissed.

EBERTS, J.A.: I agree with the words that have fallen from the lips of the learned Chief Justice in this case, and I agree that the appeal should be dismissed. I further found my opinion on the fact that the learned judge who sat on this case and had the opportunity of seeing the witnesses and visiting the site of the accident, after due deliberation was of the opinion that the defendant could, in this case, by the exercise of reasonable care, have avoided the accident. The defendant admitted himself that he could have done so if he had turned to the right, and his only reason for not doing so was because

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he would have been on the wrong side of the road. This would be futile reasoning, because many persons may go on the wrong side of the road and nothing happen. If the evidence had been that if he had gone to the right he would have met a tram-car, then it would have been said he could not possibly have made up his mind to turn to the right to avoid this accident. The trial judge, however, goes on to say that on considering the whole of the evidence he does not think the plaintiff was guilty of contributory negligence. Therefore, under all the circumstances, I would say the appeal should be dismissed.

EBERTS, J.A.

So far as damages are concerned, I do not think that we have power to increase—we have power to reduce, but not to increase. If the opinion of the Court had been that we should have a new trial, I would have been in favour of that, but a sufficient number of the Court is of the opinion that that should not be done.

Appeal dismissed.

Solicitors for appellants: *Tait & Marchant.*
Solicitor for respondent: *W. A. Brethour.*

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THE KING v. THE UNITED STATES FIDELITY & GUARANTY COMPANY AND QUAGLIOTTI.

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THE KING v. THE UNITED STATES FIDELITY & GUARANTY CO.

Succession duty—Fixed by auditor-general—Based on executor's valuation —Bond to secure payment—Real property never registered in name of deceased or her executor—Estate overvalued—Action on bond—Jurisdiction to revalue—"Coming into the hands," meaning of—R.S.B.C. 1911, Cap. 4, Sec. 114; Cap. 217.

An executor under a will having made valuation of the estate on application for probate and the auditor-general determined the amount of succession duty based on said valuation, a bond was then given to secure payment of the succession duty under the Succession Duty Act. In an action on the bond, although the Court was of opinion the estate was largely overvalued, it was held that there was no jurisdiction to interfere with the amount so fixed, and although the real estate was never registered in the name of the deceased or of the executor (it having been devised to the deceased who made her husband executor and sole devisee under her will) they in turn took possession and received the profits thereof, and the succession duty therefore was payable, there being no distinction drawn as to whether the executor dealt with the estate in his capacity as executor or as devisee.

Held, on appeal, affirming the decision of GREGORY, J., that as the valuation of the commissioner appointed under the Act was less than the executor's valuation of the estate there was no jurisdiction to review, and the appeal should be dismissed.

The King v. *Roach* (1919), 3 W.W.R. 56 distinguished.

Held, further, that the words "coming into the hands" in the condition of the executor's bond are satisfied if the lands are under their control or saleable at their instance.

Ianson v. *Clyde* (1900), 31 Ont. 579 at pp. 585-6 followed.

Statement

APPEAL by defendant Company from the decision of GREGORY, J. in an action tried by him at Vancouver on the 17th and 18th of February, 1921, to recover $44,287.50 upon a bond entered into by the defendants to the plaintiff to secure all succession duty that the defendant L. J. Quagliotti might be found liable to pay as sole executor of the estate of Petronilla Quagliotti, deceased. The facts relevant to the issue are that one Bossi who at the time of his death owned a large amount of real estate in Victoria, left all his property to his widow. Shortly afterwards she married the defendant Lorenzo J.

Quagliotti. She died on the 20th of May, 1913, having first executed a will appointing her husband executor and sole devisee. On his application for letters probate Quagliotti filed an affidavit shewing the net value of the estate at $885,750 and the auditor-general fixed the succession duty at $44,287.50. The executor could not make immediate payment and he then procured the defendant Company to execute and deliver with Quagliotti a bond to pay the amount of the succession duty in case Quagliotti failed to do so. Quagliotti failed to pay any portion of the succession duty and was in default. The Government then brought action to enforce payment under the bond.

S. S. Taylor, K.C., for the Crown.

Harold B. Robertson, and *E. L. Tait,* for defendant Company.

F. C. Elliott, for defendant Quagliotti.

11th May, 1921.

GREGORY, J.: This is an action upon a bond given to secure the payment to the Crown of succession duty upon the estate of Petronilla Quagliotti, the Fidelity Company being surety for the executor Lorenzo J. Quagliotti.

The bond was given under the provisions of the Succession Duty Act, being Cap. 217, R.S.B.C. 1911, and is in the form provided by the Schedule to that Act. The condition of the obligation is to be void if

"Lorenzo Joseph Quagliotti, the executor of all the property of Petronilla Quagliotti . . . . . do well and truly pay . . . . . any and all duty to which the property, estate, and effects of the said Petronilla Quagliotti coming into the hands of the said Lorenzo Joseph Quagliotti may be found liable under the provisions of the Succession Duty Act. . . . . ." GREGORY, J.

It is suggested that deceased had practically no estate, as the estate so called consisted of a large amount of real property devised to her by her former husband, Carlo Bossi, and that, under the provisions of the Land Registry Act, she had acquired no title, as the same had not been registered in her name, and the same is true of L. J. Quagliotti, who is the sole devisee under the will of the deceased.

It is not disputed that Carlo Bossi died possessed of a large amount of real estate and that his widow took possession of it

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and received the profits thereof, and after her death her second husband, L. J. Quagliotti, in turn took possession, managed it and received the profits. By virtue of the provisions of the Land Registry Act neither the deceased nor L. J. Quagliotti may be the registered owner of the legal estate therein, but L. J. Quagliotti is undoubtedly the owner of all the equity and the only person entitled to be registered as owner of the legal estate. Such property is undoubtedly liable for succession duty. It is argued that his possession must have referred to his capacity as devisee and not that of executor, and that, therefore, it cannot be said that the property has come into his hands, and not having come into his hands he is not liable for the succession duty. I cannot agree to this. The property has, in every sense that real estate can, "come to the hands" of Quagliotti, and I do not think it necessary or proper to make any fine distinction as to whether his dealing therewith was in his capacity as executor or devisee. The condition of the bond only requires that the property shall come to the hands of "the said Lorenzo Joseph Quagliotti" and makes no reference to the character in which they shall so come, although he is earlier described as "executor of all the property of," etc.

The next question which arises is what is the amount of duty payable? There is no dispute that it is governed by the value of the property at the date of the death of Mrs. Quagliotti.

GREGORY, J.

The defendants allege that the property was largely over-valued, and I am satisfied from the evidence that it was and that the gross value of the estate was $500,000.

Upon the application for probate the defendant Quagliotti in his affidavit made a list of the properties and their values totaling $886,000. In his application to the defendant Company for a bond he furnishes the same list and values. Upon such a valuation the duty would be $44,287.50, and I do not think that any reasonable person could come to any other conclusion than that both the defendants and the Crown believed when the bond was executed that it was to secure the payment of that amount. That amount had been determined by the auditor-general under the provisions of section 22 of the Succession Duty Act, and was based absolutely on Quagliotti's

valuation. The finance minister, under section 29 of the Act, if dissatisfied with the affidavit of valuation, could appoint a commissioner to enquire into the value. He did this and the commissioner made a valuation somewhat lower than that of Quagliotti's, and naturally the Crown was then willing to accept Quagliotti's valuation, and the auditor-general fixed the amount accordingly, without any protest by Quagliotti. Section 33 of the Act provides for an appeal from the commissioner's report by any person dissatisfied with it. Of course there was no appeal.

Upon the ascertainment of the amount of duty payable the registrar, under section 23 of the Act, shall "require immediate payment of the amount or security therefor to be given by bond," etc. The bond sued on was given in pursuance of this section of the Act. The amount of the bond is governed by section 24 and is a penal sum equal to 10 per cent. of the value of the property liable to succession duty. The amount was so fixed in the present case. In a somewhat similar case, *The King* v. *Roach* (1919), 3 W.W.R. 56, Mr. Justice Simmons revalued the property and reduced the amount of duty payable, and this case has been strongly pressed upon me as authority for my doing the same thing here, and I would be very glad to follow such a precedent if the statute in Alberta and British Columbia were similar. But the Alberta statute, Cap. 116, Consolidated Ordinances, 1905, contains no provision similar to that in section 22 of our Act, enabling the auditor-general to "determine the amount of succession duty." It contains provision for the appointment of an appraiser and an appeal from his decision. There was no such appointment in the *Roach* case. But there is a general section, *viz.,* section 12, which provides that the Court shall have jurisdiction to determine what property is liable to duty, the amount thereof, and may exercise "any of the powers which by sections 7 to 10 (being the section governing appraisement and appeal) are conferred upon any officer or person." Mr. Justice Simmons, at p. 59 of the report, says:

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"The provincial treasurer did not appoint an appraiser . . . . . and the parties interested had no recourse where the treasurer did not accept the valuation of the executor . . . . . other than to defend an action and raise by way of defence any objection."

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In the present case, the executor's valuation was in the end accepted. Mr. Justice Simmons, on the same page, says:

"Where an appraiser is appointed . . . . . there is an appeal to a judge and his decision is final. In other cases, finality, other than by agreement, can only be arrived at by an action . . . . . under sections 11 and 12. Unless there is an agreement binding upon all parties, I am of the opinion, that the whole question of values is open under section 12."

Our statute contains no such general provision as that contained in section 12 of the Alberta Ordinance, and the only jurisdiction of the Court to interfere with the values as fixed is (by the Court of Appeal under section 33 of our statute) when there is an appeal from the report of the "commissioner," and there was none.

It does not seem to me possible to allege that Quagliotti did not agree to the amount of duty as fixed by the auditor-general. It was fixed on his own valuation. He never, until this action was launched, made the slightest protest. In the *Roach* case the executor had protested, though later, by entering into the bond, he seemed to acquiesce. The defendant Company is, I think, equally barred; it was well aware of the executor's valuation and that the duty has been fixed upon it, and it knew or should have known that, under section 23 of the Act, the bond was to secure the payment of the amount so fixed.

There must, therefore, be judgment for the plaintiff for the sum of $44,287.50 with interest thereon at the rate of 6 per cent. from the 21st of May, 1915, but the defendant Company, upon paying the amount due under the judgment, will be entitled to stand in the place of the Crown so far as the amount of duty is concerned, but subject to the superior rights, if any, which may have been acquired by any innocent purchaser for value, not represented in these proceedings.

GREGORY, J.

I hope it will not be considered impertinent in me to suggest that this is a fitting case for the Crown to reduce the amount of duty as an act of grace and bounty. The property today is practically valueless. It has, as a matter of fact, largely been sold for taxes and there cannot be, in the mind of any reasonable person, any doubt that the several properties were never worth the values put upon them. There had been a most unprecedented boom in real estate shortly prior to the death

of Mrs. Quagliotti, during which absolutely unheard of values were put upon real estate in every part of the City of Victoria. The values in the inventory were based upon those inflated prices, probably through the natural unwillingness of owners to admit, even to themselves, that the boom was over and the values gone. The whole country has suffered and is still suffering from the effect of the "wild cat" speculation of those days. I would also respectfully suggest that the form of the bond given in cases of this kind should be remodelled, and that some provision should be inserted in the statute for the repayment of duties paid upon property which it is afterwards discerned has no value or has entirely disappeared. Such provisions are to be found in the statutes of other Provinces.

From this decision the defendant appealed. The appeal was argued at Vancouver on the 10th of October, 1921, before MACDONALD, C.J.A., GALLIHER and EBERTS, JJ.A.

Harold B. Robertson, for appellant: The duty was only payable by the executor in respect of property coming into his hands as executor. He had no property in his hands as executor. There is, therefore, no liability under the bond. Section 15 of the Succession Duty Act is the only one imposing any liability. Each parcel is charged with its proportion of the amount due. The property never came into his hands at all as executor, it came to him as devisee. The actual value of the estate is many times less than the amount first estimated, and it is submitted there should be a revaluation. The bond was for a sum that would be fixed in the future: see *Michigan Trust Co.* v. *Canadian Puget Sound Lumber Co.* (1918), 25 B.C. 560; Halsbury's Laws of England, Vol. 3, p. 80, par. 160. The bond condition is construed strictly for the obligor: see Halsbury's Laws of England, Vol. 3, p. 87; Sheppard's Touchstone, 8th Ed., Vol. 2, p. 375; *Blest* v. *Brown* (1862), 4 De G.F. & J. 367 at p. 376; *Stamford, etc., Banking Company* v. *Ball, ib.,* 310 at p. 313; *Maritime Motor Car Co.* v. *McPhalen* (1919), 27 B.C. 244; *Bacon* v. *Chesney* (1816), 1 Stark. 192; *The King* v. *Roach* (1919), 3 W.W.R. 56. We are entitled to subrogation without limitation.

Argument

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S. S. Taylor, K.C., for respondent: This is an action on a bond, not an action on the amount. It is a statutory bond in pursuance of the Succession Duty Act. The amount fixed cannot be changed. He is estopped by reason of his own estimate of the value of the estate and by the wording of the statute. The bond could not be given unless the property came into the hands of the executor. Section 37 is the important section of the Act and is unanswerable.

Robertson, in reply: Quagliotti's estimate of value never came before the bonding Company. Section 114 of the Administration Act is in our favour.

Cur. adv. vult.

10th January, 1922.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I am in entire agreement with the judgment of Mr. Justice GALLIHER.

GALLIHER, J.A.

GALLIHER, J.A.: The second objection taken by Mr. *Robertson* to the judgment below is that the judge should have revalued the assets, and cited *The King* v. *Roach* (1919), 3 W.W.R. 56.

In the case at bar the auditor-general, after receiving the affidavits of valuation filed by the executor Quagliotti, had a commissioner appointed under the Act, who made his report, and after the receipt of such report, which was somewhat lower than the valuation put upon the property by the executor, accepted the executor's valuation and the bond now sued upon was entered into by the defendants with full knowledge of such valuation and acceptance.

Simmons, J., points out what is, I think, a clear distinction between the *Roach* case and the one at bar, where he says, at page 59:

> "The provincial treasurer did not appoint an appraiser under these sections [referring to sections under the Succession Duty Ordinance of N.W.T. 1903, Cap. 5] and the parties interested had no recourse where the treasurer did not accept the valuation of the executor and did not appoint an appraiser, other than to defend an action and raise by way of defence any objection."

This contention fails.

On the third ground raised by Mr. *Robertson*, Mr. *Taylor* for the Crown at once assented to the judgment below being

amended so as to subrogate the defendants to the rights of the Crown without the limitation put upon it in said judgment. Mr. *Robertson's* substantial point is, that duty is payable only by an executor on property which comes into his hands as executor, and as no property came into his hands as such executor, no duty became payable from him and hence none under the bond sued on. Quagliotti was both devisee under the will and executor named therein and probated the will.

Under our law in British Columbia, real estate did not at the time of Mrs. Quagliotti's death, devolve upon the executor but he was made liable for the payment of debts, and the Succession Duty Act gives the executor power to sell the lands of his testator to pay duties. We have to look at the bond sued on and interpret the conditions of that bond, keeping in mind our statute, R.S.B.C. 1911, Cap. 217. The conditions are as follow:

"The condition of this obligation is such that if Lorenzo Joseph Quagliotti, the executor of all the property of Petronilla Quagliotti, late of the City of Victoria in the Province of British Columbia, deceased, who died on or about the 20th day of May, 1913, do well and truly pay or cause to be paid to the Minister of Finance of the Province of British Columbia for the time being, representing His Majesty the King in that behalf, any and all duty to which the property, estate, and effects of the said Petronilla Quagliotti coming into the hands of the said Lorenzo Joseph Quagliotti may be found liable under the provisions of the Succession Duty Act, within two years from the date of the death of the said Petronilla Quagliotti, or such further time as may be given for payment thereof under the provisions of said Act, or such further time as he may be entitled to otherwise by law for the payment thereof, then this obligation should be void and of no effect, otherwise the same to remain in full force and virtue."

In the beginning of the condition, Lorenzo Joseph Quagliotti is described as executor but later on the condition is that the payment is to be of "all duty to which the property, estate, and effects of the said Petronilla Quagliotti [of which Lorenzo Joseph Quagliotti was devisee under the will] coming into the hands of the said Lorenzo Joseph Quagliotti may be found liable under the provisions of the Succession Duty Act," etc.

Mr. *Robertson* wishes us to read that as if the words "as such executor" had been inserted between the words "Quagliotti" and "may be found." I think both under our statute and the

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condition in the bond, that is the true interpretation, and it remains only to determine what meaning shall be given to the words "coming into the hands."

We received no assistance from counsel on either side in the way of authorities on this point, but I have, after considerable research, found an interpretation of these words in the case of *Ianson* v. *Clyde* (1900), 31 Ont. 579, heard on appeal in the Divisional Court composed of Boyd, C. and Robertson, J. The features of that case which are necessary to notice on the point in question here are as follows:

By R.S.O. 1887, Cap. 108, Sec. 4 (the Devolution of Estates Act), real estate devolves upon the legal personal representatives. By Ont. Stat. 1891, 54 Vict., Cap. 18, Sec. 1, real estate not disposed of by the executors within twelve months after the death shall then be deemed to be vested in the devisees or heirs beneficially entitled thereto, without any conveyance by the executors unless a caution is registered during the year.

No caution was registered during the year, consequently the real property became vested in the beneficiaries under the will, but by the Act of 1893, 56 Vict., Cap. 20 (Ont.), provision is made for registering a caution after the expiry of the twelve months, and such caution was registered, and in dealing with the effect of such registration, Boyd, C. at pp. 585-6, says:

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"The effect of this legislation acted upon by registering a caution under the sanction of the County Judge appears to place the lands again under the power of the executors, so that they can sell them to satisfy debts. The County Court judgment is against the property of the deceased in the hands of the executors, and though this property was not in their hands at the date of the judgment, it became so practically when the caution was subsequently registered. 'In the hands' is of course a metaphorical expression, and it is satisfied if the land is under their control or saleable at their instance: *In re Martin* (1895), 26 Ont. 465."

Giving, then, full effect to Mr. *Robertson's* contention as to the interpretation to be placed upon the condition in the bond, I hold that the lands were under the control or saleable at the instance of the executor for the purposes of paying succession duty, and adopt the interpretation placed upon the words "coming into his hands" given by Chancellor Boyd.

In this view the appeal must be dismissed, with the variation aforesaid, which will not affect the costs, which should follow the event.

EBERTS, J.A. would dismiss the appeal.

Appeal dismissed.

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

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

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ROBERT WILSON, WILLIAM WILSON, AND ROBERT WILSON SON & COMPANY v. MUNICIPALITY OF THE CITY OF PORT COQUITLAM.

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Negligence—Corporation—Fire starting in fire-hall—Spreads to adjoining buildings—Liability of corporation—Burden of proof—Breach of by-law—New trial.

Where a fire starts in one's house it is *prima facie* evidence of negligence and in an action for damages the onus is on him to prove absence of negligence.

A municipal corporation is liable for damages caused the property of a member thereof by a fire which, owing to negligence, originates in a municipal building occupied by a servant of the corporation in the course of his duty and spreads to said property.

On the trial of an action against a municipal corporation for damages for the destruction of property by a fire which originated in the defendant municipality's fire-hall the jury brought in a verdict for the defendant.

Held, on appeal, MACDONALD, C.J.A. dissenting, that there should be a new trial because the trial judge had misdirected the jury in telling them that the onus of proving negligence was on the plaintiff and because in view of the evidence at the trial the verdict of the jury was perverse.

APPEAL by plaintiffs from the decision of MURPHY, J. of the 7th of April, 1921, and the verdict of a jury, in an action for damages for loss of property by fire alleged to have arisen through the negligence of the defendant. The old municipal

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hall in Port Coquitlam was used from 1919 as a fire-hall. It was a two-story frame structure at the back of which was a hose-tower. The fire chief was given accommodation in the building, and had a stove in one of his rooms which he used for culinary purposes. The stovepipe went up through the ceiling into the attic and through the roof. The floor of the attic came up to the stovepipe. The fire broke out on the 5th of August, 1919, in the roof of the attic and spread rapidly, destroying a number of buildings including the property of the plaintiffs. On the trial the jury brought in a verdict for the defendant. The plaintiffs appealed mainly on the ground that the judge erred in his charge in directing that the onus of proving negligence was on the plaintiffs and in not informing the jury that the breach of a by-law by the owner of property though not negligence *per se* is evidence of negligence and must be considered by them.

Statement

The appeal was argued at Vancouver on the 4th of November, 1921, before MACDONALD, C.J.A., MCPHILLIPS and EBERTS, JJ.A.

J. E. Bird, for appellants: One appeal determines three actions. The case of *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330 was applied here. The judge in his charge said they were governed by the ordinary rules of evidence. On the question of burden of proof see *Musgrove* v. *Pandelis* (1919), 88 L.J., K.B. 915; *McKenzie* v. *Corporation of Chilliwack* (1910), 15 B.C. 256; *Attorney-General* v. *Cory Bros. & Co.* (1921), 1 A.C. 521 at p. 536; *Becquet* v. *MacCarthy* (1831), 2 B. & Ad. 951 at p. 958; *Scott* v. *London Dock Co.* (1865), 3 H. & C. 596; *Filliter* v. *Phippard* (1847), 11 Q.B. 347 at pp. 356-8; *Canada Southern Ry. Co.* v. *Phelps* (1884), 14 S.C.R. 132. On the history of the doctrine see 14 Geo. III. (Imperial), Cap. 78, Sec. 86, and *Vaughan* v. *Taff Vale Railway Co.* (1860), 5 H. & N. 679. When the fire takes place the onus of proof shifts. We are entitled to succeed on the *Rylands* case. It was the defective stove and pipe that caused the fire and anything dangerous brought on the property is at the peril of the owner. It is not open to the defendant to raise the statute of Anne as it was not pleaded. There was mis-

Argument

direction on the onus of proof, lack of direction and not a word as to preponderance.

S. S. Taylor, K.C., for respondent: The main question is that of onus. It must first be proved that we started the fire, and then there was negligence: see *Dean* v. *McCarty* (1846), 2 U.C.Q.B. 448; *Furlong* v. *Carroll* (1882), 7 A.R. 145 at p. 155; *Gillson* v. *North Grey Railway Co.* (1874), 35 U.C.Q.B. 475 at pp. 482-3; *Clark* v. *Ward* (1909), 9 W.L.R. 657 at pp. 660-1. Every judgment is applicable to the particular facts proved: see *Quinn* v. *Leathem* (1901), A.C. 495 at p. 506. The *Musgrove* case is only authority for that particular set of facts. As to the by-law and the individual's duty in reference to it see *Tompkins* v. *Brockville Rink Co.* (1899), 31 Ont. 124 at pp. 129-131. As to the servant the fire chief the Municipality cannot authorize its own servants to commit a breach of its own by-laws. He was paid by salary, with living quarters. He substantially paid rent and was the sole occupant of the premises. As to the apartments he was master and servant: see *McClemont* v. *Kilgour Mfg. Co.* (1912), 27 O.L.R. 305 at p. 315; *Britannia Merthyr Coal Co.* v. *David* (1909), 79 L.J., K.B. 153. On the question of a new trial see *Metropolitan Railway Co.* v. *Wright* (1886), 11 App. Cas. 152.

Argument

Bird, in reply, referred to *Crewe* v. *Mottershaw* (1902), 9 B.C. 246; *Forbes* v. *Daw* (1920), 19 O.W.N. 262. On onus of proof see *The Glendarroch* (1894), P. 226 at p. 231; *McArthur* v. *Dominion Cartridge Company* (1905), A.C. 72 at p. 76; *Rickards* v. *Lothian* (1913), A.C. 263; *Herron* v. *Toronto R. Co.* (1913), 11 D.L.R. 697. As to liability for servant's negligence see *Thomas* v. *Winnipeg (City)* (1914), 16 D.L.R. 390. As to the by-law see *McKinlay* v. *Mutual Life Assurance Co. of Canada* (1918), 26 B.C. 5; 43 D.L.R. 259 at p. 262.

Cur. adv. vult.

10th January, 1922.

MACDONALD, C.J.A.: The plaintiff's case is that the fire which destroyed his premises, had its origin in the building of the defendant and the contention of counsel for the plaintiffs

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is that the doctrine of *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330, is applicable, and he complains that the learned trial judge did not so instruct the jury.

The fire is alleged in the statement of claim to have originated through the negligent and improper erection and construction of a cooking-range and its pipes, used by the chief of the fire brigade of defendant for domestic purposes.

If it were shewn that this allegation were true, no doubt the jury would have so found, but there was evidence given for the defence tending to shew that the fire originated from sparks emanating from the flue or pipe of an adjoining building, and on this conflict of evidence the jury found a general verdict for defendant. If the charge be not open to objection, the verdict, I think, must stand.

The learned trial judge told the jury that the *onus probandi* was on the plaintiffs to shew that the fire originated from the defendant's negligence or that of its servants. He referred to the common law and told the jury that under it the defendant would be liable on mere proof that the fire originated in the defendant's premises, but that by statute, 14 Geo. III. (Imperial), Cap. 78, Sec. 86, that state of the law had been changed and the onus of proof that the fire had not an accidental beginning was shifted to the plaintiff. This, it is submitted by plaintiffs' counsel, was misdirection. The section of the statute is as follows:

"86. No action, suit, or process whatever shall be had, maintained, or prosecuted, against any person in whose house, chamber, stable, barn, or other building, or on whose estate any fire shall . . . . . accidentally begin, nor shall any recompense be made by such person for any damage suffered thereby; any law, usage, or custom, to the contrary notwithstanding. . . . . ."

It has been held by the Courts of Ontario and the Supreme Court of Canada, that that statute is in force in Ontario, and as the laws of England have been declared to be the laws of this Province as and from the 19th of November, 1858, it is in force here also, as it appears not to have been altered by any statute of this Province.

A considerable number of authorities were cited to us at the bar, but in most of them the statute had no application. In some it was suggested that it relieved the defendant of liability

even for negligence. *Filliter* v. *Phippard* (1847), 11 Q.B. 347; *Viscount Canterbury* v. *The Attorney-General* (1842), 1 Ph. 306. In the former case, Denman, C.J. appears to have thought that where the fire was deliberately kindled it could not be said to have had an accidental beginning. The construction of the statute appears to depend upon what is meant by "accidentally began." In my opinion it means the beginning of the conflagration which has done the injury.

The fire that was kindled in the range is not the fire meant by the statute. Nearly every fire which burns in a house or building is deliberately kindled, and is necessary to the well-being of the occupants. A fire so started may escape from the stove or fireplace in which it was kindled and cause a conflagration, and if the Act is to be given a sensible meaning, it is the beginning of the conflagration which brought about the injury which is meant by the statute when it speaks of "accidentally begin." This construction is, I think, borne out by what was said by two of the Lords Justices in *Musgrove* v. *Pandelis* (1919), 88 L.J., K.B. 915, although it would appear that Duke, L.J. took a different view of it when he said (p. 920):

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> "The question may some day be discussed whether a fire, spreading from a domestic hearth, accidentally begins within the meaning of the Act, if such a fire should extend so as to involve the destruction of property or premises. I do not covet the task of the advocate who has to contend that it does."

In all of the cases to which we have been referred there was evidence of negligence. Negligence was pleaded and either proved or attempted to be proved by the plaintiff. In the case at bar negligence is pleaded and was attempted to be proved by the plaintiffs, and I think the learned trial judge was right when he told the jury that the onus of proof of that issue was upon the plaintiffs.

The appeal should, therefore, be dismissed.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: In my opinion the case is one which calls for a direction that a new trial be had between the parties. Upon the evidence, without entering into details in respect thereto, the case presents an overwhelming volume of testimony that upon the balance of probabilities the fire which caused the

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damage sued for originated in the fire-hall of the respondent, and not from elsewhere. Now, what was the origin of the fire? As to that it is clear that what would have been ordinarily a safe fire became unsafe because of the fact that there was negligence upon the part of the respondents in the stovepipe chimney, owing to the manner in which it was installed. Not only was there evidence of negligence in the way the stovepipe was carried through the roof, but it was not in accordance with the requirements of a by-law of the respondent dealing with such matters.

The fire-hall was the property of the respondent and the chief of the fire brigade lived in the building and was in charge thereof in pursuance of his duty. The fire was lighted in the stove, which was in a room occupied by the chief of the fire brigade, he being in occupation thereof in the discharge of his duty to the respondent. The fire broke out in the roof or attic of the building, and it is reasonable to say that it was caused by the defective and negligent manner of carrying the stovepipe chimney up from the stove into the attic and out upon the roof, one pipe being loosely slipped into the other, giving opportunity for cinders to fall upon the floor of the attic and a fire would be the natural result. This constituted evidence of negligence of the completest kind, and there was advanced no evidence to meet this very probable happening, save the very improbable contention that the fire originated upon the roof of the fire-hall by reason of sparks from the chimney of the building immediately adjoining the fire-hall, namely, the hotel which was next door. This contention advanced by the respondent is most unreasonable and against the balance of probabilities, and cannot be said to be supported by any reasonable evidence. In that the order of the Court is to be a new trial, it is best to refrain from canvassing the evidence in detail. This much can be said in general summary, that the evidence as adduced at the trial by the appellants was of such a nature and of such completeness, contrasted with that adduced by the respondent, that the verdict of the jury for the respondent cannot be characterized as other than a perverse verdict.

MCPHILLIPS, J.A.

The case was not shewn to be one of accidental fire, for which there would be no liability. Where negligence is proved liability follows. Lord Denman, C.J., in *Filliter* v. *Phippard* (1847), 11 Q.B. 347, said at p. 356:

"For fires which accidentally begin are not fires produced by negligence."

And at p. 358:

"That the clause in the Building Act respecting accidental fires cannot apply to such as are produced by negligence."

See *Vaughan* v. *Menlove* (1837), 3 Bing. (N.C.) 468, 477 (43 R.R. 711). In *Tuberville* v. *Stampe* (1697), 1 Ld. Raym. 264-5:

"So in this case if the defendant's servant kindled the fire in the way of husbandry and proper for his employment, though he had no express command of his master, yet his master shall be liable to an action for damage done to another by the fire; for it shall be intended, that the servant had authority from his master, it being for his master's benefit."

In the present case it was a chimney fire and a defective chimney constructed in admitted non-compliance with the respondent's own by-law. The presumption was (and in that the learned trial judge, with great respect, went wrong in his charge to the jury) that the fire was due to the default of the occupier of the fire-hall, that is, the respondent, until the contrary was proved, but that onus was not in the charge put upon the respondent but was put upon the appellants (see *Becquet* v. *McCarthy* (1831), 2 B. & Ad. 951, Lord Tenterden, C.J. at p. 958). It is clear under the law of England—and it is the same in British Columbia—that a man is liable for so negligently keeping his fire that the house or property of his neighbour becomes damaged thereby; further, it is *prima facie* evidence of negligence when the fact is that the fire first broke out in his house, and that is the present case and the case was not so presented by the learned trial judge to the jury. The respondent had in this case to meet that exact case, and the onus was therefore upon the respondent when that fact was shewn, and it was shewn by the appellants.

MCPHILLIPS, J.A.

The respondent in not constructing the chimney in the manner required by the by-law (and they were called upon to obey its terms, as were all the inhabitants of the Municipality) committed a breach of a statutory condition (as admittedly

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the by-law was *intra vires, i.e.,* within the statutory powers of the Municipality) and its breach imports negligence (and upon this point also, with great respect, the learned trial judge erred in law in his charge to the jury) and gives a cause of action. See *Groves* v. *Wimborne* (*Lord*) (1898), 2 Q.B. 402; *Britannic Merthyr Coal Company, Limited* v. *David* (1910), A.C. 74; *Butler* (*or Black*) v. *Fife Coal Company, Limited* (1912), A.C. 149; *Watkins* v. *Naval Colliery Company* (*1897*), *Limited, ib.* 693; *Jones* v. *Canadian Pacific R. Co.* (1913), 13 D.L.R. 900; 30 O.L.R. 331; *Guardians of Holborn Union* v. *Vestry of St. Leonard, Shoreditch* (1876), 2 Q.B.D. 145; *McClemont* v. *Kilgour Mfg. Co.* (1911), 27 O.L.R. 305 at p. 315.

The present case was not left in the way that upon the evidence *McKenzie* v. *Chilliwack Corporation* (1912), 82 L.J., P.C. 22 was. There Sir Samuel Evans said, at p. 24:

> "In their Lordships' opinion the appellants in this case entirely failed to establish, or to adduce any proof, that the death of the deceased was in any way attributable to, or materially contributed to, by any negligent act or omission on the part of the respondents."

Here we have positive evidence of the negligent act of the respondent in installing the chimney in a dangerous way and against the express terms of the by-law. The respondent must be held to be liable for the condition and state of its building, and the acts of the chief of the fire brigade in charge of the fire-hall, and where, as here, there is evidence of negligence even apart from the terms of the by-law, the consequences of such negligence and the damage therefrom may be properly visited upon the respondent (*Black* v. *Christchurch Finance Co.* (1893), 63 L.J., P.C. 32).

MCPHILLIPS, J.A.

The case is one that entitles the appellants to have a new trial as, in my opinion, substantial wrong was occasioned at the trial by the learned trial judge misdirecting the jury, but even if I should be wrong in this view, there should be a new trial upon the ground that the verdict was against the weight of evidence and such that a jury could not reasonably or properly find in truth, a perverse verdict upon the evidence as adduced before them.

It follows that, in my opinion, the appeal should to the extent of granting a new trial, be allowed.

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

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

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Solicitors for appellants: *Bird, Macdonald & Co.*
Solicitor for respondent: *E. W. Bigelow.*

MERRIMAN v. PACIFIC GREAT EASTERN RAILWAY COMPANY.

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MERRIMAN v. PACIFIC GREAT EASTERN RY. CO.

Railway—Indian reserve—Animals—Gap in fence—Cow killed by train—Enclosed land adjoining—Subletting—Trespass—When "at large"—R.S.C. 1906, Cap. 37, Sec. 294; Can. Stats. 1910, Cap. 50, Sec. 8—R.S.B.C. 1911, Cap. 194, Sec. 210 (4).

The plaintiff's cow which was pastured on an enclosed area within an Indian Reservation and adjoining the defendant Company's right of way, made its way through the fence onto the right of way and was killed by a passing train. The cow was pasturing on the enclosed area by reason of a bargain made by the plaintiff with an Indian who had no authority to deal with the property. An action for damages was dismissed.

Held, on appeal, affirming the decision of CAYLEY, Co. J. (MCPHILLIPS, J.A. dissenting), that the cow was a trespasser on the enclosed area and "at large" within the meaning of section 210(4) of the British Columbia Railway Act and being at large by the wilful act of the plaintiff he cannot recover.

APPEAL by plaintiff from the decision of CAYLEY, Co. J., of the 4th of August, 1921, in an action for damages for the loss of a cow on the railway track adjoining the Capilano Indian Reserve. The facts are that one John Nesbit claimed to have leased an enclosed pasture within the reserve and adjoining the railway right of way from an Indian named Joe. Nesbit kept his cattle there and the plaintiff under arrangement with Nesbit paid him rent for the right to pasture his cow within the enclosure. The plaintiff's cow

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appears to have made its way through a hole in the fence on the south side of the enclosure onto the railway right of way where it was killed by a passing train. There was no evidence to shew that Indian Joe had any authority to lease or deal in any way with property within the Indian Reservation. The learned trial judge dismissed the action.

The appeal was argued at Vancouver on the 21st and 24th of October, 1921, before MACDONALD, C.J.A., GALLIHER and MCPHILLIPS, JJ.A.

J. Wilson, for appellant: The cow got through a hole in the fence and the Railway Company must keep it in repair: see section 172 of the British Columbia Railway Act. As to sections 210 and 211 dealing with cattle we do not come within them. We say the cow was not "at large" within section 210: see *Sporle* v. *Grand Trunk Pacific Ry. Co.* (1914), 17 Can. Ry. Cas. 71; *McLeod* v. *Canadian Northern R.W. Co.* (1908), 9 Can. Ry. Cas. 39 at p. 43. We say we were licensees as Indian Joe leased to us and said he owned the enclosure: see *Littleton* v. *M'Namara* (1875), 9 Ir. C.L.R. 417; *Robinson* v. *Vaughton* (1838), 8 Car. & P. 252; *Hupp* v. *Canadian Pacific Ry. Co.* (1914), 20 B.C. 49; *Parks* v. *Canadian Northern R. Co.* (1911), 14 Can. Ry. Cas. 247. If the animal is under physical restraint in an enclosure it is not "at large." There is no wilful omission or neglect on our part: see *Krenzenbeck* v. *Canadian Northern R.W. Co.* (1910), 13 W.L.R. 414. Even if we are not adjoining owners that is no defence: see *Carruthers* v. *Canadian Pacific R.W. Co.* (1906), 6 Can. Ry. Cas. 15. As to the maintenance of the fence by the railway see *Palo* v. *Canadian Northern R.W. Co.* (1913), 29 O.L.R. 413; *Krenzenbeck* v. *Canadian Northern R. Co.* (1910), 14 Can. Ry. Cas. 226.

Argument

W. C. Brown, for respondent: He bases his case on the fence. The mere fact that there was a fence there creates no liability on us to keep it in repair. There was no liability to fence: see *McLeod* v. *Canadian Northern R.W. Co.* (1908), 9 Can. Ry. Cas. 39 at p. 46. This was not a properly enclosed ground. What they call fences were merely a lot of brush

and logs thrown together: *Cortese* v. *The Canadian Pacific Ry. Co.* (1908), 13 B.C. 322. The case of *Dreger* v. *Canadian Northern Railway Co.* (1905), 15 Man. L.R. 386 is overruled by *Schellenberg* v. *Canadian Pacific Railway Co.* (1906), 16 Man. L.R. 154; see also *Bugg* v. *Canadian Northern Railway* (1917), 3 W.W.R. 458. The cow was trespassing. Indian Joe had no authority whatever and no person had the right to be on the reserve without permission. They were "at large": see *Anderson and Eddy* v. *Canadian Northern Rway. Co.* (1918), 57 S.C.R. 134; *Fraser* v. *Canadian Northern Railway* (1918), 3 W.W.R. 962. The learned trial judge found the cow was trespassing and it must follow she was "at large" in which case there is no liability: see *Ferris* v. *Canadian Pacific Ry. Co.* (1894), 9 Man. L.R. 501. On the liability to fence see *Westbourne Cattle Co.* v. *Manitoba & N.W. Ry. Co.* (1890), 6 Man. L.R. 553. There is no evidence the hole was in the fence before the cow got through. In case of bad fencing as to animals being at large see *Clayton* v. *Canadian Northern Railway* (1908), 17 Man. L.R. 426 at p. 437; *Becker* v. *Canadian Pacific R.W. Co.* (1906), 7 Can. Ry. Cas. 29 at p. 33; *Bourassa* v. *Canadian Pacific R.W. Co., ib.* 41; *Murray* v. *Canadian Pacific R.W. Co.* (1907), 7 W.L.R. 50; *Biddeson* v. *Canadian Northern R.W. Co.* (1907), 7 Can. Ry. Cas. 17; see also Abbott's Railway Law of Canada 403.

Argument

Wilson, in reply, referred to *Quinn* v. *Canadian Pacific R.W. Co.* (1908), 8 Can. Ry. Cas. 143 at p. 146; *Dunsford* v. *Michigan Central R.W. Co.* (1893), 20 A.R. 577; *Studer* v. *Buffalo and Lake Huron R.W. Co.* (1866), 25 U.C.Q.B. 160.

Cur. adv. vult.

10th January, 1922.

MACDONALD, C.J.A.: John Nesbit claims to have rented the land in question from Indian Joe, and to have given the plaintiff the right to pasture his cow there for a consideration. The cow got through a hole in the railway fence and was killed on the railway track by the defendant's train.

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This land which Nesbit claims to have rented from Indian

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Joe was part of the Indian Reserve, and Joe had no authority to lease or deal with it in any way. The plaintiff's cow was therefore a trespasser upon this land, and I do not think the Railway Company were bound to fence for her protection.

According to the evidence, neither Nesbit nor the plaintiff had any right to have cattle on the Indian Reserve. The cattle were therefore "at large" within the meaning of the British Columbia Railway Act, Sec. 210, Subsec. (4), and as they were so at large by the wilful act of the plaintiff, he cannot recover in this action.

Said section 210, subsection (4), is the same in effect as section 294, subsection (4) of the Railway Act, R.S.C. 1906,

MACDONALD, C.J.A.

Cap. 37, which was interpreted by us in *Hupp* v. *Canadian Pacific Ry. Co.* (1914), 20 B.C. 49, where we held under similar circumstances that the plaintiff could not succeed. I would, therefore, dismiss the appeal.

GALLIHER, J.A.

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

MCPHILLIPS, J.A.

MCPHILLIPS, J.A. would allow the appeal.

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitors for appellant: *McGeer, McGeer & Wilson.*
Solicitors for respondent: *Ellis & Brown.*

PLANT v. URQUHART *ET AL.*

MURPHY, J.

1921

April 8.

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PLANT v. URQUHART

Conviction—Confiscation of liquor ordered—Noted on summons and conviction—Second conviction inadvertently signed—Confiscation of liquor omitted—Second form filed with County Court—Appeal dismissed—Action to recover liquor—Estoppel—Barrister—Duty of counsel—B.C. Stats. 1915, Cap. 59, Sec. 83; 1916, Cap. 49, Sec. 50.

A magistrate signed a conviction declaring liquor confiscated under the British Columbia Prohibition Act after having noted the adjudication on the information. Later he inadvertently signed another form of conviction in the same case but it contained no adjudication of confiscation. The latter document, but not the first, was forwarded to the County Court on an appeal which was dismissed. The plaintiff then brought action for a return of the confiscated liquor which was dismissed.

Held, on appeal, affirming the decision of MURPHY, J. (MACDONALD, C.J.A., dissenting), that there was a valid conviction which correctly expressed the adjudication of the Court and the latter document must be viewed as a nullity and be entirely disregarded.

Per MCPHILLIPS, J.A.: Counsel upon the appeal to the County Court did not discharge his full duty in failing to call the attention of the Court to the erroneous form of the conviction on file.

APPEAL by plaintiff from the decision of MURPHY, J., in an action to recover 1213 cases of Corby's rye whisky valued at $40,000, tried by him at Vancouver on the 31st of March and 1st of April, 1921. An information had previously been laid against the plaintiff for keeping intoxicating liquor for sale. He was convicted, fined $300, or in default three months in gaol and his liquor was declared to be confiscated to the Crown under the provisions of the Prohibition Act. The magistrate properly noted the real adjudication on the information and signed a conviction to that effect. Two days later the magistrate was handed a number of papers for signature and he then inadvertently signed another conviction in the same case that did not contain any order of confiscation. An appeal was taken to the County Court and this second conviction was forwarded to the County Court instead of the first. The appeal was later dismissed. The 1213 cases of rye whisky were confiscated and the plaintiff brought this action to recover them.

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Wilson, K.C., and *D. Donaghy*, for plaintiff.
S. S. Taylor, K.C., and *A. Macneil*, for defendants.

8th April, 1921.

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MURPHY, J.: It is conceded that so long as the decision in *Canadian Pacific Wine Co.* v. *Tuley* [(1920), 29 B.C. 472 at pp. 473-5] 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 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.

From this decision the plaintiff appealed. The appeal was argued at Vancouver on the 31st of October, 1921, before MACDONALD, C.J.A., MARTIN and MCPHILLIPS, JJ.A.

Wilson, K.C., for appellant: He is not bound by his conviction until its return to the County Court. The conviction that was returned did not contain any adjudication of forfeiture. A demand for return of the liquor was refused. When a magistrate has transmitted his conviction to the County Court he is *functus officio*: see *Rex* v. *Sarah Smith* (1911), 19 Can. Cr. Cas. 253. The magistrate as a witness cannot be heard to falsify his own return. The magistrate can change his mind before conviction is filed: see *Jones* v. *Williams* (1877), 36 L.T. 559; *Ex parte Austin* (1880), 44 L.T. 102 at p. 103. Parol evidence is not admissible to change a document of record: see *Rex* v. *Carlile* (1831), 2 B. & Ad. 362

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at pp. 367-8. These memorials are the end of strife: see *Rex* v. *Porhorliuk* (1918), 43 D.L.R. 767; *Rex ex rel. Johnson* v. *James* (1918), 2 W.W.R. 994; *Commissioner of Police* v. *Donovan* (1903), 1 K.B. 895 at p. 901. The common law of the subject is dealt with in *Hartley* v. *Hindmarsh* (1866), L.R. 1 C.P. 553 at p. 556. The record creates an estoppel: see Halsbury's Laws of England, Vol. 13, pp. 322 and 334, pars. 448, 468-9; *Rex* v. *Beamish* (1901), 8 B.C. 171; *Regina* v. *Starkey* (1890), 6 Man. L.R. 588. As to the proceedings in the County Court see *Dale's Case* (1881), 6 Q.B.D. 376 at p. 463; article in 131 L.T. Jo. 40 at p. 63.

Argument

A. Macneil, for respondents: The only question is which was the real conviction? The first and proper conviction was sent to the County Court after the appeal was taken but before it was heard. The signing of the second conviction was a nullity. The magistrate was *functus officio* after signing the first. He can correct the error and did so before the hearing of the appeal: see *Reg.* v. *McAnn* (1896), 4 B.C. 587; *Regina* v. *Bennett* (1883), 3 Ont. 45; *Regina* v. *Hartley* (1890), 20 Ont. 481; *Rex* v. *Barker* (1800), 1 East 186. The minute of conviction was the real conviction: see Crankshaw's Magistrates' Manual, 3rd Ed., 314; *Ex parte Carmichael* (1903), 8 Can. Cr. Cas. 19; *Rex* v. *Crawford* (1912), 20 Can. Cr. Cas. 49.

Wilson, in reply.

Cur. adv. vult.

10th January, 1922.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The plaintiff was convicted of keeping liquor for sale contrary to the British Columbia Prohibition Act, was fined and the liquor confiscated to His Majesty. On the same day the formal conviction was drawn up and duly signed by the convicting magistrate and left with one of the police Court clerks. It appears to be the custom of the magistrate, who was very busy at that time, when disposing of a charge, to make a note upon the information of his adjudication. This he had done, noting that the prisoner had been fined $300 and the liquor confiscated. With a large number of other informations disposed of that day, the magistrate, as

was the custom, sent the one in question to one of the clerks of the police Court, whose duty it was to draw up the formal conviction. By some mistake, not explained, the clerk drew up a formal conviction in this case and with a large number of others, sent it in to the magistrate to be signed. It was so signed, and afterwards the clerk of the police Court deposited the same in the County Court, pursuant to section 83 of the Summary Convictions Act. The real conviction, the one previously signed, remained with the papers in the police Court. This second conviction, or what purported to be a conviction, was signed the day following the magistrate's signature to the real conviction. It differs from the real conviction in this, that while it purports to impose the fine, it says nothing about the confiscation of the liquor.

The accused appealed to the County Court and on search of the records of the County Court before the appeal came on, his counsel discovered the document and finding no other conviction deposited there, he offered no evidence and the appeal was dismissed.

The liquor in question is of the value of about $40,000, and it was against the confiscation of the liquor that the substantial appeal was taken. Upon the dismissal of the appeal, the solicitor of the accused demanded a return of the liquor which had been seized prior to the conviction and upon refusal brought this action for the recovery of it. The defence is the conviction confiscating the liquor.

MACDONALD, C.J.A.

Assuming for the purposes of this case that it was open to the magistrate to change his mind, even after he had signed the true conviction, the fact is he did not do so, he signed the second document without even knowing that it purported to be a conviction. The conviction never was sent by him to the County Court, pursuant to said section 83, but the false document was so sent and became a record in the County Court. Section 83 declares that

"It shall be sent to the County Court and there to be kept among the records of the Court."

That was the conviction that was before the County Court judge when he dismissed the appeal.

The defendants represent His Majesty in this appeal, and

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I think the document sent to the County Court obviously for the purposes of the appeal, estops the defendants from setting up the true conviction. The appeal should, therefore, be allowed, and an order made as prayed for the delivery of the liquor to the plaintiff.

MARTIN, J.A.

MARTIN, J.A.: In my opinion the learned judge below has reached the right conclusion. Whatever may be said of the impossibility of questioning the authenticity of the conviction (which means the original conviction), which the justice is directed by section 83 of the Summary Convictions Act, 1915, Cap. 59, to "transmit to the Court to which the appeal is . . . . given," yet that impossibility is, I think, restricted to the *quasi*-criminal proceedings in that specified Appellate Court and does not extend to these independent civil proceedings, wherein the Crown sets up in defence of what it alleges is the original true record as against the so-called one which the plaintiff relies upon but which the Crown submits is in effect a false record, as having been signed and sealed by the convicting magistrate by mistake as to its contents and in forgetfulness of the existence of a prior valid conviction which correctly expressed the adjudication of the Court, and hence the later document must be viewed as a nullity and entirely disregarded in the proceedings. This is, in my opinion, the correct view of the matter, the question not really being one of impeaching a record but of deciding the truth between two conflicting records invoked in a proceeding distinct from that in which the false document may, nevertheless, under the special statutory provisions be properly regarded as the true one. The doctrine of estoppel by record is based upon the assumption that the record relied upon is true. The case is a very peculiar one (and none of the authorities cited touches the actual point), owing to the carelessness of the magistrate who, after signing and sealing a conviction on the afternoon of the trial (July 22nd, 1920) imposing a fine of $300 and confiscating the liquor in accordance with the judgment he had delivered, nevertheless, by a strange oversight, two days later signed and sealed another conviction without reading it, in the same case, which unaccountably omitted the confiscation he had

ordered and still intended to order; and the further mistake was made of transmitting the later conviction to the County Court, the extraordinary result being that there are upon record in the County Court and in the police Court of Vancouver two different adjudications upon the same charge. Now, though it may be, as I have said, because of said statute, impossible for the respondents to impeach the record of the *quasi*-criminal appellate proceedings in the County Court, yet in other civil proceedings I am unable to take the view that they are, in such very unusual circumstances as are before us at least, estopped from proving what was, and is in fact, the true record expressing the original and unaltered decision of the convicting tribunal, and hence, upon the general principles which I applied, though happily in different circumstances, in the Prize Court in the case of *The Leonor* (1916), 3 P. Cas. 91; (1917), 3 W.W.R. 861, the second so-called conviction is in law a mere nullity—"a thing of naught"—and should be disregarded. It follows that the appeal should be dismissed.

McPHILLIPS, J.A.: This appeal cannot in any way trespass upon any of the questions of law determined by their Lordships of the Privy Council in *Canadian Pacific Wine Company, Limited* v. *Tuley* (1921), 37 T.L.R. 944, that is, it has been finally determined that the Summary Convictions Act (B.C. Stats. 1915, Cap. 59) and the British Columbia Prohibition Act (B.C. Stats. 1916, Cap. 49) are *intra vires* of the Legislature of the Province of British Columbia.

Further, where as in the present case, there was a valid conviction, there was the power to declare the liquor forfeited to His Majesty. That was also the situation in *Canadian Pacific Wine Company, Limited* v. *Tuley, supra,* and the conviction and forfeiture were sustained. In that case no appeal was taken (here an appeal was taken and dismissed) to the County Court, a procedure which was open and which I dealt with in my reasons for judgment to be found in *Canadian Pacific Wine Co.* v. *Tuley* (1921), [29 B.C. 472 at pp. 477-80]; 2 W.W.R. 433 at pp. 434-7. In my opinion the appeal having been taken to the County Court with an appeal lying to this Court there-

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from (see *Rex* v. *Evans* (1916), 23 B.C. 128), this action is incompetent as the appeal to the County Court was in its nature an appeal both upon the facts and the law (see sections 75 to 83 inclusive of Cap. 59, B.C. Stats. 1915).

The notice of appeal to the County Court was in the words and figures following: [his Lordship, after reading the notice of appeal, continued].

It would appear that when the appeal came on before the County Court, counsel for the appellant became aware then, if not before, that the conviction returned by the magistrate was not in the form of the conviction as made at the time of the adjudication, *i.e.*, it had not therein the forfeiture provision. It would seem, that through some error or inadvertence upon the part of the magistrate, the conviction returned to comply with section 83 of the Summary Convictions Act was not in form in compliance with the adjudication made, and later the conviction in proper form was transmitted to the County Court. It was stated at this bar by counsel for the appellant, that counsel for the appellant in the County Court observing that the conviction upon file in the County Court did not cover the forfeiture of the liquor, contented himself with not calling the attention of the learned judge thereto and did not urge that by reason thereof the appeal should be allowed.

MCPHILLIPS, J.A.

The conviction was, in fact, drawn up and signed in proper form and was in the terms as understood by the appellant and recited in the notice of appeal. The conviction as transmitted to the County Court was signed, it would seem, two days after the conviction in proper form had been signed. The writing (conviction as transmitted) in erroneous form was a nullity—it was not the conviction—the true adjudication of the magistrate. The most that could be said would be that some argument in the appeal in the County Court might have been founded upon it, and that for the purposes of the appeal it would have to be deemed to be the conviction made, an argument, however, not made or ventured to be made; an argument which, to me, would be but idle argument. The erroneous writing so transmitted could be well defined in the language of the Divisional Court of Ontario, in *McLeod* v. *Noble* (1897), 28 Ont. 528

at p. 548, as "a thing of naught." (Also see *De Geneve* v. *Hannam* (1830), 1 Russ. & Myl. 494, Vice-Chancellor Shadwell, "a mere nullity," and see *The Leonor* (1916), 3 P. Cas. 91, MARTIN, J. at pp. 101, 103, 104, 108; and *In re Robert Evan Sproule* (1886), 12 S.C.R. 140). Nothing being said in the County Court upon the appeal to that Court—as to the spurious conviction there filed—the attempt now is by means of this action to succeed upon the ground that the effect of the filing of the erroneous conviction precludes reference to the conviction in any other form, that is, that a false conviction must be read as the true conviction. No authority is cited for this astounding proposition, and it is not to be wondered at, as authority for fundamental error is a rarity.

It is a matter for remark that counsel upon the appeal to the County Court did not discharge his full duty, I regret to say, in not calling the attention of the learned judge to the form of the conviction upon file—erroneous in form. I observed upon this during the argument of the appeal at this bar. The learned judge in that Court, in dismissing the appeal, proceeded upon a conviction declaring forfeiture of the liquor. It is now submitted in this Court that the conviction containing the declaration of forfeiture cannot be looked at. I expressed my disapproval of the course adopted by counsel in the County Court, and referred, as I do now, to what was said by the Lord Chancellor (Lord Birkenhead) in *Glebe Sugar Refining Company, Ltd.* v. *Trustees of the Port and Harbours of Greenock* (1921), W.N. 85 at p. 86, owing to its very instructive nature.

MCPHILLIPS, J.A.

It is clear that the language of the Lord Chancellor is comprehensive of what occurred here. The learned judge in the County Court should have been advised of the erroneous form of the conviction as transmitted to that Court. The submission to this Court that, in that erroneous form only, can the conviction be looked at, and that this appeal should succeed and that it be decided that no forfeiture of the liquor is sustainable, is an untenable contention. It would be a travesty of the law if this would of necessity have to be the determination of this Court.

It was strongly pressed that there is estoppel here. I cannot see that there is any form of estoppel. Co. Litt. 352 (a):

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"Estoppel is when one is concluded and forbidden in law to speak against his own act or deed, yea, though it be to say the truth." (Termes de la Ley, tit. Estoppel, cited in *Ashpitel* v. *Bryan* (1863), 3 B. & S. 474, 489; *Simm* v. *Anglo-American Telegraph Co.* (1879), 5 Q.B.D. 188, C.A. *per* Bramwell, L.J., at p. 202).

But it has been held:

"Estoppel is only a rule of evidence; you cannot found an action upon estoppel":

Lowe v. *Bouverie* (1891), 3 Ch. 82, *per* Bowen, L.J. at p. 105; and see *per* Lindley, L.J. at p. 101. *In re Ottos Kopje Diamond Mines, Limited* (1893), 1 Ch. 618, *per* Bowen, L.J. at p. 628; and see *Dickson* v. *Reuter's Telegram Company* (1877), 3 C.P.D. 1; *Harriman* v. *Harriman* (1909), P. 123, *per* Farwell, L.J. at p. 144.

The true conviction has been given in evidence in the action, and there is nothing that creates estoppel of record by deed or matter *in pais*—the false record transmitted to the County Court can be of no embarrassment in the Supreme Court or in this Court.

Then it was pressed at this bar that the situation was one of *res judicata,* by reason of what happened in the County Court. I must say that I cannot follow this argument. With deference, the *res judicata,* if it exists at all, is in favour of the respondents, as upon the record in the County Court the appeal from the conviction and forfeiture stood dismissed, and from that point of view it might well have been urged upon the part of the respondents to this appeal that the action was frivolous and vexatious and should have been stayed (*Stephenson* v. *Garnett* (1898), 1 Q.B. 677).

MCPHILLIPS, J.A.

It is clear to me that the action is not maintainable. The conviction, which includes the forfeiture, is unassailable. There was an appeal to the County Court, an appeal upon the facts and upon the law, and that appeal stood dismissed, and although there was a further appeal therefrom to this Court, no appeal was taken. The mere statement of the history of the proceedings had and taken establishes that this action offends against all the recognized precedents determinative of litigious proceedings. There is here an attempt to reagitate questions that have been finally determined, the appellants, in my opinion,

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are concluded by the existent and upheld conviction and forfeiture.

I therefore am satisfied that the learned trial judge arrived at the right conclusion in dismissing the action, and for the foregoing reasons I would dismiss the appeal.

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

Solicitor for appellant: *A. Whealler.*
Solicitor for respondents: *A. Macneil.*

McKINNON AND McKILLOP v. CAMPBELL RIVER LUMBER COMPANY LIMITED.

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Timber limits—Sale—Agreement between vendor and subsequent purchaser —Payment under—Failure of consideration—Right of recovery.

M.'s price for his timber limits was $165,000. The defendant Company wanted the limits but not having the money to purchase interested R. who offered to purchase for $230,000 provided 800 shares in another company be accepted as $90,000 of the purchase price. M. and the Company (which required working capital) then entered into an agreement that M. should accept R.'s offer, pay $65,000 to the Company and the Company would later take over the 800 shares of stock at $85,000. The sale from M. to R. was carried out and M. paid the Company $65,000. R. then sold the limits to the Company giving the necessary delay for payment and the Company proceeded to work the limits. Later the Company assigned for the benefit of its creditors. M. sold his interest in the agreement to K. who brought action to recover the amount agreed to be paid for the 800 shares and the action was dismissed as the purchase of the shares was *ultra vires* of the powers of the Company. K. then brought action to recover the $65,000 paid by M. to the Company which was dismissed on the ground that there was but one agreement of which the $65,000 payment was a part and there was only partial failure of consideration in the Company failing to take over the 800 shares of stock.

Held, on appeal, reversing the decision of GREGORY, J. (MACDONALD, C.J.A. dissenting), that the $65,000 sued for is money payable by the respondent to the appellants by reason of an extraneous transaction, and

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further, that the money was used to pay indebtedness of the corporation. The shares were always held by the appellants merely as security and the position on the determination that the holding of shares was *ultra vires* of the Company was as if the contract had never been made and the sum so paid by the appellants to the respondent should be returned.

Statement

APPEAL by plaintiffs from the decision of GREGORY, J., of the 12th of May, 1921, in an action to recover from the defendant Company $65,000 paid by the plaintiff McKillop to the defendant Company in connection with the sale of certain timber licences. The facts are that the defendant Company of which H. W. Hunter was president and F. G. Fox a director, wished to acquire the limits in question from the owner McKillop whose purchase price was $165,000. The Company did not have the funds on hand to make the purchase but Hunter interested one D. C. Rounds of Wichita, Kansas. Rounds would not enter into a deal unless he could give as $90,000 of the purchase price 800 shares that he held in the North American Lumber Company of Maine, and an arrangement was made in March, 1915, whereby McKillop was to sell to Rounds for $230,000, McKillop to accept the stock of the North American Lumber Company of Maine as $90,000 of the purchase price and the Campbell River Lumber Company were to later repurchase the said stock from McKinnon at $85,000 and McKillop, upon receiving the cash portion of his purchase price, was to advance therefrom to the Company $65,000, the Company requiring this sum for carrying on its operations. The Company at the same time arranged with the said Rounds to take over the limits, he giving them the necessary delay for payment therefor. When discussing terms McKillop wanted a mortgage on the assets of the Company as security for the $65,000 payment but Hunter pointed out that this would injure the credit of the Company and McKillop agreed to the arrangement of the Company taking over the stock of the North American Lumber Company of Maine. McKillop received $140,000 from Rounds and in pursuance of the agreement paid the defendant Company $65,000. Later McKillop assigned all his interest in the agreement in question to the plaintiff McKinnon. The defendant Company

after obtaining possession of the limits from Rounds operated until December, 1915, when the Company made an assignment for the benefit of its creditors. McKinnon filed a claim for $108,141 being the amount agreed to be paid for the shares on the North American Lumber Company of Maine, the market value of which had dropped to about $20,000. The claim was disputed and McKinnon brought action to establish the claim but it was dismissed on the ground that the purchase of the shares was *ultra vires* of the powers of the defendant Company. The plaintiffs in this action claim that the payment of the $65,000 was made in consideration of the taking over of said shares by the Company, the Company having repudiated the purchase of the shares and it having been declared *ultra vires* of its powers that the consideration for making the payment of $65,000 had wholly failed and the plaintiffs are entitled to recover said sum. It was held by the trial judge that the whole transaction was one agreement; that the defendant Company not having taken over the shares was only partial failure of consideration and the action should be dismissed.

Statement

The appeal was argued at Vancouver on the 24th, 25th and 28th of November, 1921, before MACDONALD, C.J.A., McPHILLIPS and EBERTS, JJ.A.

Martin, K.C., for appellants: The $65,000 was received by the Company. Assuming it was an *ultra vires* engagement they entered into they must account for this money had and received: see Brice's Ultra Vires, 3rd Ed., 641 *et seq.*; *Moses* v. *Macferlan* (1760), 2 Burr. 1005. When an agreement is *ultra vires* the parties go back to where they were. The Court can relieve against a mistake in law: see *Stone* v. *Godfrey* (1854), 5 De G.M. & G. 76; *O'Brien* v. *Knudson* (1919), 27 B.C. 492; *Re Saxon Life Assurance Society* (1862), 2 J. & H. 408; *Royal Bank of Canada* v. *Regem* (1913), A.C. 283 at p. 298.

Argument

S. S. Taylor, K.C., for respondent: There was no transaction of loan at all. It was neither raised in the pleadings nor on the trial. They got what they bargained for and there is no cause of action: see *Lambert* v. *Heath* (1846), 15 M. &

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W. 486; *Lawes* v. *Purser* (1856), 6 El. & Bl. 930; *Begbie* v. *Phosphate Sewage Co.* (1875), L.R. 10 Q.B. 491 at pp. 499-500; (1876), 1 Q.B.D. 679. The statement of claim alone is sufficient for us as it neither alleges a loan nor that the $65,000 was theirs. It was paid in pursuance of the contract: see *Anglo-Egyptian Navigation Company* v. *Rennie* (1875), L.R. 10 C.P. 271 at p. 284. As to total failure of consideration see Halsbury's Laws of England, Vol. 7, p. 483; *Whincup* v. *Hughes* (1871), L.R. 6 C.P. 78 at pp. 81 and 85.

Argument

Craig, K.C., on the same side: If it had been suggested at the trial that this was a loan we would have conducted our case in an entirely different way.

Martin, in reply: The learned judge was in our favour on conflict of evidence and if it was not our money how would a question of mortgage arise?

Cur. adv. vult.

10th January, 1922.

MACDONALD, C.J.A.: I would dismiss the appeal for the reasons given by the learned trial judge.

I think there was but one transaction and that it was agreed before the sale was made to Rounds that the extra $65,000 added to the plaintiff's price should go to the defendant Company; that plaintiff should accept the shares as part payment from Rounds and that the Company should agree to take them over.

MACDONALD, C.J.A.

When the parties went to Mr. Carter to have this part of the agreement put in writing and secured by mortgage on the mill, the mortgage was not to be a security for money then paid over, but was to secure performance of the purchase agreement of the shares. It is only necessary to read what plaintiff himself says on this matter. The whole trouble arose from the fact that the Company has no power to purchase shares in another company. If the payment of the $65,000 could be separated from the rest of the transaction, there would have been a total failure of consideration for its payment, but it is evident that it was a part of the earlier transaction.

The appeal should be dismissed.

McPHILLIPS, J.A.: This appeal presents phases of complexity when first approached, but all complexity vanishes when the salient point is kept in view, and that is that the sale of standing timber was only possible of being effected if the sale could be financed and the financing of the same was done in a somewhat circumlocutory way.

In the carrying out of the transaction the sale was first made to one Rounds, and then from Rounds to the respondent. I do not propose to deal in detail with all that took place, as much of it is extraneous to the real matter at issue in this action, all resolving itself into admittedly one point. The appellants were entitled to a sum of $65,000, being a part of the purchase price of the property, and which sum was payable by the respondent to the appellants. That can be said to be common ground. When the situation was that, and indisputably that, an agreement was entered into which, if carried out, would have brought about the payment of the $65,000 and also discharged a further sum due and owing of $25,000, *i.e.*, $85,000 was to be accepted in full discharge of an amount due in the whole of $90,000. That which forms the subject-matter of this action is confined to the balance of the purchase-money, *viz.*, $65,000. The $65,000, it is true, was to constitute working capital for the respondent but that did not mean that it should never be paid to the appellants. In the *interim* of time the appellants were holding 800 shares of the capital stock of the North American Lumber Company as security for the $25,000, and as well it might be said as security for the $65,000, but the shares were not the shares of the appellants—they were the holders thereof as trustees for the respondent. In short, it may well be said upon the facts that the balance of the purchase-money coming from the respondent to the appellants, *i.e.*, the $65,000 was a loan made by the appellants to the respondent extraneous to and apart from the sale transaction altogether, when it is properly viewed. This sum of $65,000 was to be retained as working capital by the respondent but it was, nevertheless, money of the appellants, being admittedly a portion of the sale price of the property sold, and the agreement was that

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its repayment was to be secured by the respondent to the appellants by the execution of a mortgage upon the property sold. When matters were at this stage and when the appellants were pressing for the mortgage, then it was that the respondent pointed out that the giving of a mortgage would destroy the commercial credit of the respondent. After some negotiations it was then agreed upon that a contract should be entered into whereby the shares above referred to would be taken over by the respondent at $85,000 within four years. The contract was in the following terms: [after setting out the contract his Lordship continued].

Whilst the appellants had taken the shares from Rounds in the carrying out of the sale, unquestionably the appellants held the shares as trustees for the respondent and were not the beneficial owners of the shares, and had the shares become of great value and in excess of the amount due by the respondent to the appellants that excess would undoubtedly have been payable by the appellants to the respondent, that is, if same were realized upon. The shares were always held and only held as a security —then it was that the above contract was made. What the appellants were entitled to was a mortgage upon the property, and if the mortgage had been given would not the consideration therefor, namely, the $65,000, have been due and payable at the end of the four years (as that was to be the term thereof, the $65,000 in the meantime forming the required working capital)?

MCPHILLIPS, J.A.

The evidence conclusively establishes that the $65,000 was an admitted amount due by the respondent to the appellants; it is part of the purchase price and without it being paid the appellants will have had taken from them the property sold without receiving the full purchase price.

Now, if the contract had not been *ultra vires* of the corporation, *i.e.*, in excess of the corporate powers of the respondent, all might have been well, but it was so determined in an action brought to enforce the contract, therefore in the result it is as if the contract had never been made, and as the contract was made in the year 1914 the term of credit, the four years, having elapsed, it follows that the amount is due and payable by the respondent to the appellants.

With great respect, I cannot follow or agree with the view of the learned trial judge that the case is one of a partial failure of consideration and that there can be no relief accorded. The sale transaction was finally concluded. The $65,000 sued for is money payable by the respondent to the appellants by reason of an extraneous transaction. The procedure adopted to admit of the working capital being available to the respondent does not sweep the $65,000 into the sale transaction, it stands out separate and distinct therefrom. To visualize it clearly, the $65,000 was paid in cash by the respondent to the appellants, thereby fully completing payment of the total purchase price going to the appellants, and the appellants advanced the $65,000 to the respondent—the respondent to use the same as working capital, but not in a venture in which the appellants were in any way concerned, and what the appellants were to receive was a mortgage upon the property sold which would have been a sound security. This was changed to the contract providing for the purchase of the shares, held later to be an illegal contract and valueless. The amazing contention though, is (and I say this with the greatest respect to all contrary opinion), that because of the invalidity of the contract the debt is paid. This certainly is a most surprising result if it can be said to be the result in law. Rather should it be said that it merely leaves the parties where they were originally, and that was that the respondent had $65,000 of the appellants which they were to secure by a mortgage on the property sold, the mortgage to be payable in four years, and at its maturity, of course, it would have been payable, and such a mortgage would have been a valid mortgage.

MCPHILLIPS, J.A.

The submission is, upon the part of the respondent, that the invalid contract constitutes payment of the debt. If not in terms, that is the effect of the contention. Any such contention affronts one and cannot, in my opinion, be given effect to, as it would be subversive of all fair dealing, and certainly is unsupportable by any authority that I am conversant with, and it indeed would be surprising if any authority could be cited to support any such astounding proposition. The commercial position of the respondent was one of financial embar-

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rassment in carrying on, and money was wanted to tide the respondent over; a mill had been built and timber land was desired. The course adopted cannot be said to be one that can be approved but yet there is no issue of fraud raised or any finding of that nature, or such a state of facts as really calls for or entitles the Court to refuse relief in the action. The scheme worked out, as the respondent upon its own evidence shews was to purchase the property through a sale being first made to Rounds for $230,000, $135,000 of the $230,000 to be the purchase price to go to the appellants and the shares above referred to were at that time the shares of Rounds and he would not carry out the transaction unless they were taken into consideration as part of the purchase price, but the appellants were not willing to take the shares as part payment, but were willing to take a mortgage upon the property sold for the balance of the purchase price, namely, $65,000. The shares in the meantime were to be held in the name of one of the appellants—in the name of McKillop. The shares were originally held in the name of Mrs. Rounds, and were said to be of the value of $80,000 and in the sale the shares were treated as of that value to be held by McKillop for the respondent. Unless the shares were taken as part of the purchase price the transaction could not go through and the respondent agreed to this, and if so taken Rounds would finance the transaction and this was all at the instance of the respondent. In the course of the transaction the respondent said that as to the shares it would guarantee their value or take them off the hands of the appellants at the guaranteed value—in fact, it was so agreed. In the carrying out of the matter the appellants paid to the respondent the $65,000, which is the amount sued for in this action. One cogent matter of evidence to shew that the appellants were to be secured in the repayment of the $65,000 by the respondent to them, is the clause in the contract which provides that the respondent would not sell, mortgage or dispose of the lumber mill or premises until the $85,000 and interest should be fully paid, unless consented to in writing by McKillop. The $65,000 was used by the respondent to pay indebtedness of the corporation.

MCPHILLIPS, J.A.

It is to be observed that the learned trial judge accepted the evidence of McKillop, one of the appellants, as being credible evidence, and proceeded wholly upon a point of law in dismissing the action. Further, the learned trial judge held that:

"The payment of the $65,000 to the Company was never intended by anyone to be a commission for a sale to Mr. Rounds, but was the Company's scheme to get some working capital out of Rounds. The defendant Company is unable to carry out a portion of its agreement and it seems perfectly clear that there has only been a partial failure of consideration and the usual principle of law must apply."

Later on in his reasons for judgment the learned trial judge said:

"There being only one agreement, a partial failure of the consideration does not enable the plaintiff to recover back a portion of what he parted with."

That which the plaintiffs, the appellants, parted with as referred to by the learned judge is the amount sued for in the action, namely, the $65,000.

The corporation, the respondent, would appear to have been in financial difficulty after the happenings here set forth and made an assignment, but has apparently relieved itself of this situation and is again a going concern, so that nothing requires attention upon this score as to whether there can be liability imposed. That there is the requirement to repay moneys advanced and used to pay indebtedness of the corporation cannot, in my opinion, upon the facts of the present case, be gainsaid, and I would refer to Brice on Ultra Vires, 3rd Ed., pp. 641 to 650. Paragraph 259A, at p. 650, reads as follows:

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"259A. But a corporation is liable in respect of an *ultra vires* engagement only to the extent of the benefits it may have received therefrom."

Here there can be no question and it is not contested that the $65,000 went to the benefit of the corporation (see *In re Cork and Youghal Railway Co.* (1869), 4 Chy. App. 748; *In re Exmouth Docks Company* (1873), L.R. 17 Eq. 181; *Blackburn Building Society* v. *Cunliffe, Brooks, & Co.* (1882), 22 Ch. D. 61; (1884), 9 App. Cas. 857 and *Baroness Wenlock* v. *River Dee Company* (1887), 19 Q.B.D. 155; *Ex parte Chippendale, Re German Mining Co.* (1854), 4 De G.M. & G. 19; *The Bank of Australasia* v. *Breillat* (1847), 6 Moore, P.C. 152; *Sinclair* v. *Brougham* (1914), A.C. 398, Lord

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Parker of Waddington at pp. 440-1; and see *Royal Bank of Canada* v. *British Columbia Accident, &c. Insurance Co.* (1917), 24 B.C. 197).

I see no difficulty whatever in according the relief claimed in this action. The $65,000 is an amount due by the respondent to the appellants and no injury is imposed upon the corporation in any way. The moneys were used to pay the indebtedness of the Company; this is admitted upon the evidence. The moneys went to the credit of the corporation upon its own shewing, being paid into the Bank of Montreal to the credit of the corporation and paid out in the discharge of indebtedness of the corporation. Upon this state of admitted facts how is it possible to hold otherwise than that it is a liability that must be discharged? The law is perfectly clear upon the point, it is idle to attempt to evade payment by setting up that the contract was *ultra vires*. That merely leaves the position as it was originally and that was the advance by way of loan by the appellants to the respondent of $65,000, which must be repaid. The action, in my opinion, was well founded, the judgment of the Court below was wrong, and judgment should be entered for the appellants for the amount claimed, the appeal to be allowed.

EBERTS, J.A.

EBERTS, J.A. would allow the appeal.

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

Solicitors for appellants: *Martin & Murray.*

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

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Banks and banking—Promissory note—Given bank manager to swell assets of bank—Promise of no liability—Consideration—Insolvency of bank—Action by receiver to recover on note—Estoppel.

The defendant gave a promissory note to the manager of a bank in the State of Washington knowing that it was to be used for the purpose of deceiving the bank examiner as to the bank's assets. There was no consideration for giving the note and he received from the bank manager a written acknowledgment that there would be no liability in connection with it. The defendant subsequently renewed the note at the request of another manager who acknowledged in writing that the renewal was taken under the arrangement with the former manager. The bank subsequently became insolvent. On the bank commissioner acting under statutory powers of the State as receiver bringing action in British Columbia on the note it was held that he was entitled to recover.

Held, on appeal, affirming the decision of MACDONALD, J. (MACDONALD, C.J.A. dissenting), that upon the insolvency of the bank the defendant was estopped from pleading want of consideration and was liable on the note.

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 acted differently in his subsequent action had such note not been in existence, did not affect the defendant's liability.

APPEAL by defendant from the decision of MACDONALD, J. of the 28th of February, 1921, reported in 29 B.C. 323, in an action on a promissory note for $10,189.14. The defendant who is a doctor of medicine, formerly practised his profession in Vancouver, B.C., where he was on friendly relations with one W. R. Phillips, who later moved to Seattle where he became president of the Northern Bank and Trust Company. In 1914, the defendant was induced by Phillips to move to Seattle and practise his profession there. Shortly after moving to Seattle Phillips asked the defendant to sign a note to the bank for $10,000. The defendant signed the note on the 24th of December, 1914, and Phillips gave him back a memo as follows: "Received from Dr. N. Allen a note of Ten thousand held Re Issaquah Superior Coal Co. The Bank

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agrees that there is no liability of any kind pertaining to said note," which was signed "Northern Bank & Trust Co. W. R. Phillips, Pres." Shortly after this Phillips was succeeded by one W. L. Collier as president of the bank and on the 22nd of September, 1915, Collier asked the defendant to renew the $10,000 note. This he did, and Collier endorsed on the letter of indemnity which the defendant had received from Phillips when he signed the $10,000 note, the following words "Renewal of this note taken under agreement hereinabove mentioned." There was no consideration for the giving of the note or for the renewal thereof. Subsequently $3,000 appears to have been paid on the note by a third party and $7,521 and interest was due on the note as renewed when the bank became insolvent in January, 1917, and the bank examiner took possession of the assets. A writ was issued on the note by the bank commissioner in November, 1920, for $10,136.09. The learned trial judge gave judgment for the plaintiff.

The appeal was argued at Vancouver on the 2nd, 3rd and 4th of November, 1921, before MACDONALD, C.J.A., GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Argument

Craig, K.C., for appellant: The learned judge below found there was no consideration but said the defendant was estopped from setting up that defence. The transaction took place in Washington State and the law of that State applies to this case. Where a note is given and a memo taken back of this nature it must be for the purpose of deception but the bank examiner admitted on examination that it would not have altered his action if the note had not been there.

[MACDONALD, C.J.A.: A witness as to the American law should not refer us to cases with a view to our finding the law from them. It is his duty to tell us the law.]

As to the application of the foreign law see *Bremer* v. *Freeman* (1857), 10 Moore, P.C. 306 at p. 307; *Di Sora* v. *Phillipps* (1863), 10 H.L. Cas. 624 at p. 640.

A. Alexander, for respondent: The proper evidence of foreign law is the evidence of a lawyer of that country: see *Concha* v. *Murrieta. De Mora* v. *Concha* (1889), 40 Ch. D.

543 at p. 550. That the defendant is estopped from pleading want of consideration see *Dixon* v. *Kennaway & Co.* (1900), 1 Ch. 833 at pp. 841-2. The American cases on this point are *Moore* v. *Kildall* (1920), 191 Pac. 394; *Golden* v. *Cervenka* (1917), 116 N.E. 273 at p. 281; *Lyons* v. *Benney* (1911), 79 Atl. 250 at p. 251. The case of *Ogilvie* v. *West Australian Mortgage and Agency Corporation* (1896), A.C. 257 is decided on a point that does not arise here. In this case there is a conspiracy on public policy. A promissory note valid on its face as given for a consideration. He is in full possession of the facts and aids in the commission of a fraud and is therefore estopped from pleading the agreement that there was to be no liability: see *Pauly* v. *O'Brien* (1895), 69 Fed. 460; *Barto* v. *Nix et al.* (1896), 46 Pac. 1033; *Ewing* v. *Dominion Bank* (1904), 35 S.C.R. 133 at pp. 154-5.

Argument

Craig, in reply referred to *Egbert* v. *National Crown Bank* (1918), A.C. 903 at pp. 908-9.

Cur. adv. vult.

10th January, 1922.

MACDONALD, C.J.A.: The transaction between the defendant and Phillips, the manager of the bank, when defendant gave the note and took back the letter that the note was to create no liability, is otherwise so senseless, that the only reasonable inference is, that it was entered into for the purpose of making a false appearance of assets of the bank. The learned judge does not in express terms find fraud on his part. He evidently took the more charitable view that the defendant did not apprehend what he was doing, but apart from the letter and independently of it, it has been proven that the transaction was a voluntary one, that is to say, the defendant received no consideration for the note. It was therefore a *nudum pactum,* and the question is, whether the plaintiff, who holds the office under the laws of the State of Washington known as bank commissioner, and who, in pursuance of his duty in that behalf, closed the bank and is administrating its assets for the benefit of those entitled thereto, can maintain this action. The onus is upon him to shew that he is in a more favoured position than an ordinary receiver, and he has attempted to satisfy this

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onus by giving evidence by an expert witness of the laws of the State of Washington, governing the construction of this contract. A witness was also called of the same character by the defendant, but in the last analysis the question is one of estoppel. The onus was upon the plaintiff to shew that he suffered a loss by reason of the existence of this apparent asset. The only thing which is suggested is that the bank could have been closed at an earlier time than it actually was closed. Estoppel *in pais* arises when it is proved that a representation has been made with the intention that it should be acted upon; that it was false to the knowledge of the party making it, that the party to whom it was made believed it to be true and acted upon it to his prejudice. It is a question of evidence and therefore one where the law of the forum applies.

Now the plaintiff himself gives no evidence as to what effect the absence from the assets of the bank of $7,500, the amount remaining unpaid on the note, would have had on the decision to close the bank in September, 1916, when it may be said to have become a matter for discussion. Mr. C. S. Moody, who was the bank's examiner and the plaintiff's predecessor in office, under a different title in September, 1916, was called and gave evidence which was finally summed up in these words:

"Now, if the assets had been $7,500 less by reason of that note not having been exhibited to you, will you swear that you would have done anything more than you did do? No, I don't think I would."

MACDONALD, C.J.A.

It is not suggested that any one ever saw or was aware of the existence of the note other than the plaintiff or his predecessor in office and the bank officials, so that the note did not influence the customers of the bank. In these circumstances, the existence of the note made no difference whatever in the course pursued by the bank examiner or commissioner, and did not prejudice either the bank or the bank's creditors or depositors.

The onus of proving all the elements necessary to make a complete estoppel is upon the plaintiff, and in this case he has entirely failed to shew any prejudice by reason of the giving of the note. If the note had not been given plaintiff would have been in the same position precisely as he is in today.

The element of prejudice necessary to an estoppel is therefore wanting.

I would allow the appeal.

GALLIHER, J.A.: The only point upon which I entertain some doubt is whether one of the essentials necessary to raise estoppel, *viz.*, whether the plaintiff acted upon the representation of the defendant to the prejudice of the creditors, is present here. The evidence upon this point is not as clear as it might be, but I think it can fairly be gathered from same that he did. That being the case, and the learned judge below having taken that view, I am not prepared to say he is in error. If, then, estoppel is rightly set up, and as I think want of consideration is the only substantial defence which defendant had to this action, it follows that the appeal should be dismissed.

GALLIHER, J.A.

I have some regret in coming to this conclusion on account of the unfortunate position the defendant finds himself by trusting too much in his friends.

MCPHILLIPS, J.A.: In my opinion the judgment of Mr. Justice MACDONALD should be affirmed and the appeal dismissed.

The case is one which must be decided upon the law of the State of Washington, and the evidence given and the authorities quoted by the learned witnesses, being members of the bar of that State, leave no doubt upon my mind that the plaintiff in the action, the bank commissioner, has a *status* very different to that which the Northern Bank and Trust Company would have had, had it been the plaintiff—not that I am prepared to say that the bank would have necessarily failed if it had been the plaintiff. The evidence discloses, in my opinion, a palpable case of fraud—it is idle contention upon the part of the appellant to put any other complexion upon the transaction—it was the case not only of giving one promissory note, but the renewal of it at a lesser amount, a payment on account being shewn, yet it is contended that throughout there was no liability, the attempt to escape liability being put upon the ground that officers of the bank so contracted and agreed. The very manner of carrying out the

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transaction indicates the intent to put in the hands of the bank negotiable paper for use in the way of banking and to be used for the benefit of a customer of the bank. The learned trial judge well indicates the state of mind of the defendant when he quotes in his judgment an excerpt from a letter of the defendant to the State bank examiner. It was not the case of no thought of the effect of giving negotiable paper that would by any possible circumstance deceive, but an appreciation that it might deceive. He wrote:

"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."

It is clear that the defendant knew the possible result of things and nevertheless took the chances, and now he must be visited with the responsibility he took. He has no possible legal escape. It would seem to me that *Lyons* v. *Benney* (1911), 79 Atl. 250, and *Pauly* v. *O'Brien* (1895), 69 Fed. 460-1, well indicate the principle of law which controls in the State of Washington, and which must be given effect to here. Shortly, the bank commissioner is not incommoded in the slightest degree by the claimed indemnity from the officers of the bank. It would be a fraud upon the creditors of the bank to so hold and, as I read the law, and as expounded by the legal witnesses, liability is clearly imposed upon the defendant upon the true reading of the controlling cases.

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The learned counsel for the respondent referred to two very recent cases bearing upon the point requiring consideration that would seem to still further accentuate the position that upon the facts of this case there is liability upon the defendant, one case being that of *Moore* v. *Kildall* (1920), 191 Pac. 394, a decision of the Supreme Court of Washington. The judgment was that of Mr. Justice Mount, concurred in by Holcomb, C.J., Fullerton, Tolman and Bridges, JJ., and quoting from the head-note, we find this statement:

"One giving a note as 'live paper' to make an appearance of assets so as to deceive the bank examiner is estopped, on the insolvency of the bank, to allege want of consideration."

The present case is exactly that upon the facts. The defendant gave "live paper" to make an appearance of assets in

connection with the account of the Issaquah Coal Company, and appreciated that he was doing this, as is well indicated by the quotation from his letter hereinbefore quoted.

The other case referred to is *Golden* v. *Cervenka* (1917), 116 N.E. 273, a decision of the Supreme Court of Illinois, and at p. 281, Mr. Justice Dunn said:

"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 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."

It was admitted by counsel at this bar that the case had to be determined by the law of the State of Washington. That being the case, I do not find it necessary to further pursue the enquiry or to in detail refer to many of the cases cited. The appeal is in small compass. If there is estoppel, the defendant cannot be heard to say that the promissory note was given without consideration.

Then as to the claimed indemnity. That is valueless when the action is as here, the action of the bank commissioner in the interests of creditors, as held in the *Pauly* case, *supra,* p. 461:

"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."

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The present case is one that exactly fits into the above statement of the law, and it would appear to be a statement which has the force of law in the State of Washington.

I do not find it necessary to travel further afield and analyze the matter at any greater length. The case resolves itself into the determination of whether the defendant is or is not liable upon the promissory note sued upon, and that liability must be determined upon the existent law of the State of Washington. One must always feel some hesitancy in deter-

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mining a question of this nature where there is any contestation or variance of view upon the part of the witnesses qualified to testify, but applying my mind to that determination, I cannot in the end see any real divergence of view when the special facts of this case are weighed. In truth, in my opinion, there can be only one answer and that is, that the defendant is liable, and further, it is a matter of gratification to have the support of learned judgments defining the state of the foreign law, *i.e.*, the law of the State of Washington, which carry out true principles of justice. It would be unconscionable, upon the facts of the present case, to admit of the defendant escaping liability.

EBERTS, J.A.

EBERTS, J.A. would dismiss the appeal.

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

Solicitors for appellant: *Craig & Parkes.*
Solicitors for respondent: *Tiffin & Alexander.*

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FREY v. FLOYD.

Vendor and purchaser—Mutual mistake—Parol evidence of—Purchaser's knowledge — Rectification — Specific performance of agreement as rectified.

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The defendant purchased certain lands from the plaintiff by agreement for sale, and on making default in payment of an instalment due in October, 1920, raised objections to going on with the agreement on the ground that he had bought the property not understanding that there was any reservation of coal rights as contained in the original conveyance from the Esquimalt and Nanaimo Railway Company to the plaintiff. In an action for rectification of the agreement for sale and for specific performance of the agreement as rectified it was held that on the evidence the defence of not being aware of the coal reservation in the grant from the Esquimalt and Nanaimo Railway was not available and the plaintiff was entitled to judgment.

Held, on appeal, affirming the decision of HUNTER, C.J.B.C. (MACDONALD, C.J.A. and MARTIN, J.A. dissenting), that there was evidence upon

which the finding could reasonably be made that the appellant had notice of the reservation contained in the conveyance from the railway company and the plaintiff was entitled to rectification.

Held, further, that a decree for rectification of a written agreement and that the agreement as rectified be specifically performed may be made in one and the same action.

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APPEAL by defendant from the decision of HUNTER, C.J.B.C. in an action tried by him at Nanaimo on the 1st of June, 1921, for the correction of an alleged mutual mistake in a written contract of the 29th of October, 1919, between the plaintiff and defendant for the sale to the defendant of 25 acres of land in Cranberry District, Vancouver Island. The land in question had been sold to the plaintiff by the Esquimalt and Nanaimo Railway Company subject to certain conditions, exceptions and reservations contained in the conveyance which included coal, petroleum and base metals. The reservations in the agreement of the 29th of October, 1919, which was in the ordinary printed form did not include coal, petroleum and base metals. The plaintiff claimed that the agreement should be rectified by inserting therein a clause that the conveyance be subject to the conditions, exceptions and reservations contained in the conveyance from the railway, and for the enforcement of the agreement as corrected. The further necessary facts are set out fully in the judgment of the learned trial judge.

Statement

A. Leighton, for plaintiff.
Cunliffe, for defendant.

HUNTER, C.J.B.C.: This is an action for the rectification of an agreement for sale, requesting that it be amended to include in it, in addition to the other matters reserved in the agreement for sale, a reservation of the same character as is contained in the original conveyance of the lands of the Esquimalt and Nanaimo Railway Company; and it is also an action to enforce payment of an instalment which is due under the agreement of October, 1919. The defendant made default in payment of this instalment and then raised objections to going on with the agreement on the ground that an order had been made vesting the property in the official custodian apparently

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on the hypothesis that the owner was an alien enemy. He also raised an objection to the title on the ground that there was a reservation about the timber. These matters were cleared up. The vesting order was cancelled and the timber reserve was cleared up and then he rested upon a contention that he had bought the property not understanding that there was any reserve in favour of coal rights as contained in the original conveyance from the Esquimalt and Nanaimo Railway Company. With respect to this latter matter, I do not think that the defence is available to the defendant. In the first place, having regard to the probabilities and having regard to his position, which is that of a mining engineer, and to his being upon the Island some 18 months prior to this transaction being entered into, I think it is highly probable that the knowledge came to him that these lands within the Esquimalt and Nanaimo Railway belt were subject to that reservation. It is a matter of notorious knowledge to everybody that is within that community that these grants to the Esquimalt and Nanaimo Railway contain reservations with regard to coal-mining rights as well as other reservations.

We also find that he never took the trouble to investigate the title apparently, at least as far as the evidence has brought it out, which coupled with the fact that he is a man evidently of some business sagacity, would seem to point to his being aware that these reservations were contained in these deeds.

HUNTER, C.J.B.C.

Then we have Mr. Bate telling us in contradiction of the testimony of the defendant that he never made such a statement as was imputed to him. I am inclined to give credence to Bate's evidence for the simple reason that he has been in the conveyancing business for some ten or eleven years. He was born in the City of Nanaimo and if anyone would have knowledge of the fact that these reservations were to be found in the Esquimalt and Nanaimo conveyances it would be him, and it seems to me I would have to impute direct fraud to Bate if I were to credit the statement that he made any such statement to Floyd. But however all that may be, I think that the evidence given by Hayes is conclusive of the matter, because he says that in October, 1920, when Floyd took him

down to look at the farm with a view to purchasing it, Floyd told him he did not own the coal rights. Now, we have the evidence of a man who is an absolutely disinterested witness, at least as far as I can gather from the evidence, and there is no reason suggested by anyone that Hayes should make a statement that was not the truth. This statement, too, of Hayes's, in my mind, is corroborated by the dealings with the property which have been engaged in by the defendant. We find him leasing the property to Placas and we find him selling a half interest to Bywell, a man with whom he is supposed to be in full confidence, and we find him attempting to sell the property to Hayes. Now, I think that these acts corroborate Hayes's evidence to some extent, at all events.

There is also the fact that the price agreed to be paid is inconsistent with the price ordinarily paid for coal-mining property. There is also the fact that when he was pressed to pay the obligations he wanted to have the matter postponed by paying the interest. That is a strong circumstance, to my mind, to shew that he was not in reality resting upon any substantial ground of defence, because it seems to me inconceivable that a man with his knowledge and in his position would want to maintain the bargain by paying interest and having in that way the principal deferred if he was really resting on the defence that there was a reservation without his knowledge. I think I must give judgment for the plaintiff as prayed.

From this decision the defendant appealed. The appeal was argued at Vancouver on the 12th, 13th and 14th of October, 1921, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Mayers (*Cunliffe,* with him), for appellant: Parol evidence cannot be received to rectify a written agreement: see *The Marquis Townshend* v. *Strangroom* (1801), 6 Ves. 328; also *Rich* v. *Jackson* [(1794)], 4 Bro. C.C. 514, referred to at p. 334; *Woollam* v. *Hearn* (1802), 7 Ves. 211*b*; *Clinan* v. *Cooke* (1802), 1 Sch. & Lef. 22 at pp. 33 and 39; *Attorney-General* v. *Sitwell* (1835), 1 Y. & C. 559; *Davies* v. *Fitton*

Argument

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(1842), 2 Dr. & War. 225; *Wood* v. *Scarth* (1855), 2 K. & J. 33 at p. 42; *Price* v. *Ley* (1863), 4 Giff. 235; *May* v. *Platt* (1900), 1 Ch. 616. There are two documents here which distinguish it from *Fordham* v. *Hall* (1914), 20 B.C. 562. As to this being an executory contract see *Thompson* v. *Hickman* (1907), 1 Ch. 550; *Olley* v. *Fisher* (1886), 34 Ch. D. 367. Common knowledge is not a ground for rectification, there must be irrefragable evidence: see *Hobbs* v. *The Esquimalt and Nanaimo Railway Company* (1899), 29 S.C.R. 450. As to the effect of a reservation of mines and minerals on the surface rights see *Fuller* v. *Garneau* (1921), 1 W.W.R. 857 at p. 863. They must establish that we knew all the facts: *Stackhouse* v. *Barnston* (1805), 10 Ves. 453 at p. 466; *Williams* v. *Stern* (1879), 5 Q.B.D. 409. All acts were done subsequently in pursuance of the sale of contract itself: see *Stevens* v. *Guppy* (1828), 3 Russ. 171; *Townend* v. *Graham* (1899), 6 B.C. 539; *Cato* v. *Thompson* (1882), 9 Q.B.D. 616; *Innis* v. *Costello et al.* (1917), 1 W.W.R. 1135; *Universal Land Security Co. Ltd.* v. *Jackson et al., ib.* 1352. The Judicature Act did not alter the old and established rule: see *Fordham* v. *Hall, supra*; Pollock on Contracts, 8th Ed., 541. There is no evidence that Floyd knew of the Esquimalt and Nanaimo reservation.

Argument

D. S. Tait, for respondent: We will shew, first, that Floyd knew of the reservations before he agreed to purchase; second, that with knowledge he not only entered the contract but waived the right to object to the rectification afterwards; third, if it is not established that he knew before he entered into the contract he undoubtedly knew in October, 1920, when he saw the certificate; and fourth, by his dealings later he waived any rights. On the question of notice of the railway's reservations see *Jones* v. *Smith* (1841), 1 Hare 43; *Coppin* v. *Fernyhough* (1788), 2 Bro. C.C. 291. You cannot have rectification of an executory agreement which is subject to the Statute of Frauds: see *Olley* v. *Fisher* (1886), 34 Ch. D. 367; *Shrewsbury and Talbot Cab and Noiseless Tyre Company Limited* v. *Shaw* (1890), 89 L.T. Jo. 274; *Carroll* v. *The Erie County Natural Gas and Fuel Co.* (1899), 29 S.C.R. 591; *Joynes*

v. *Statham* (1746), 3 Atk. 387; *Walker* v. *Walker* (1740), 2 Atk. 98; *Hodgkinson* v. *Wyatt* (1846), 9 Beav. 566; *Stedman* v. *Collett* (1854), 17 Beav. 608. Since the Judicature Act there is no longer a bar to rectification and specific performance in the same action: see *Howard* v. *Stewart* (1915), 8 W.W.R. 616; *Rudd* v. *Manahan* (1913), 4 W.W.R. 350. On the question of waiver it is established he knew of the reservations: see *Burnell* v. *Brown* (1820), 1 J. & W. 168 at p. 172; *In re Gloag and Miller's Contract* (1883), 23 Ch. D. 320; Fry on Specific Performance, 6th Ed., 575; *Dyer* v. *Hargrave* (1805), 10 Ves. 505 at p. 508; *Margetson* v. *Wright* (1831), 7 Bing. 603; Sugden on Vendors and Purchasers, 14th Ed., 343. As to the effect of taking possession and exercising acts of ownership see *Rogerson & Moss* v. *Cosh* (1917), 24 B.C. 367; *Wallace* v. *Hesslein* (1898), 29 S.C.R. 171. Knowledge of the title is a waiver: see *Halkett* v. *Dudley* (*Earl*) (1907), 1 Ch. 590; *Re Barrington, Ex parte Sidebotham* (1834), 1 Mont. & Ayr. 655; *Re Barrington, Ex parte Barrington* (1835), 2 Mont. & Ayr. 245.

Argument

Mayers, in reply referred to *Cook* v. *Cook* (1915), 8 W.W.R. 506.

Cur. adv. vult.

10th January, 1922.

MACDONALD, C.J.A.: The action is for rectification of an executory agreement for sale and for specific performance of the reformed agreement.

The agreement was made on the 29th of October, 1919, between the plaintiff as vendor and the defendant as purchaser, and the sum of $1,000 was paid down, the balance extending over a period of years. The plaintiff's title was derived from what is known as an "E. & N. grant," a grant from the Esquimalt and Nanaimo Railway Company, which contained reservations of coal, petroleum, base metals and timber, which I need not particularize. The said agreement for sale contained no reference to these reservations, and the plaintiff claiming mutual mistake, seeks to have the agreement reformed by embodying the reservation in it.

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The plaintiff's case is not that Bates, the vendor's agent, told the defendant of the reservations, but that the reservations in E. & N. deeds were so notorious that defendant must have known of them and contracted with reference to them. Now, there can be no rectification where there is no prior contract, either written or verbal, by which to make the rectification. This in itself is sufficient to dispose of the question of rectification.

It is quite clear from the evidence that no reservations were mentioned either before or at the time the contract was entered into. If it be of any importance the defendant denies that he was aware that this land was subject to such reservations, and I do not see that his evidence has been successfully shaken. He says that at the time of the purchase, Mr. Bates, plaintiff's agent, who made the sale, assured him that he had everything "above and below," that the only question with regard to the coal rights spoken of was a licence to take coal given by the Government to one McLellan, which defendant alleges Mr. Bates told him had expired. Defendant immediately took possession of the land and this is relied upon as a waiver of title, but in view of the fact that a conveyance was to be made at a future time, I cannot hold that taking possession at this time without knowledge of the reservations, was a waiver. If there was a waiver then it must have been subsequent to the contract and possession, and in this regard it becomes important to arrive at the date of defendant's knowledge of the reservations. Coming back to the question of knowledge, it is alleged that while the defendant was shewing the property to one Hayes, the question of the coal rights came up, and as it is upon this evidence that the judgment of the learned trial judge proceeds, I shall quote it:

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"What was that conversation you had with Mr. Floyd about this? I asked him who owned the coal rights—and however, he did not own them, so he told me. But it was only to the timber—he said it would be easy to dispose of what timber was there and that is how we got started talking about the coal rights.

"Did he say who did own the coal? McLellan, I understood. That is my understanding of who owned the coal rights.

"THE COURT: When was this conversation with Floyd? This took place —well, at the beginning; it would be in October sometime but I cannot remember the date.

"Mr. *Leighton*: 1920? 1920."

This is denied by defendant.

This evidence falls far short of making out the plaintiff's case. The rectification sought is to have the E. & N. reservations inserted in the agreement. These include a great many other reservations besides the coal. There are, *inter alia*, reservations of timber, petroleum and the base metals and many others, and it is apparent from Hayes's evidence that defendant did not know this. In any case, this evidence is specifically denied by the defendant, but even if it were accepted, the plaintiff still cannot succeed because of the other reservations, exceptions and conditions claimed, which are substantial and as to which there is no evidence at all that defendant was aware of them. To shew that the plaintiff's solicitor even had no clear conception of the matter, it is only necessary to peruse his letter to defendant's solicitor on the 8th of February, 1921, in which he says, that:

"The Government owned the coal and petroleum under this particular piece of land, I believe. This was reserved by the Crown when this land was made a school reservation and the Crown have subsequently granted a lease to one McLellan,"

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which is quite inconsistent with the claim now made. The reference to McLellan is of importance as corroborating the evidence of defendant as to what was said about McLellan's licence at the time of the purchase. Mr. Leighton's letter is sufficient indication of the fallacy of supposing that because the land was in the railway belt, therefore the conveyance of it must necessarily have contained reservations.

It will be found on a careful perusal of the evidence that there is entirely wanting in this case that clear irrefragable evidence which is always required to make out a case for reformation of a written instrument on the ground of mutual mistake.

The appeal should therefore be allowed. I need not enter upon the counterclaim, as the majority of the Court would dismiss the appeal.

MARTIN, J.A.: I agree with the Chief Justice that, apart from any legal question, the evidence, in any event, falls so far short of what is necessary to obtain rectification that, with

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all due respect, I am compelled to say the learned judge below reached a conclusion thereupon which is "clearly wrong" and, moreover, erroneously based his judgment upon the ground of a "notorious knowledge" of the Esquimalt and Nanaimo Railway Company's reservations for which there is no legal foundation.

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

GALLIHER, J.A.: I think the learned Chief Justice below came to the right conclusion and would dismiss the appeal.

MCPHILLIPS, J.A.: I am of opinion that the learned Chief Justice of British Columbia arrived at the right conclusion, and that a proper case was established for rectification and specific performance.

In *Carroll* v. *The Erie County Natural Gas and Fuel Co.* (1899), 29 S.C.R. 591 at p. 594, Sir Henry Strong, C.J., said:

> "It was formerly held that a party could not have a decree for specific performance in the suit for rectification, that is specific performance of the agreement as altered by the decree, but no sound reason was ever given for this doctrine and it is no longer law. *Olley* v. *Fisher* [(1886)], 34 Ch. D. 367."

The learned trial judge found that there was notice to the appellant of the reservations contained in the conveyance from the railway company, and in my opinion there was evidence upon which that finding could reasonably be made (*Wallace* v. *Hesslein* (1898), 29 S.C.R. 171 at p. 175; also see *Bing Kee* v. *McKenzie* (1919), 3 W.W.R. 221).

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The present case is not analogous to *Hobbs* v. *The Esquimalt and Nanaimo Railway Company* (1899), 29 S.C.R. 450. There the vendee had no notice of any reservations and it was there held that the vendee was entitled to a decree for specific performance without regard to the claimed reservations. Further, if it was at any time open to the appellant to take exception to the title as shewn, the facts disclose, without here stating them all in detail (notably amongst other facts, the giving of a lease of the land after knowledge of the reservations of the railway company) that the appellant is now precluded from setting up any such contention. In *Wallace* v. *Hesslein, supra,* Sir Henry Strong, C.J., at p. 176, said:

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"There was moreover a clear waiver of all objections to title by Mr. Wallace, who took possession of the property and exercised acts of ownership by making repairs and improvements to the amount of $285, according to his own evidence, thus exercising acts of ownership sufficient to shew a waiver."

(Also see *Rogerson & Moss* v. *Cosh* (1917), 24 B.C. 367).

I would dismiss the appeal.

EBERTS, J.A. would dismiss the appeal.

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

Solicitor for appellant: *F. S. Cunliffe.*
Solicitor for respondent: *A. Leighton.*

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Real property—Land partly covered by sea—North shore Burrard Inlet—Public harbour—Lease from Dominion—Jurisdiction—Plaintiff in possession—Right of action for nuisance.

The plaintiff operated a shingle mill on a piece of land partly covered by sea water on the north shore of the First Narrows, Burrard Inlet, having obtained assignment of a lease known as the "MacLaren Lease" given by the Vancouver harbour commissioners to whom the north shore of Burrard Inlet (including the land in question) had been granted by the Dominion Government. A sewer-pipe of the defendant Corporation discharged sewage and refuse on that portion of the leased premises covered by water at high tide. An action for an injunction and damages in respect of said nuisance was dismissed on the ground that it had not been established that there was ownership of the Crown in the right of the Dominion.

Held, on appeal, affirming the decision of GREGORY, J. (MCPHILLIPS, J.A. dissenting), that as it was not shewn that the north shore of the First Narrows was a public harbour at the date of the entry of British Columbia into the Dominion a grant from the Dominion Government to the Vancouver harbour commissioners and a lease from the latter to the plaintiff conveyed no title, and the plaintiff

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could not maintain an action for nuisance in respect of the pollution of the water covering said land by sewage.

The finding of fact in *Attorney-General for British Columbia* v. *Canadian Pacific Railway* (1906), A.C. 204; 75 L.J., P.C. 38 must be restricted to the foreshore at the point to which that action related, *i.e.*, a portion of the south shore of Burrard Inlet.

Statement

APPEAL by plaintiff from the decision of GREGORY, J., of the 27th of May, 1921, in an action for an injunction to restrain the defendant from discharging sewage and refuse on the plaintiff's land which is partly covered by water on the north shore of the First Narrows, Burrard Inlet, and for damages in respect of said discharge. The plaintiff manufactured shingles in a saw-mill on the lands in question situate on Forbes Avenue, North Vancouver. By indenture dated the 1st of April, 1920, the Vancouver harbour commissioners leased the lands in question to the MacLaren Shingle Mills Limited for a term of ten years and on the 13th of September, 1920, the lessees assigned the unexpired residue of the term granted to the plaintiff who proceeded to carry on the business of a shingle manufacturer in accordance with the terms of the lease. A sewer of the defendant Corporation discharged sewage and refuse on the land covered by water within the demised premises and by reason thereof the plaintiff is prevented from carrying on his business and retarded in his work as during the period of low tides the shingle bolts are covered with sewage and refuse and are unfit for handling by the men employed in the manufacture of shingles. It was held by the trial judge that it was not shewn that the land on the north shore of Burrard Inlet was ever used as a public harbour and if not so used the Dominion Government would have no jurisdiction over it; that this is an action for nuisance and the plaintiff must shew title and not having done so the action must be dismissed.

The appeal was argued at Vancouver on the 15th, 16th and 17th of November, 1921, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Argument

A. H. MacNeill, K.C., for appellant: The Dominion Government transferred the north shore of the harbour (including the land in question) to the Vancouver harbour commissioners

who leased the land in question to the MacLaren Mills who assigned to us. My submission is that being in possession we are entitled to judgment irrespective of our title: see *Brown and Bayley* v. *Mother Lode Sheep Creek Mining Co.* (1912), 17 B.C. 248; *Harper* v. *Charlesworth* (1825), 4 B. & C. 574. We are entitled to rely on our possession: Encyclopædia of the Laws of England, Vol. 10, p. 235; Bullen & Leake's Precedents of Pleadings, 7th Ed., p. 421 (for nuisance p. 379); *Price's Patent Candle Company, Limited* v. *London County Council* (1908), 2 Ch. 526; *Graham* v. *Peat* (1801), 1 East 244; *Asher* v. *Whitlock* (1865), L.R. 1 Q.B. 1. On the question of possessory title see *Corporation of Hastings* v. *Ivall* (1874), L.R. 19 Eq. 558 at p. 583; *Perry* v. *Clissold* (1907), A.C. 73 at p. 79; Lightwood's Possession of Land, 124-5. As to an action for a nuisance being a possessory action see Bullen & Leake, 7th Ed., pp. 394-5. On the question of actual proof of title see *Attorney-General* v. *C.P.R.* (1905), 11 B.C. 289 at p. 299; (1906), A.C. 204. In *Holman* v. *Green* (1881), 6 S.C.R. 707, the harbour of Summerside, P.E.I., was declared to be a public harbour and the foreshore was in the Dominion: see also *Attorney-General for the Dominion of Canada* v. *Attorneys-General for the Provinces of Ontario, Quebec, and Nova Scotia* (1898), A.C. 700; *Attorney-General of Canada* v. *Ritchie Contracting and Supply Co.* (1914), 20 B.C. 333; (1915), 52 S.C.R. 78; (1919), A.C. 999. The inference from these cases throws the onus on them to shew the *locus in quo* was not included in these judgments. As to evidence of this foreshore being part of a public harbour see *Jones* v. *Williams* (1837), 2 M. & W. 326; Phipson on Evidence, 6th Ed., 294 and 384; Taylor on Evidence, 11th Ed., par. 624. In the case of *Neill* v. *Duke of Devonshire* (1882), 8 App. Cas. 135 all the cases are discussed.

Argument

Mayers, for respondent: On the form of the action as to the right to sue: (1) In the case of Crown lands possession alone is not sufficient in an action for trespass unless concurrence of the Crown to possession is shewn; (2) an action of nuisance is one in which the plaintiff must shew some title other than possession; (3) this is an action for nuisance and not for tres-

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pass; (4) he is confined to his pleadings and the course of the trial and cannot now set up trespass. I am treating them as squatters as the only title they pretend to have is from the Dominion. The common law right by prescription does not pertain to Crown lands. He is a mere squatter as he has no lease from the Province. Title and possession are distinct: see *Leeds* v. *Shakerley* (1600), Cro. Eliz. 751; 78 E.R. 983; Garrett on Nuisances, 3rd Ed., p. 2; *Simper* v. *Foley* (1862), 2 J. & H. 555 at p. 564; *Jones* v. *Chappell* (1875), L.R. 20 Eq. 539; *Jacomb* v. *Knight* (1863), 3 De G.J. & S. 533. They did not plead trespass: see *Price's Patent Candle Company, Limited* v. *London County Council* (1908), 2 Ch. 526 at p. 528. As to their having shewn any title, there are three objections to their mode of shewing title: (1) The record in the Street Ends case (*Attorney-General for British Columbia* v. *Canadian Pacific Railway* (1906), A.C. 204) cannot be used; (2) the reasons for judgment in that case cannot be looked at; (3) the decision in that case is confined to the *locus in quo* there and does not apply to or include the *locus in quo* here. Public rights are not concerned here. This is a dispute between private parties. On the reception of this evidence see *Neill* v. *Duke of Devonshire* (1882), 8 App. Cas. 135 at pp. 147 and 186; *Hemphill* v. *M'Kenna* (1845), 8 Ir. L.R. 43 at p. 51. You can shew the result of the Street Ends case but not the reasons for judgment: see *Re Allsop and Joy's Contract* (1889), 61 L.T. 213 at p. 215; *The Queen* v. *Hutchings* (1881), 6 Q.B.D. 300 at p. 304; *Ballantyne* v. *Mackinnon* (1896), 2 Q.B. 455 at p. 462. To shew title from the Crown all formalities must be complied with: Halsbury's Laws of England, Vol. 6, par. 747, p. 480. Assent to the assignment from MacLaren was necessary and was not obtained until three months after: see *Peck* v. *Sun Life Assurance Co.* (1905), 11 B.C. 215 at p. 227.

Argument

MacNeill, in reply: There is no common law right to discharge sewage into the sea: see *Foster* v. *Warblington Urban District Council* (1906), 1 K.B. 648 at p. 665. It is his possessory right and not proprietary right that gives him the right of action. It is not necessary for him to prove title. He

is entitled to the water in its natural state of purity: see *Jones* v. *Llanrwst Urban Council* (1911), 1 Ch. 393. On the distinction between trespass and nuisance see Halsbury's Laws of England, Vol. 21, p. 506, par. 844. We have proved it is a harbour. As to the use of the record in the Street Ends case see *Laybourn* v. *Crisp* (1838), 4 M. & W. 320 at p. 326; *Want* v. *Moss and Wife* (1894), 70 L.T. 178; *Houstoun* v. *Marquis of Sligo* (1885), 29 Ch. D. 448 at p. 457-8.

Cur. adv. vult.

10th January, 1922.

MACDONALD, C.J.A.: The plaintiff came to the nuisance, and while if he had obtained a title to the property instead of being a trespasser this would not affect his right of recovery, yet being a trespasser, as I must hold that he was, he is not entitled to recover either for trespass or for nuisance.

Plaintiff's root of title, if any, is in section 108 of the British North America Act. If the *locus in quo* was at the date of the union with Canada part of a public harbour, then plaintiff's title is unimpeachable, but he has not shewn that that part of the foreshore in question was part of a public harbour at that date. This is a question of fact. *Attorney-General for British Columbia* v. *Canadian Pacific Railway* (1906), A.C. 204; *Attorney-General of Canada* v. *Ritchie Contracting and Supply Co.* (1914), 20 B.C. 333; (1915), 52 S.C.R. 78; (1919), A.C. 999.

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What was said by Mr. Justice Duff in the trial of the first-mentioned case, must be confined to the question at issue in that case. I have no doubt that the learned judge did not intend any broader meaning to be placed on his words; he was dealing with a small portion of the southern shore of Burrard Inlet and not with any portion of the northern shore.

Now, in the present case there is no evidence at all that the property in question, namely, what is known as "MacLaren's Lease," was part of a public harbour in 1871, and hence the plaintiff has failed to make out his title and cannot succeed in this action.

An application was made to amend by setting up a case of

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trespass and we reserved judgment. It is immaterial to my present judgment, whether the amendment be made or not, but as the case may go farther, I would accede to the motion.

A very large part of the evidence was devoted to the surveys, the contest being as to whether or not the outlet of the sewer falls within the boundaries of the MacLaren lease. That question was thoroughly gone into on both sides and I can see no objection to allowing the amendment.

I would dismiss the appeal.

MARTIN, J.A.: Unless the finding of fact of the learned trial judge in the case of *Attorney-General* v. *C.P.R.* (1905), 11 B.C. 289, can be extended to the *locus* in this case, it is beyond question, in my opinion, that the plaintiff must be regarded as a trespasser. In that case there was only one limited question, and the learned judge states it at p. 290:

"Was the foreshore at the time of the construction of the railway, subject to a public right of passage to and from the waters of the harbour at the ends of the streets referred to?"

These ends were three in number, situate in the City of Vancouver on the other (south) side of Burrard Inlet from the present distinct defendant Corporation of North Vancouver. But though this was the restricted question before him he proceeded to find at large that all that very extensive "part of Burrard Inlet between the First and Second Narrows was a public harbour," which was something far beyond what was necessary to determine the question before him. The Privy Council in dealing with the matter ((1906), A.C. 204; 75 L.J., P.C. 38) said, p. 208:

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"The alleged public rights of way the interpretation of which is now complained of were in continuation of those [three] streets, across the foreshore down to low-water mark."

And they went on to say, pp. 209-10:

"In accordance with that ruling the question whether the foreshore at the place in question formed part of the harbour was in the present case tried as a question of fact, and evidence was given bearing upon it directed to shew that before 1871, when British Columbia joined the Dominion, the foreshore at the point to which the action relates was used for harbour purposes, such as the landing of goods and the like. That evidence was somewhat scanty, but it was perhaps as good as could reasonably be expected with respect to a time so far back, and a time when the harbour was in so early a stage of its commercial development. The evidence

satisfied the learned trial judge, and the Full Court agreed with him. Their Lordships see no reason to dissent from the conclusion thus arrived at."

I am, therefore, of opinion that the finding of fact must be restricted, as their Lordships express it, to "the foreshore at the point to which the action relates" and that it cannot be extended indefinitely up and down the widely divergent and opposite shores of the Inlet. Their Lordships remark upon the "scanty" evidence upon which the finding was founded, even in that case where the streets were in the heart of Vancouver, and it would probably be found that the evidence as to many other "parts" within the same large water area would be much less than "scanty." It must be remembered that no public right is, properly speaking, in question here; it is simply a dispute between private parties.

The plaintiff, then, is in the position of a trespasser upon the lands of the Crown Federal, and I am unaware of any case which decides that he can maintain such an action as the present. The strongest case in support of such a submission is *Foster* v. *Warblington Urban Council* (1906), 1 K.B. 648; 75 L.J., K.B. 514, but the facts are very different from those at bar, the plaintiff having had exclusive use and undisturbed occupation of certain artificially constructed oyster ponds upon the foreshore for over twenty years, as Lord Justice Stirling points out at p. 671, and goes on to say:

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"What has been done by the plaintiff is totally different from anything that he could have done simply as a member of the public exercising the public right of fishing. In these circumstances I think that the plaintiff had at the time of bringing his action such a possession of the ponds as to entitle him to maintain an action for trespass against a wrong-doer. The plaintiff alleges that the defendants are wrong-doers, inasmuch as they have discharged sewage on to his ponds or beds to the great damage of the oysters."

And Lord Justice Fletcher Moulton, after reciting that these ponds had existed "throughout the whole of living memory" as proved by witnesses of "ages ranging between sixty and seventy years," proceeds, at p. 679, to say:

"Now, it is an unquestionable principle of our law, that, where there has been long-continued enjoyment of an exclusive character of a right or a property, the law presumes that such enjoyment is rightful, if the property or right is of such a nature that it can have a legal origin. I am satisfied that in this case there has been actual possession of a

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sufficiently long duration; and a possession more exclusive in character could not, I think, be imagined, because the surface of the ground is artificially altered to adapt it for its purpose, valuable objects in the shape of oysters are laid there, and are taken from those beds to be sold in the market; and, if the possession was not exclusive, all those oysters would be capable of being appropriated by the public in general and by the population of the town of Emsworth in particular, which is in the immediate neighbourhood of these beds."

There is obviously, no similarity between such circumstances and those at bar, and so the case does not, under the principle laid down in *Quinn* v. *Leathem* (1901), A.C. 495 at p. 506; 70 L.J., P.C. 76, assist the appellant. It follows, therefore, that the appeal should be dismissed, and I only add that having regard to the pleadings and course of the trial wherein the controversy was fought out on the basis of a nuisance, it would, in my opinion, not be in accordance with justice to now allow any amendment deviating from that issue.

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GALLIHER, J.A.

GALLIHER, J.A.: I am, though I say so with regret, forced to the conclusion that this appeal must be dismissed.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: The action may be said to have been tried out as one claiming the existence of a nuisance and a possessory action for trespass. It is true the pleadings might have been more precise but in these days it has unfortunately come about, owing to present practice, to proceed with the trial almost ignoring the form of the pleadings (see *Banbury* v. *Bank of Montreal* (1918), A.C. 626, Lord Parker of Waddington, at pp. 701-10).

The facts as led at the trial well established that the appellant was in possession of the land in question and was the assignee of a lease of the land covered by water, the lease assigned to the appellant being from the Vancouver Harbour Commissioners, and describes the land as forming a part of the public harbour of Vancouver, the harbour commissioners having had title thereto granted to them by Crown grant from the Government of Canada. The appellant being in possession of the land, it is trite law that the appellant was not called upon to prove title. That the evidence establishes that there was a trespass is beyond question and, in my opinion, it was equally well established that the respondent is maintaining a nuisance and

that the appellant is suffering special and particular damage therefrom and independent of the public generally. The respondent attempted to justify the maintenance of the sewer outlet upon Provincial Government approval but the evidence well discloses that no protection can be gained from this contention in that the scheme approved by the Provincial authority was not carried out and an entirely different outlet for the sewer was adopted than that approved by the Provincial authority, even if it could be claimed that following the scheme there would be immunity from liability. The learned trial judge held that the land in question in the action did not form a part of a public harbour, *i.e.,* was not within the confines of the public harbour of Vancouver. With great respect, in my opinion, this holding was in error. It was as long ago as 1905 when that question was finally determined and ever since that time and even before, *i.e.,* ever since 1871, when British Columbia entered the Canadian Confederation, the Government of Canada has exercised control over Vancouver harbour—inclusive of the *locus in quo*—as being a public harbour in pursuance of section 108, of the British North America Act, 1867.

The physical conformation of the land being looked at, there can be no question of the nature and extent of the public harbour. The entry into the harbour from the Gulf of Georgia is through what is called the "First Narrows," and when entry is made the harbour is clearly before you and is entirely land-locked, constituting one of the great harbours of the world.

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In 1905 the case of the *Attorney-General for British Columbia* v. *Canadian Pacific Railway* was carried to the Privy Council (see 75 L.J., P.C. 38) and their Lordships affirmed the judgment of the Full Court of British Columbia which had affirmed the judgment of DUFF, J., that the foreshore of Vancouver Harbour was under the jurisdiction of the Parliament of Canada either as having formed part of the harbour at the time of the union of British Columbia with the Dominion or by reason of the jurisdiction of the Dominion attaching at the union. In the judgment of Mr. Justice DUFF (see *Attorney-General* v. *C.P.R.* (1904), 11 B.C. 289 at pp. 291-2) we find this language:

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"I am, however, of the opinion that the lands in question here passed to the Dominion under section 108 of the B.N.A. Act. I find, as a fact, that at the time of the admission of British Columbia into Canada, that part of Burrard Inlet between the First and Second Narrows was a public harbour, and that the parts of the foreshore subject to the public rights of passage referred to were in use as, and were in fact part of the harbour; as was the whole of the foreshore adjoining the townsite of Granville.

"Moreover, if formal Provincial assent were necessary I must give effect to the presumption arising from long, notorious occupation with the knowledge and acquiescence of the Provincial Government; these circumstances, cogent in any case, become conclusive in the absence of any evidence indicating the non-existence of such assent."

Now, the land and foreshore in question in this action is admittedly "between the First and Second Narrows," and it may be said that this is a matter of common knowledge. How many times must there be a decision as to whether certain lands or foreshore form a part of a public harbour? It is unthinkable that the matter is always to be one of continued litigation, and that it may be agitated as to every foot of land lying within the generally accepted and well-known limits of the harbour. There must surely be finality at some time, and when we find that the Attorney-General for British Columbia was the active litigant in the case above referred to, in fact the action was brought by the Attorney-General for British Columbia at the relation of the City of Vancouver, it is impossible to have it now contended that the land in question is not within the public harbour of Vancouver, and that the title to the lands in the bed of the harbour is vested in the Government of the Province of British Columbia. It seems to me that it is clear to demonstration that the title in the lands is in the Government of Canada and that the Crown Dominion was entitled to make the grant to the harbour commissioners and the harbour commissioners rightly leased the lands, and the appellant is the successor in title, an unassailable title, although as I view it, possession alone was sufficient title, the respondent not establishing title in itself.

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It may be remarked that the only proof of title advanced at the trial was title in the Crown Dominion, and the Attorney-General for British Columbia is not a party to this litigation; and I fail to see how it can be at all contended that the title to the land is vested in other than the Crown Dominion and

the appellant is the assignee of the lease executed by the harbour commissioners, the grantees from the Crown Dominion. Assuredly the title in the Dominion upon the facts is established and the onus most certainly rested upon the respondent to displace this title, which onus was not discharged.

Apart from the well-established action for trespass there is the maintenance of a nuisance owing to the sewer outlet upon the property of the appellant. Undoubtedly it is a nuisance and at this bar it was not denied, as I understood it, that a nuisance existed but the contention was that the appellant failed to establish a cause of action—that it was a public nuisance and the action was not well constituted, as in that case the Attorney-General of the Province should be a party to the proceedings. The facts, however, establish—and I do not go into them in detail—that the nuisance is one which affects the appellant and the works carried on by the appellant being within the area of operation of the works of the appellant and upon the property of the appellant, injures the appellant and causes inconvenience to the appellant in the carrying on of the business operations, and unquestionably special damage has been suffered by the appellant over and above that imposed upon the general community (*Paine* v. *Partrich* (1691), Carth. 191; [90 E.R. 715]; *Williams's Case* (1592), 3 Co. Rep. 145; *Bell* v. *Corporation of Quebec* (1879), 5 App. Cas. 84; *Whelan* v. *Hewson* (1872), 6 Ir. R.C.L. 283).

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The facts here disclose that what is being done is the discharge of sewage into the sea, *i.e.*, the harbour. Coulson & Forbes on Waters, 3rd Ed., 63, has this statement:

"At common law there is no right to discharge sewage into the sea so as to cause nuisance to another, neither does any such right exist under the Public Health Acts, 1848 and 1875, nor can such a right be acquired by prescription. *Hobart* v. *Southend-on-Sea Corporation* [(1906)], 75 L.J., K.B. 305; 94 L.T. 337; 54 W.R. 454; 70 J.P. 192; 4 L.G.R. 757; 22 T.L.R. 307, 530; *Foster* v. *Warblington Urban Council* (1905), 21 T.L.R. 214; 69 J.P. 42; 3 L.G.R. 605; *Owen* v. *Faversham Corporation* (1908), 73 J.P. 33, C.A."

The sewage as established upon the facts adduced at the trial of this action is most offensive and endangers the health of the operatives working for the appellant. It is untreated

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sewage, pollutes the water, renders the water unfit for booming bolts or timber and is destructive of otherwise possible business operations.

In *Owen* v. *Faversham Corporation* (1908), 73 J.P. 33, the Court of Appeal held, on the authority of *Foster* v. *Warblington Urban District Council* (1906), 1 K.B. 648; 70 J.P. 233, "that the defendants had no right to discharge sewage into the sea so as to cause a nuisance, and that an injunction ought to be granted." The action was one brought by the owners of an oyster fishery for an injunction to restrain a municipal corporation from discharging untreated sewage into tidal waters so as to pollute the plaintiff's oyster beds, the defendants pleading that they had a right both at common law and by prescription to discharge their sewage into the sea. Here we have the case of a municipal corporation also contending that it has the right to discharge this untreated sewage into the sea. In my opinion this decision is conclusive and entitles the appellant to the relief claimed in the action.

I would, therefore, allow the appeal.

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitors for appellants: *Hamilton Read & Jackson.*
Solicitor for respondent: *A. C. Sutton.*

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CANADIAN TRADING CO., LTD. v. CANADIAN GOVERNMENT MERCHANT MARINE LTD.

Contract—Breach—Space on ships under construction—Unavoidable delay in completion of ships—Implied condition—Damages.

The plaintiff entered into two contracts with the defendant for cargo space on two certain ships, one for April and the other for April or May, 1920. The ships were at the time of the agreement under construction and were to be delivered to the defendant upon completion of which the plaintiff had knowledge. The contract contained a clause that "this contract is entered into conditional upon the continuance of the steamship company's service and the sailings of its steamers between the ports named therein." There was delay in construction for reasons not clearly defined but largely through disputes between the builders and owners and the ships were not ready to sail within the specified time. The plaintiff then cancelled the contract and brought action for damages which was dismissed.

Held, on appeal, reversing the decision of GREGORY, J. (MARTIN, J.A. dissenting), that it was not a case of impossibility of performance, the express condition in the contract had no reference to delays in sailings, and there should not be read into the contract an implied term relieving the defendant in the event of the ships not being ready within the specified period.

Taylor v. *Caldwell* (1863), 3 B. & S. 826 distinguished.

APPEAL by plaintiff from the decision of GREGORY, J. of the 4th of May, 1921, in an action for damages for breach of two contracts, the first dated the 19th of March, 1920, to supply space in early April, 1920, in the steamship "Canadian Inventor" for the shipment of one million feet of lumber from Vancouver or Genoa Bay to Australia, the second dated the 24th of March, 1920, to supply space in April or May, 1920, in the steamship "Canadian Prospector" for the shipment of two hundred and fifty thousand feet of lumber from Vancouver to Australia. Each contract contained an express provision that its performance was dependent upon the sailing of the defendant's steamers between the ports named in the contracts. The parties knew that at the time the contracts were entered into the vessels named were in the course of construction. The vessels were constructed by Coughlan & Co. under contract

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with the minister of marine and fisheries and on completion were to be handed over to the defendant Company. Owing to strikes the ships were not completed in time to carry out the contracts and by letters of the 1st of June, 1920, the plaintiff notified the defendant that the contracts were cancelled. The defendant Company pleaded that as the ships were under construction to the knowledge of all parties when the contracts were entered into there was an implied condition that the ships must be ready for sailing; second, that there was no express condition in the contract that relieved them from sailing a ship; and thirdly, the contract was rescinded by the plaintiff. The learned trial judge held that there was an implied condition as to the completion of the ships and dismissed the action.

The appeal was argued at Vancouver on the 14th and 15th of November, 1921, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Argument

McPhillips, K.C., for appellant: They failed to carry out the contract and they have two defences: (1) That the contracts were subject to the implied conditions that the ships would be ready; (2) that there was an express condition in the contract relieving them. The general principle is found in Pollock on Contracts, 9th Ed., 306; see also *Baily* v. *De Crespigny* (1869), L.R. 4 Q.B. 180 at p. 185; *Hammond* v. *Daykin & Jackson* (1914), 19 B.C. 550. The same rule applies as to strike cases: see *Hick* v. *Raymond & Reid* (1893), A.C. 22 at p. 37. The question of an implied condition is dealt with in *Horlock* v. *Beal* (1916), 1 A.C. 486; *F. A. Tamplin Steamship Company, Limited* v. *Anglo-Mexican Petroleum Products Company, Limited* (1916), 2 A.C. 397 at pp. 403-4. If he thought the ships might not be ready he should have included an express condition in the contract: see *Taylor* v. *Caldwell* (1863), 3 B. & S. 826 at pp. 833, 837-8; *Williams* v. *Lloyd* (1628), Jones (W.) 179; 82 E.R. 95; *Rugg* v. *Minett* (1809), 11 East 210; *Lebeaupin* v. *Crispin* (1920), 2 K.B. 714 at p. 716. As to the second point they were not required to run the special ship under the contracts: see Scrutton on Charter Parties, 10th Ed., 16; *Burton* v. *English* (1883),

12 Q.B.D. 218 at p. 223; *Leduc* v. *Ward* (1888), 20 Q.B.D. 475; *Howell* v. *Coupland* (1876), 1 Q.B.D. 258. Further cases as to an implied condition are *Carr* v. *Berg* (1917), 24 B.C. 422; *Dana* v. *The Vancouver Breweries, Ltd.* (1915), 21 B.C. 19; 52 S.C.R. 134; *Elderslie Steamship Company* v. *Borthwick* (1905), A.C. 93; *Churm* v. *Dalton Main Collieries, Limited* (1916), 1 A.C. 612 at pp. 648-9. The third point as to the effect of our letter cancelling the contract see Halsbury's Laws of England, Vol. 26, p. 178, par. 270; *Jackson* v. *Union Marine Insurance Co.* (1874), L.R. 10 C.P. 125; *Thomas Nelson & Sons* v. *Dundee East Coast Shipping Co., Limited* (1907), S.C. 927.

Mayers, for respondent: The ships were under construction by the Government and on completion were to be transferred to the defendant Company and all parties knew of this. It was a contract to ship by a named ship: see *Howell* v. *Coupland* (1876), 1 Q.B.D. 258 at p. 261; *Carr* v. *Berg* (1917), 24 B.C. 422; *Garrard* v. *Lund* (1921), 1 W.W.R. 329 at p. 333; *Dana* v. *The Vancouver Breweries, Ltd.* (1915), 21 B.C. 19; 52 S.C.R. 134 at p. 142; *Oliver* v. *Fielden* (1849), 4 Ex. 135. That there was the implied condition see *Nickoll & Knight* v. *Ashton, Edridge & Co.* (1901), 2 K.B. 126; *Halcroft* v. *West End Playhouse* (1916), S.C. 182 at pp. 183 and 185; *Lebeaupin* v. *Crispin* (1920), 2 K.B. 714 at p. 718; *Roche* v. *Johnson* (1916), 53 S.C.R. 18 at pp. 23, 26 and 38; *Bank Line, Limited* v. *Arthur Capel & Co.* (1919), A.C. 435 at pp. 439, 444, 452 and 462. The last paragraph of the contract which recites "inability to secure transportation or other causes of delay beyond the control of either party" relieves us of liability.

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McPhillips, in reply: There is no evidence to prove we knew the defendant was not building the ships. As to small print in a written contract see *Elderslie Steamship Company* v. *Borthwick* (1905), A.C. 93 at p. 96. He must carry out his contract as the exceptions laid down do not arise here: see *Howell* v. *Coupland* (1874), L.R. 9 Q.B. 462 at p. 463. As to measure of damages see *Stroms Bruks Aktie Bolag* v. *John & Peter Hutchison* (1905), A.C. 515 at p. 524.

Cur. adv. vult.

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10th January, 1922.

MACDONALD, C.J.A.: The defendants entered into two contracts of affreightment with the plaintiffs, fixing definite periods for loading, the first in early April, the second in April and May. At the time of the contracts the ships were under construction by J. J. Coughlan & Son, for the Canadian Government, and were to be turned over to the defendant, which was an operating company for the Canadian Government.

There was delay in delivery of the ships arising from causes which are not very clearly defined by the evidence, but apparently as to one of the ships, the "Canadian Inventor," by a dispute between the builders and the Canadian Government with regard to the work. It was suggested that the work was delayed by a strike in the Coughlan Company's yard, but this evidence is so vague and unsatisfactory as to amount to nothing. Mr. J. J. Coughlan says the strike might have commenced on the 5th of March; if so, it was either ended or in progress at the time the contracts were entered into.

There are two defences: The defendant claims that the contracts were subject to implied conditions, that the ships should be ready at the times fixed for loading; that they were relieved by an express condition in the contract itself. The plaintiff admits that it was aware that the ships were under construction when the contracts were made. They say that they were under the impression that they were under construction for the defendant. I do not think they were under any misapprehension in regard to this as the defendant is in effect the Canadian Government, or a department of the Canadian Government. Now then, J. J. Coughlan in his evidence says that a dispute in regard to a stern tube in the "Canadian Inventor" delayed delivery of that vessel two months; he maintains that the stern tube was in accordance with the contract; he says that he finally made the change demanded by the Government not because the tube had been wrong in the first place, but to buy peace. There is no satisfactory explanation at all for the non-delivery of the other ship, the "Canadian Prospector," except the suggestion referred to above of a strike of painters. In these circumstances the defendant relied upon *Taylor* v. *Caldwell* (1863), 3 B. & S. 826 and the other cases

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which follow it. In these cases there was a real impossibility of performance. In the case at bar I do not think there was. It is by no means clear that the delay in the delivery of the ships was due to any default on the part of the Coughlan Company. It was by reason of the dispute no doubt, between that Company and the Canadian Government, but I do not think the delay caused by the dispute as to the character of the work is sufficient to enable me to invoke the principle of those cases. I therefore think that the defendant has failed to make out a case of impossibility of performance. If the doctrine of *Taylor* v. *Caldwell, supra,* could be applied to a case of this character, there would be no certainty in commercial agreements.

The second defence is based upon the following words in the contracts:

"This contract is entered into conditional upon the continuance of the steamship company's service and the sailings of its steamers between the ports named therein."

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This, in my opinion, has no reference to delays in sailings, which was all that was occasioned by the delay in the delivery of the ships; the service was continued and the sailings went on without any real interruption.

The question of damages was spoken to by counsel at the trial and, as I understood it, was in case of necessity to be referred to a referee. If the parties cannot agree there should be a new trial for the purpose of ascertaining the damages.

MARTIN, J.A.: In my opinion the learned judge below took the correct view of this case in regarding it as one in which the possibility of the ships (then in course of construction for the Government of Canada) not being completed and transferred by the Government to the defendant Company (which is legally quite a distinct legal entity from the Government) was reasonably in contemplation of the parties, and the contracts, which are for cargo space on named ships, the "Canadian Inventor" and the "Canadian Prospector," were impliedly conditional upon such completion and transfer in time for shipment and sailing in "early April" and "April-May," 1920. About the impossibility of the ships coming into complete existence

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and into the defendant's hands so as to be able to sail on the specified dates, there can be no serious question, or that the defendant Company had no control over the situation.

Furthermore, as between the Government and the ship-builders [*sic*], I am of opinion that the clause in the contract as to its being "conditional upon the continuance of the Steamship Company's service and the sailing of the steamers between the ports named herein," expressly applies, having regard to all the circumstances, to what happened here, *viz.*, a break in the sailings of named steamers. Under its contract the plaintiff Company was entitled to space on a named ship only, and so when the "continuance" of the contemplated schedule of sailings was broken the condition of the clause came into operation: it cannot, I think, be even plausibly submitted that in a clause providing for the "continuance of service and sailings" (which is conjunctive) a total discontinuance of the whole service was contemplated to be governed thereby, because the conjunctive provision respecting "service and sailings" could have no application to a total discontinuance under which there could be no sailings. The language of the condition, in fact, exactly fits what happened, *viz.*, a break in the continuance in the sailings for about two months, and when the situation is so precisely provided for by the condition, I do not see, with all respect, why the condition should be reserved for application to some other situation which has not arisen.

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I am, therefore, of opinion that the judgment should be sustained on these grounds: (1) On the express condition; and (2) because the case is within the principle of *Taylor* v. *Caldwell* (1863), 3 B. & S. 826; 32 L.J., Q.B. 164; *Howell* v. *Coupland* (1876), 1 Q.B.D. 258; 46 L.J., Q.B. 147, and the most recent case of *Kerrigan* v. *Harrison* (1921), 62 S.C.R. 374, wherein a vendor was absolved from a covenant to maintain a road which had become encroached upon and undermined by the inroads of a lake, Mr. Justice Duff saying, p. 380:

> "The case is within the broad principle upon which the rule in *Taylor* v. *Caldwell* [*supra*], rests, if not embraced within the terms of the rule itself. The parties clearly contracted on the footing that the site of the road should continue to exist. I say they clearly did so because, having regard to all the circumstances, one cannot suppose that reasonable

persons, having clearly in view the contingency which happened, would on the one hand have exacted or on the other hand agreed to enter into an unqualified covenant to protect the site of the road from the invasion of the lake."

And see Mr. Justice Anglin, to a similar effect, p. 381, he taking the view that even though the contract was not one which was in fact impossible of performance, yet "in the light of the circumstances under which it was made" the maintenance of the road "cannot reasonably be supposed to have been within the contemplation of the parties."

The submission by the appellant's counsel, that the rule only applies where the subject-matter has wholly come into existence (which would here be the completion of the ships) was answered in *Howell* v. *Coupland, supra,* by Lord Justice Mellish, who said, p. 149:

"No doubt there is here the difference that the potatoes, the subject-matter of the contract, are not at the time of the contract in actual existence, or at any rate not in existence in the state in which they are to be delivered. But I do not think that makes any difference in principle. Both where the subject-matter exists, and where it is to come into existence, the contract is for the sale of a specific chattel or chattels, and such a contract is subject to the condition that if the existence of the subject-matter at the time of the performance is prevented without the default of the defendant he is not to be liable for the non-performance which is so prevented."

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

GALLIHER, J.A.: The respondent had ships plying between the Port of Vancouver, in British Columbia, and Australia at the time the contract in question here was entered into, and had also on the stocks nearing completion, two other ships, the "Canadian Inventor" and the "Canadian Prospector."

The appellant made a contract with the respondent, V-69, for space on the "Inventor" for shipment of one million feet of lumber and a further contract, V-74, for the shipment of 250,000 feet of lumber on the "Prospector," both from Vancouver to Sydney or Melbourne, Australia, the former for early April, the latter for April or May, 1920. These contracts were dated, respectively, March 19th, and March 24th, 1920, and it was assumed that these ships would be completed and ready to take on cargo during these months. When it became apparent that the ships would not be delivered by the

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Coughlan Company, who was building them, during the specified periods, the appellant wrote two letters, June 1st, 1920, cancelling contract V-69, and same date cancelling contract V-74, for the reasons therein stated. These letters were acknowledged on June 4th, 1920. In the meantime, upon an understanding with the respondent, the appellant had purchased the lumber, had placed it on scows and on the Government wharf, so that when the ships were ready they could be more expeditiously loaded and get quick clearance. This was in the interest of the respondent and at its instance. In pursuance of this the appellant was put to certain expense, all of which is set out in the particulars filed herein, and it is to recover these expenses that the present action is brought.

The respondent says, first, that we should read into the contract an implied term that providing the ships which were building were not available during the terms specified that they would be relieved from carrying out their contract. This depends on the terms of the contract itself, and a consideration of the conditions and surrounding circumstances. In each of the contracts is the following clause:

"This contract is not transferable and is entered into conditional upon the continuance of the steamship company's service and the sailing of its steamers between the ports named herein."

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It is urged that this means the sailing of the particular ships in question. The Company was continuing its service with its other ships between these ports. I think it simply means that if the Company went out of business or ceased sailing vessels between these ports, then the contract was off.

The implied term we are asked to import was not, I think, in the minds of the parties in the sense urged. If it was, it would have been a simple matter to have put it in the contract, and it might very well be that had such a term been mooted the appellant would not have assented thereto and taken all the risk, but be that as it may, I am not satisfied that a case has been made out which would warrant us in giving effect to the respondent's contention. The respondent, however, further says that it is not liable by reason of the fact that the ships to the knowledge of all parties were under construction by a firm of shipbuilders over which they had no control, and

through no fault of theirs the contract on their part became impossible of fulfilment, and seek to apply the principles laid down in the leading case of *Taylor* v. *Caldwell* (1863), 3 B. & S. 826, and cases which have followed that. I am far from satisfied, upon the facts of this case, that the contract was one impossible of fulfilment, and I think it would be extending the principles of *Taylor* v. *Caldwell* and the other cases following that were we to apply that principle here. This, I do not think we should do. There should be some point at which reasonable certainty as to commercial contracts should obtain. I would, therefore, hold that the plaintiff in this action is entitled to damages and allow the appeal.

There was some discussion at the trial as to a reference as to the *quantum* of damages, and while Mr. *Mayers* for the defendant admitted that the amounts sued for had been paid and that the different charges were reasonable and proper charges, yet maintained they were charges which they were not called upon to pay, and owing to the finding of the trial judge dismissing the action, it did not become necessary to enter into it, and the question of the *quantum* not having been tried out, the case should go back for a new trial on that issue.

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McPHILLIPS, J.A.: The action was one brought for damages for breach of two contracts of affreightment between British Columbia and Australia. The contracts sued upon are in the following terms: [after setting out the contracts the learned judge continued].

In the preparation for the shipment of the lumber, a large quantity of the lumber, in compliance with the request of the respondent, was placed upon scows, but neither of the ships became available to the appellant for the shipment of the lumber and no other ships were provided by the respondent to carry out the terms of the contracts made. It is not the case of the non-existence of the named ships but their unavailability owing to non-completion, but it is to be observed that the contract is not really confined to the named ships, the contracts were "entered into conditional upon the continuance of the steamship company's service and the sailing of its steamers."

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The present case differs greatly from many of the cases to

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be found in the books. Here we have express contracts, subject only to expressed conditions of relief, but the defence made does not come within the conditions. Here no safeguard was taken to cover the non-completion or non-availability of the ships. Such a contingency was provided for in *Oliver* v. *Fielden* (1849), 4 Ex. 135; 18 L.J., Ex. 353 (also see *Corkling* v. *Massey* (1873), L.R. 8 C.P. 395; 42 L.J., C.P. 153).

In *Baily* v. *De Crespigny* (1869), L.R. 4 Q.B. 180, Hannen, J., at p. 185, said:

> "We have first to consider what is the meaning of the covenant which the parties have entered into. There can be no doubt that a man may by an absolute contract bind himself to perform things which subsequently become impossible, or to pay damages for the non-performance, and this construction is to be put upon an unqualified undertaking, where the event which causes the impossibility was or might have been anticipated and guarded against in the contract, or where the impossibility arises from the act or default of the promissor."

In the present case conditions are set forth but the contingency of the non-completion of the ships was not dealt with, and it may also, upon the facts of the present case, be said that there was "default of the promissor" in not having the ships available and ready to provide the space and carry out the contracts of affreightment. In considering what should have been in the contracts here to give protection to the respondent, it is instructive to observe what Lord Ashbourne said in *Hick* v. *Raymond* (1893), A.C. 22 at p. 37:

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> "But, my Lords, it is not upon analogies or upon conflicting authorities alone that the decision of your Lordships can rest, although they are most valuable and important to elucidate the position. Principle and reason, in my opinion, alike oppose the contention of the appellant. It is somewhat hard to make either party suffer, but there is no help for it. It must be remembered that there are forms of bills of lading which expressly name strikes and such contingencies, and cast the responsibility upon the consignees. If the shipowner wishes the merchant to be answerable for such events, he can stipulate for it expressly. It is no doubt hard on the shipowner in this case, but I do not apprehend any disturbance in mercantile contracts, as parties can readily, if they please, change the terms of future contracts, and prevent the possibility of misunderstanding or surprise. On the grounds that I have referred to I think the judgment of the Court of Appeal should be affirmed."

The contention of the respondent is that upon the rule established by *Taylor* v. *Caldwell* (1863), 3 B. & S. 826, 833, it is

excused from liability. That case was considered and a number of cases reviewed by Lord Atkinson in *Horlock* v. *Beal* (1916), 1 A.C. 486 at p. 496. Lord Atkinson quotes the rule as laid down by Blackburn, J.:

"The rule I refer to is laid down by Blackburn, J. in the case of *Taylor* v. *Caldwell* (1863), 3 B. & S. 826, 833, in these words: 'Where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents, the performance of his contract has become unexpectedly burthensome or even impossible. . . . . But this rule is only applicable when the contract is positive and absolute, and not subject to any condition express or implied; and there are authorities which, as we think, establish the principle that where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfilment of the contract arrived some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what there was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor.' This principle applies not only to contracts in their executory stage, but when they have been in part performed."

But we have Lord Atkinson at p. 506, saying:

"Moreover, the judgments of Grose, J. and Lawrence, J., especially that of the latter, rather indicate that they treated the contract to carry the goods to Leghorn as a positive and absolute contract to do so within a reasonable time—the dangers of the seas only excepted. The latter learned judge says they 'absolutely engaged to carry the goods, "the dangers of the seas only excepted"; that therefore is the only excuse which they can make for not performing the contract; if they had intended that they should be excused for any other cause, they should have introduced such an exception into their contract.' Of course, if the contract of the parties be thus positive and absolute, they are bound by it, however impossible the performance of it may become."

MCPHILLIPS, J.A.

Now, in the present case the contracts are in form "positive and absolute." If the respondent desired to be excused upon the ground that there should be liability only if the ships were completed and available, provision to that effect should have been incorporated in the contracts. The case is not one of the non-existence of the ships, nor do I think, upon the facts, can it be successfully stated that the non-availability of the ships was "without default of the [respondent]" (see Blackburn, J., in *Taylor* v. *Caldwell, supra,* at p. 833).

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1922

Jan. 10.

CANADIAN TRADING CO., LTD. v. CANADIAN GOVERNMENT MERCHANT MARINE LTD.

We have here no provision for the contingency that arose (the non-completion of the ships), but were they not so well on to the completion that the respondent took the chances? Lord Loreburn in *F. A. Tamplin Steamship Company, Limited* v. *Anglo-Mexican Petroleum Products Company, Limited* (1916), 32 T.L.R. 677 at p. 679 put the question:

"Since the parties had not provided for the contingency, ought a Court to say that it was obvious that they would have treated the thing as at an end?"

And further on, at p. 679, said:

"Ought the Court to imply a condition in the contract that an interruption such as this should excuse the parties from further performance of it? He thought not. He thought they took their chance of lesser interruptions and the condition that he would imply went no further than that they should be excused if substantially the whole contract became impossible of performance, or, in other words, impracticable, by some cause for which neither was responsible."

It cannot be said upon the facts of the present case that the non-completion of the ships was something the respondent was not responsible for, in any case it is the case of a special contract with some contingencies provided for and silent as to the contingency relied upon. When it is considered that the appellant was making contracts for the delivery of lumber to oversea ports and would suffer heavily in damages in case of non-fulfilment of contracts, it does not seem at all reasonable that any condition to excuse the respondent should be implied, rather that it is the case of the respondent undertaking a risk that has not been provided against and cannot be heard to the contrary (see *Lebeaupin* v. *Crispin* (1920), 2 K.B. 714 at pp. 717, 718; *Leduc* v. *Ward* (1888), 20 Q.B.D. 475 at p. 477; *Thomas Nelson & Sons* v. *Dundee East Coast Shipping Co., Limited* (1907), S.C. 927 at pp. 928-30).

MCPHILLIPS, J.A.

The learned counsel for the respondent relied greatly upon the case of *Halcroft* v. *West End Playhouse* (1916), S.C. 182 at pp. 183, 185, 186, but with deference, I consider the present case is exactly what that case was not. There, there was the clause "subject to the theatre being in the occupancy and possession of the management"; here the contract was with respect to specially named ships. Here there was by contract the representation and warranty that the ships were in existence and ready to carry out the contracts, and in my opinion,

in the present case we have a sufficient statement of representation or warranty without provision for any excuse in case of there being any failure to provide the ships. We have here absolute and unqualified contracts for the contracted space in named ships.

I think that it may be well said that no term will be implied which is inconsistent with the express provisions of the contract. In the contracts we have before us, the respondent has made precise stipulations as to the terms on which it shall be liable and the non-completion of the ships is not made a matter of excuse, and *F. A. Tamplin Steamship Company, Limited* v. *Anglo-Mexican Petroleum Products Company, Limited* shews that no term (see (1916), 2 A.C. 397, 422) will be implied which is inconsistent with the express provisions of the contract. The case of *Bank Line, Limited* v. *Arthur Capel & Co.* (1919), A.C. 435, is an example of a case where by terms of the charter-party liability was excused, but the care there taken was not taken in this case. Here we have the case of contracts plain in their terms that the ships would be available, not dependent for the possibility of performance on their availability, and the non-availability does not excuse. Further, there was default upon the part of the respondent, over which it had control.

MCPHILLIPS, J.A.

I would allow the appeal.

EBERTS, J.A. would allow the appeal.

EBERTS, J.A.

Appeal allowed, Martin, J.A. dissenting.

Solicitors for appellant: *Coburn & Duncan.*
Solicitor for respondent: *R. W. Hannington.*

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Nov. 24.

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1922
March 7.

STANDARD TRUSTS CO. v. DAVID STEELE, LTD.

STANDARD TRUSTS COMPANY AND SEWELL v. DAVID STEELE, LIMITED, AND CANADIAN CREDIT MEN'S TRUST ASSOCIATION LIMITED.

Landlord and tenant—Lease—Insolvency of lessee—Proviso for re-entry—Writ to recover possession—Further incidental claims—Relief against forfeiture—Trustee in bankruptcy—Right to retain premises—Can. Stats. 1919, Cap. 36, Secs. 14 and 52(5); 1921, Cap. 17, Sec. 41.

Although a writ in an action by a landlord claiming possession of a leased premises includes a claim for double the yearly value of the land and premises until possession shall be given, it may, nevertheless, be equivalent in law to re-entry. Under the Landlord and Tenant Act the claim for double yearly value can only be valid if the lease is at an end, therefore the claim is incident to a claim for possession and a writ claiming possession and any further relief incidental to such claim is equivalent to re-entry.

In the case of a landlord having re-entered in law thereby bringing into operation a proviso in a lease as to forfeiture of the term before a trustee in bankruptcy of the tenant enters into occupation, the trustee has no right to possession as a trustee's right to retention of "leased premises" under section 41 of The Bankruptcy Act Amendment Act, 1921, is only in respect to premises covered by a subsisting lease.

Relief against forfeiture of the lease through tenant's insolvency was refused.

APPEAL by defendants from the decision of MURPHY, J. (reported *ante* p. 359) in an action as to the Standard Trusts Company, as trustee under the will of Harry Braithwaite Abbott, deceased, and as to Margaret Amelia Sewell in her own right, to recover possession of certain tracts of land in the City of Vancouver, together with the store and other buildings thereon situate, known as number 556 Granville Street, Vancouver, B.C., and also for a declaration that the lease thereof dated the 30th of December, 1919, from the plaintiffs to the defendant has been cancelled, that the term thereby created has been forfeited and is void, and for double the yearly value of such land and premises until possession shall be given, and for damages.

Statement

The appeal was argued at Victoria on the 12th and 13th of January, 1922, before MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Mayers (*F. R. Anderson,* with him), for appellants: The premises were under lease containing a provision for forfeiture on insolvency. As to the point of time when forfeiture takes place see *Grimwood* v. *Moss* (1872), L.R. 7 C.P. 360 at p. 364. The Ontario Act is substantially the same: see *Tew* v. *Routley* (1900), 31 Ont. 358 at p. 365; *Soper* v. *Littlejohn* (1901), 31 S.C.R. 572; *In re McKay* (1921), 2 C.B.R. 59 at p. 63. We should be relieved against forfeiture: see *Hamilton* v. *Ferne and Kilbir* (1921), 1 W.W.R. 249; *Huntting* v. *MacAdam* (1908), 13 B.C. 426. Relief has been given in case of an assignment: see *Royal Trust Co.* v. *Bell* (1909), 12 W.L.R. 546 at p. 551; *Warner* v. *Linahan* (1919), 2 W.W.R. 94; see also *In re Auto Experts Ltd.* (1921), 1 C.B.R. 418.

Davis, K.C. (*Abbott,* with him), for respondents: It is purely a question of the construction of the statute, *i.e.*, section 52(5). It must be given its ordinary meaning. When the statute takes away rights it must be very clear and when there is a change in the statute it is presumed it was for the purpose of changing the meaning of the former one. Here it is a question how far it interferes with the landlord's rights. We say the lease was at an end before the trustee could exercise his power given by the Act. The case admits the tenant was insolvent prior to the trustee holding office. A formal entry is not necessary. The issue of the writ was sufficient and a verbal notice terminates the lease. Once the lease is ended by the landlord nothing can resurrect it: *Linton* v. *Imperial Hotel Co.* (1889), 16 A.R. 337 at p. 338. An order affirming an arrangement is equivalent to a receiving order: see *In re McKay* (1921), 2 C.B.R. 59; *Hill* v. *Barclay* (1811), 18 Ves. 56 at pp. 61-2. A landlord cannot have a tenant forced on him: see *Barrow* v. *Isaacs & Son* (1891), 1 Q.B. 417; *Edwards* v. *Fairview Lodge* (1920), 28 B.C. 557 at p. 559. On the question of relief from forfeiture see *Buckley* v. *Beigle* (1884), 8 Ont. 85. When you obtain relief everything is put back as it was. This cannot be done when a tenant is forced on the landlord against his will: see *Smith* v. *Gronow* (1891), 2 Q.B. 394 at p. 397.

Argument

Mayers, in reply, referred to *Moore* v. *Ulleoats Mining Co.*

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(1907), 77 L.J., Ch. 282; (1908), 1 Ch. 575 at pp. 578 and 587; Maxwell's Interpretation of Statutes, 6th Ed., 406 and 484.

Cur. adv. vult.

7th March, 1922.

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

GALLIHER, J.A.: I am in agreement with the learned trial judge for the reasons given by him.

McPHILLIPS and EBERTS, JJ.A. would dismiss the appeal.

Appeal dismissed.

Solicitors for appellants: *Russell, Hancox & Anderson.*
Solicitors for respondents: *Abbott, Macrae & Company.*

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1922
March 9.

VANCOUVER ISLAND MILK PRODUCERS' ASSOCIATION v. ALEXANDER.

Contract—Sale of all milk and cream produced for three years—Breach—Injunction—Specific performance.

VANCOUVER ISLAND MILK PRODUCERS' ASSOCIATION v. ALEXANDER

The Court will not grant an injunction to restrain the breach of a contract for the sale and delivery of goods where an action for specific performance does not lie.

Where, therefore, a milk vendor contracts to sell and deliver to the plaintiff all the milk and cream produced by himself for sale for a period of three years there being a covenant that he pay $500 as liquidated damages in case of breach:—

Held, that as the parties had agreed in the contract for liquidated damages in case of breach the Court will not grant an injunction.

Statement

APPEAL by defendant from the order of LAMPMAN, Co. J., of the 14th of February, 1922, restraining the defendant from selling milk or cream until the trial of the action and for a further order of the 16th of February, 1922, continuing the injunction until the trial of the action. The plaintiff Associa-

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tion and the defendant entered into an agreement in writing on the 1st of July, 1920, whereby the defendant agreed to sell the Association all the milk and cream produced by the defendant for sale for three years. The agreement provided that the milk should be delivered in good condition at Victoria, and there was a further provision that if the defendant failed to carry out his agreement or make default in the supply or delivery of milk he should pay the plaintiff $500 by way of liquidated damages. In February, 1922, the defendant refused to further deliver to the plaintiff and from that date sold his milk and cream direct to the public.

Statement

The appeal was argued at Vancouver on the 9th of March, 1922, before MACDONALD, C.J.A., MARTIN and MCPHILLIPS, JJ.A.

Mayers, for appellant: The law applicable to this case is settled in *W. L. Macdonald & Co.* v. *Casein, Ltd.* (1917), 24 B.C. 218; *Fothergill* v. *Rowland* (1873), L.R. 17 Eq. 132. A decree for specific performance cannot be obtained here so the proper action is for damages and not for an injunction: see *Dominion Coal Company, Limited* v. *Dominion Iron and Steel Company, Limited and National Trust Company, Limited* (1909), A.C. 293 at p. 311. The damages must be irreparable before an injunction will be granted: see *Carnes* v. *Nesbitt* (1862), 7 H. & N. 778. The provision for payment of $500 as liquidated damages shews the value placed on repudiation of the contract: see *Young* v. *Chalkley* (1867), 16 L.T. 286.

Argument

N. W. Whittaker, for respondent: It is not necessary in order to obtain an injunction that there be an express negative covenant in the agreement: see *Doherty* v. *Allman* (1878), 3 App. Cas. 709 at p. 720. On the question of irreparable damage see Kerr on Injunctions, 5th Ed., 16. That an injunction cannot be granted unless complainant is entitled to specific performance see *Washington Cranberry Growers' Ass'n* v. *Moore* (1921), 201 Pac. 773 at p. 776. On granting an injunction see *French* v. *Macale* (1842), 2 Dr. & War. 269; *Bird* v. *Lake* (1863), 1 H. & M. 111; Fry on Specific Performance, 6th Ed., p. 68, par. 146.

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Mayers, in reply: They have inserted no negative covenant and then taxed the damages that might arise.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I think the appeal must be allowed. The case is entirely governed, as I see it, by *W. L. Macdonald & Co.* v. *Casein, Ltd.* (1917), 24 B.C. 218. The case is not one for which specific performance would lie. What the plaintiff claims here is, to obtain specific performance by means of an injunction. The parties had agreed in the contract itself for liquidated damages. Now each party was entitled to rely upon that. The defendant was entitled to say "If I break this contract the damages which I am incurring are as set out in the contract." Now it is proposed in this action to disregard that altogether and in effect grant specific performance.

The appeal is allowed.

MARTIN, J.A.

MARTIN, J.A.: This case seems to me to be governed by the decision in the case of *W. L. Macdonald & Co.* v. *Casein, Ltd.* (1917), 24 B.C. 218. The strongest point the plaintiff could have shewn (but that has not been done) would be to produce the evidence to shew that it was impossible for him to supply the milk from other quarters.

I think the appeal should be allowed.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: In my opinion the appeal succeeds. I consider the case similar to *W. L. Macdonald & Co.* v. *Casein, Ltd.* (1917), 24 B.C. 218, not in any salient feature capable of being differentiated. That in itself is sufficient to dispose of the appeal.

With great respect to what my learned brother the Chief Justice has said with regard to the action itself, I refrain from expressing any view as to the rights of the parties to the action, because it is an *interim* injunction, the trial yet to be had. It may be that we may be concerned with it later.

Appeal allowed.

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

Solicitors for respondent: *Whittaker & McIlree.*

NIMMO *ET AL.* v. ADAMS *ET AL.*

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NIMMO v. ADAMS

Will—Codicil—Whether latter inconsistent with former—Specific devises —Codicil revoking same—Surrounding circumstances—Right of Court to consider.

Executor—Duty of—Wrong-doing—Launching action instead of seeking aid of Court to interpret will—Costs—Against executor personally.

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 F. and W. 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 F. and W. was a specific legacy (subject to the right of said legatee of $1,000) and therefore the beneficiaries named in the will other than F. and W. had no right to intervene or seek any redress in connection with the business.

It is the duty of an executor to seek the aid and protection of the Court in the interpretation of the will.

Here, the executor, having launched an action to wind up a business specifically devised, instead of seeking the advice of the Court, was condemned personally in costs.

Statement

APPEAL by plaintiffs from the decision of MACDONALD, J. of the 10th of February, 1921 (reported in 29 B.C. 277),

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in an 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 defendants. Mrs. M. T. Marvin while living at Los Angeles, California, made her will in June, 1912. She gave her house and furniture in California to her daughter Grace, and the balance to F. F. Hedges of Victoria and Wm. J. Nimmo of California as executors to act jointly or alone in their respective countries. The will provided, *inter alia,* that the executors should take and hold the residue of the estate for certain uses and trusts: (1) To manage the business of E. B. Marvin & Co., ship chandlers (in which she owned a two-thirds interest); (2) to pay certain legacies out of the proceeds from said business; (3) to give one-third of what remained of the business to her grandson Walter and the balance to her daughter Grace. Shortly after the will was executed she conveyed by deed to her daughter Grace her residence in California, all her remaining property being in British Columbia. She returned to British Columbia and made a codicil in January, 1917, revoking her bequest in the business to her grandson, charging the business with a bequest of $1,000 to her adopted daughter Florence and dividing "the whole of my share and interest remaining in the said business" between her son Frank and her grandson Walter. The executor Hedges died in 1919, and the surviving executor Nimmo brought action in 1920. The facts are set out fully in the judgment of the trial judge (29 B.C. 278).

Statement

The appeal was argued at Vancouver on the 1st of December, 1921, before MARTIN, GALLIHER and EBERTS, JJ.A.

Maclean, K.C., for appellant Nimmo: Property specifically devised is subject to debts: see *Davies* v. *Nicolson* (1858), 2 De G. & J. 693; Williams on Executors, 11th Ed., 1077. It is the executor's duty to see that the debts are paid and that the beneficiaries are paid. The trial judge has no jurisdiction to deprive the executor of his costs unless he decides he has been guilty of misconduct. Marginal rule 976 deals with this. See also *Re Pugh; Lewis* v. *Pritchard* (1888), 57 L.T. 858; *In re Sarah Knight's Will* (1884), 26 Ch. D. 82 at p. 90;

Argument

In re Love. Hill v. *Spurgeon* (1885), 29 Ch. D. 348 at p. 350; Annual Practice, 1922, p. 1261.

Higgins, K.C., for appellant beneficiaries: I adopt Mr. *Maclean's* argument: see also *In re Stephens* (1903), 73 L.J., Ch. 3; *Green* v. *Tribe* (1878), 9 Ch. D. 231; *In re Grainger* (1900), 69 L.J., Ch. 789 at p. 793. To hold that Frank and Walter took the whole business freed from the terms of the will the following facts would be ignored: (1) That the will is confirmed; (2) that the bequest to the executors in trust is not revoked; (3) that the revocation is confined to an interest in the firm; (4) that what remains in the will would have to be entirely ignored; and (5) that Florence would take nothing from the *corpus* of the estate. An intention to revoke must be clear and manifest: see *Hearle* v. *Hicks* (1832), 1 Cl. & F. 20; *Farrer* v. *St. Catharine's College, Cambridge* (1873), L.R. 16 Eq. 19 at p. 23; *Re Percival; Boote* v. *Dutton* (1888), 59 L.T. 21; *In re Freeman* (1909), 79 L.J., Ch. 110; Grace's interest is not revoked and Florence has legacies by two different instruments: see Halsbury's Laws of England, Vol. 28, p. 784, par. 1432; Theobald on Wills, 7th Ed., 158; Jarman on Wills, 6th Ed., 1121. Legacies given by different instruments are *prima facie* cumulative. You cannot insert any words into the will. It must be taken as it reads: see *Hunter* v. *Attorney-General* (1899), A.C. 309 at p. 517. Extrinsic evidence is not admissible: see *Higgins* v. *Dawson* (1901), 71 L.J., Ch. 132. As to specific bequests see *Bothamley* v. *Sherson* (1875), L.R. 20 Eq. 304; *Robertson* v. *Broadbent* (1883), 8 App. Cas. 812.

Argument

Bass, for respondents: In answer to Mr. *Maclean,* if property specifically devised is subject to debts, then all the specifically devised property of the estate should be brought in, and not just one devise attacked, as here. The surviving executor (plaintiff) took the wrong course in launching this action, which had the effect of damaging the chief tangible asset of the estate. There was pending at the time an application to the Court for a construction of the will and codicil, which would have settled the question in controversy. It is submitted that in pursuing the course he adopted, he was guilty

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of wrong-doing, in that it was his duty to conserve the estate and not subject it to unnecessary legal expenses. Therefore the learned trial judge was right in penalizing him with costs personally, together with the beneficiaries who joined him in the action. It is further submitted that the learned judge, for the reasons stated by him, was right in making the joining beneficiaries party plaintiffs with the executor. Further, the deceased executor, Hedges (co-executor of plaintiff), treated the business as belonging to the defendants (respondents) and formally transferred it on the books of the firm. Plaintiff Nimmo must be taken as being aware of and consenting to this. With deference, the respondents adopt *in toto* the reasons of the learned trial judge, both on the general merits and on the question of making party plaintiffs the beneficiaries joining with the executor.

Cur. adv. vult.

7th March, 1922.

MARTIN, J.A.

MARTIN, J.A.: After a careful consideration of this case, in the course of which I have perused all the evidence as was requested by counsel, I agree with the views expressed by my brother GALLIHER.

GALLIHER, J.A.

GALLIHER, J.A.: I think the learned trial judge came to the right conclusion as to the interpretation of the will and codicil, and I would come to the same conclusion without reference to the evidence to which objection is taken.

I am also not disposed to disagree with his finding as to costs. It seems clear to me that the plaintiff Nimmo was, in the proceedings taken and in the manner in which the case developed at the trial, in reality fighting the battle of his co-plaintiffs in conjunction with them and not in the proper sense seeking the aid and protection of the Court in guiding him in his duties as executor. There was a simple and comparatively inexpensive method of bringing the matter before a judge upon originating summons, and had he done so there could have been no question that he would have been entitled to costs as between solicitor and client out of the estate, and it may be, too, that had his co-plaintiffs been necessary parties to such proceedings,

they, even though unsuccessful, could have been awarded costs: see *In re Clarke* (1908), 97 L.T. 707. I do not think they would have been necessary parties to such proceeding, but be that as it may, in the proceedings which were taken, though they were not at first parties and delivered no pleadings, they came in at the trial represented by counsel and asked to be allowed to take part. After several objections by *Sir Charles Hibbert Tupper,* who appeared with Mr. *Bass* for the defendants, they were, without the concurrence of defendants' counsel, given a *status* and allowed to come in as party plaintiffs (see remarks of trial judge on application as to costs).

The case assumed the aspect of a trial of an issue between all the plaintiffs and the defendants as to who were entitled, and to what extent, and subject to what charges, to the business of Marvin & Co., under the terms of the will and codicil in question.

GALLIHER, J.A.

Again we find the plaintiffs all joining in the one notice of appeal and all appealing without differentiation on all the grounds set out in the notice. All this leads me to the conclusion, as I before stated, that this was not a *bona fide* application for direction by the executor, but a suit brought in the interest of his co-plaintiffs.

In such circumstances, I would not interfere with the judgment of the learned trial judge and would dismiss this appeal with costs.

EBERTS, J.A. would dismiss the appeal.

EBERTS, J.A.

Appeal dismissed.

Solicitors for appellant Nimmo: *Elliott, Maclean & Shandley.*

Solicitor for appellants Grace Adams *et al.*: *Frank Higgins.*

Solicitors for respondents: *Bass & Bullock-Webster.*

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1922

March 7.

DAY v. CANADIAN PACIFIC RY. CO.

DAY AND THE ROYAL TRUST COMPANY v. THE CANADIAN PACIFIC RAILWAY COMPANY.

Damages—Families Compensation Act—Value of life of deceased—Prospective loss—Amount of damages—Jury—Appeal—R.S.B.C. 1911, Cap. 82.

In an action under Lord Campbell's Act on behalf of the wife and four children of the deceased who fell into a pit from the unguarded curb of the driveway at the southern end of the defendant Company's hotel at Victoria, B.C., and died from injuries sustained, it was proved that the deceased's life expectancy (being 62 years old at the time of his death) was twelve years, that the profits of his brokerage business from the year 1910 to 1920 averaged $4,000 a year but for the last five years only $2,600 a year. It was further proved that the estate received on his death $7,500 accident insurance and $6,000 life insurance and the total value of his estate was $130,000. The verdict of the jury was $12,000 for the wife and $5,000 and $3,000 respectively for the two younger children for which judgment was entered.

Held, on appeal, affirming the decision of GREGORY, J., that on the evidence the jury might reasonably find as they did and the appeal should be dismissed.

APPEAL by defendant from the decision of GREGORY, J., of the 5th of December, 1921, and the findings of a jury in an action for damages for the death of Mrs. Day's husband through the negligence of the defendant Company. On the 26th of November, 1920, at about nine o'clock in the evening Mr. and Mrs. Day arrived in their automobile at the Empress Hotel, for the purpose of attending a ball. Mr. Day proceeded to park his car at the southerly end of the hotel just beyond the portico. The night was dark and rainy, and on getting out of the car Mr. Day fell over the curb at the end of the driveway, there being a fall of about 8 feet beyond the curb. Mr. Day was found unconscious about 35 minutes after he fell. He died about ten days later from the injuries sustained from the fall. The action was for the benefit of Mrs. Day and four children, Olive M. Dundas, aged 29, Richard W. Day, 25, Amy L. Day, 22, and Robert W. Day, 14. The jury brought in a verdict for $20,000, distributed as follows: Mrs.

Statement

Day, $12,000, Robert, $5,000, Amy, $3,000, and nothing for Olive M. Dundas and Richard W. Day. The defendant Company appealed on the grounds of misdirection and excessive damages.

The appeal was argued at Victoria on the 13th of January, 1922, before MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Davis, K.C. (*McMullen,* with him), for appellant: On the question of excessive damages, Mr. Day was 62 years old and his expectancy of life was about 12 years. He was a real estate man and his average income from business for ten years was about $4,000 a year and for the last five years about $2,600 a year. He had $7,500 accident insurance and $6,000 life insurance. His estate was $130,000. On the question of damages with relation to deceased's earning power see *Farquharson* v. *B.C. Electric Ry. Co.* (1910), 15 B.C. 280 at p. 282; *Taylor* v. *B.C. Electric Ry. Co.* (1911-12), 16 B.C. 109 and 420; *Rowley* v. *London and North Western Railway Co.* (1873), L.R. 8 Ex. 221 at pp. 230-1; *Johnston* v. *Great Western Railway* (1904), 2 K.B. 250 at pp. 255-7. On the question of misdirection the learned judge said in his charge that the jury could consider probable investments and profits. This cannot be considered in estimating loss of income.

Argument

Mayers, for respondent: The damages are not founded on what he actually earned; prospective loss may be considered: see *Taff Vale Railway* v. *Jenkins* (1913), A.C. 1 at p. 4. You cannot on appeal scrutinize minutely how the verdict was arrived at. Owing to the war business was suspended: see *Pym* v. *The G.N. Railway Co.* (1863), 4 B. & S. 396; *Wolfe* v. *Great Northern Railway Co.* (1890), 26 L.R. Ir. 548; *Johnston* v. *Great Northern Railway Co., ib.* 691. The jury could on the evidence reasonably come to the conclusion that they did. The objection as to the charge should have been taken on the trial: see *Nevill* v. *Fine Art and General Insurance Company* (1897), A.C. 68 at p. 76.

Davis, in reply.

Cur. adv. vult.

7th March, 1922.

MARTIN, J.A.: In this appeal it is submitted that the verdict

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for $20,000 should be set aside on the ground of misdirection to the jury and excessive damages. With respect to the latter ground, the general principle upon which our interference would be justified is well established upon the cases cited in our decision in *Farquharson* v. *B.C. Electric Ry. Co.* (1910), 15 B.C. 280; 14 W.L.R. 91, wherein we considered the matter, and it is simply a question of its application to the particular facts of each case. I do not think in the present one it is necessary to say more than that after a careful consideration of the evidence I am of opinion that the jury took an entirely reasonable view of the matter. With respect to misdirection, there is not, I think, anything of substance to complain of, having regard to the qualifications the learned judge was careful to put upon his instructions. In some respects the charge was not so favourable to the plaintiffs as it might well have been. The appeal therefore will be dismissed.

MARTIN, J.A.

GALLIHER, J.A.: A new trial is asked on two grounds: (a) Excessive damages; (b) misdirection. Taking ten years, 1911 to 1920 inclusive, it is shewn that the earnings averaged $4,000 a year. Of these years, 1911 and 1912 were exceptional years, owing to activity in real estate in Victoria, gradually declining until 1914, and from 1915 to 1918 dropping off very considerably and from that on until Mr. Day's death shewing a considerable upward tendency. I cannot say that the jury could not reasonably consider that this might continue or even improve. They might, upon the evidence, so find, and being entitled so to find they might reasonably assume that his earnings would be $4,000 per year out of the business. On that basis and the prospect of life and earning ability being fixed at 12 years, that would amount in that time to $48,000.

GALLIHER, J.A.

Though we cannot speculate as to just how the jury arrived at the amount fixed, it seems more than a coincidence that on that basis and deducting all the claims urged by Mr. *Davis,* it works out at just $20 less than the amount awarded, *viz.,* $20,000.

It was open to the jury to deal with it in this manner, and if they did so, I cannot say that they dealt with it unreasonably, and a new trial should not be ordered on this ground.

The objections taken by Mr. *Davis* as to misdirection are as follow:

"You multiply then the number of years that you fix upon, by the annual earnings that he makes—his annual income, whether it is earnings from his business *or business plus profitable investments.*"

And then again:

"So you take his *whole income.*"

The words objected to by Mr. *Davis* I have italicized, and did they remain without any further reference in the charge, I think the defendants would be entitled to a new trial. The matter was again referred to:

"Mr. *Davis*: I think your Lordship made it clear, excepting the earnings; you were speaking merely of his business income. My learned friend is under the impression that it was not limited to that, but I think it was. I think that is what your Lordship meant.

"THE COURT: When I speak of earnings, I mean the earnings in his business.

"Mr. *Davis*: Yes, that is what I understood.

"THE COURT: I spoke of income from any properties which he may have; but that property is still here, so far as that is concerned."

In view of this I do not think that it can be said the jury might have been influenced or were misled by the statement first above quoted.

The appeal must, therefore, be dismissed.

MCPHILLIPS and EBERTS, JJ.A. concurred in dismissing the appeal.

Appeal dismissed.

Solicitor for appellant: *J. E. McMullen.*

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

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Feb. 11.

SMILEY v. SMILEY.

Husband and wife—Separation agreement—Petition by wife for judicial separation and alimony refused—Subsequent order by magistrate for weekly payment by husband—Appeal—R.S.B.C. 1911, Cap. 242.

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In March, 1921, a husband and wife entered into a separation agreement. In the following September a petition by the wife in the Supreme Court for judicial separation and alimony was dismissed. An order was then made at the instance of the wife by the assistant police magistrate at Vancouver under the Deserted Wives' Maintenance Act whereby the husband was ordered to pay $10 a week for the maintenance of the wife. On appeal by the husband to the County Court:—

Held, that once the Supreme Court is seized of the matter the magistrate ought not to entertain any application by the wife against her husband under the Deserted Wives' Maintenance Act.

Held, further, that as the separation agreement still subsisted there could be no desertion and the magistrate had no jurisdiction to make the order.

Statement

APPEAL to the County Court by the husband from an order of the assistant police magistrate of Vancouver under the Deserted Wives' Maintenance Act whereby the husband was ordered to pay $10 a week for the maintenance of his wife. The facts are set out fully in the reasons for judgment. Argued before CAYLEY, Co. J. at Vancouver on the 24th of January, 1922.

J. E. Bird, for appellant.

Woodward, for respondent.

11th February, 1922.

Judgment

CAYLEY, Co. J.: This is an appeal on behalf of the husband from an order made by the assistant police magistrate of Vancouver, under the Deserted Wives' Maintenance Act, whereby the husband was ordered to pay $10 a week for the maintenance of the wife. The order was made November 9th, 1921. The appellant exhibited a separation agreement made between the parties, dated March 17th, 1921, and a judgment of Mr. Justice CLEMENT of the Supreme Court of British Columbia, dated September 13th, 1921, dismissing a petition of the wife for a judicial separation and alimony. The petition, answer and reply were also exhibited, whereby it appeared that the

separation agreement was brought to the attention of the learned judge. Appellant's counsel thereupon applied to have the assistant magistrate's order set aside on the grounds that the petition to a judge of the Supreme Court and its dismissal precluded the magistrate from acting in disregard thereof, and that there could not be a desertion by the husband while a separation agreement was still subsisting.

I think the appellant's application must succeed. Counsel for the wife claimed that he could produce evidence that the parties cohabited after the separation agreement was executed and that I should therefore consider the agreement as abrogated. There is nothing, however, in the County Courts Act which gives a County Court judge authority to set aside a separation agreement. Nor has a police magistrate any such authority. Whatever the conduct of the parties has since been, such an agreement must be held as subsisting until set aside by a competent authority. The question then comes to this: Can an order for maintenance be made under the Deserted Wives' Maintenance Act while there is a subsisting separation agreement? In *Charter* v. *Charter* (1901), 84 L.T. 272, which was an appeal from a magistrate's decision convicting the husband of desertion, the President, Sir F. Jeune, says:

"There was a separation by consent. . . . . I cannot understand on what ground the magistrate found desertion."

Again he says:

"The separation was not contrary to the wishes of the wife, but was really at the time a separation by mutual consent. The appeal must therefore be allowed."

Judgment

In *Piper* v. *Piper* (1902), P. 198 at p. 200 the same judge says: "The respondent in this appeal is met by the insuperable difficulty of this deed," *i.e.*, a deed of separation. In that case it was held that the deed put an end to any desertion theretofore existing. In *Pape* v. *Pape* (1887), 58 L.T. 399, another appeal from magistrates, but in the Queen's Bench, it was held that there was no desertion when there was separation under agreement. In all the above cases the order of the magistrates for maintenance was set aside on the ground that there could be no desertion where the parties had originally separated by agreement. I think, therefore, that the appeal in this case must be allowed on the ground that there can be no desertion when the parties have separated by agreement.

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There was the further contention by appellant's counsel that an application for alimony having been made by the wife to the Supreme Court and dismissed by Mr. Justice CLEMENT on September 13th, 1921, the magistrate was precluded from subsequently making an order for maintenance. Counsel cited *Re Wiley and Wiley* (1919), 49 D.L.R. 643 at p. 645. This is an Ontario case, which counsel distinguished from the present case on the ground that the order of the magistrate made in the present case was subsequent to Mr. Justice CLEMENT's judgment, while in *Re Wiley and Wiley* the order of the magistrates had been made prior to the dismissal of the action for alimony in the Supreme Court. I do not think the distinction alters the principle. But the language of Middleton, J. shews this,

> "It would certainly be an extraordinary situation if, after this Court [*i.e.*, Supreme Court of Ontario] had solemnly adjudicated that the wife was not entitled to alimony from her husband, the justices should be at liberty to direct a distress upon his property,"

was the language of the judge, and it would seem to follow from this language that an order for maintenance made by justices after the Supreme Court had solemnly adjudicated that the wife was not entitled to alimony would also be extraordinary.

Judgment

Re Wiley and Wiley is founded on *Craxton* v. *Craxton* (1907), 23 T.L.R. 527, in which Mr. Justice Bargrave Deane (p. 528) said:

> "Once the Divorce Court was seized with a matrimonial dispute, justices had no right to interfere in the matter."

This would include County Court judges also, since they are not a Divorce Court. In *Craxton* v. *Craxton* the application to the justices had been made while the divorce action was still pending, so again it may be distinguished from the case before me. But the language of Mr. Justice Bargrave Deane is broad enough, I think, to oust any subsequent jurisdiction of a magistrate when once the parties have been before a higher Court with their disputes and certainly ousts the jurisdiction where the order of the justice is made, as here, within two months of the dismissal of the petition for alimony.

The appeal is allowed, but the respondent's costs will be paid by the husband, as the terms of the separation agreement do not make any provision for the wife.

Appeal allowed.

ACME STEEL GOODS COMPANY OF CANADA LIMITED v. WALSH CONSTRUCTION COMPANY LIMITED.

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Sale of goods—Conversion—Damages—Mercantile agent—"When acting in the ordinary course of business," meaning of—Action by owner against buyer—Bad faith of buyer—R.S.B.C. 1911, Cap. 203, Sec. 69(1)—Factors Act, 1889 (52 & 53 Vict., c. 45), Sec. 2(1).

The meaning of the expression "when acting in the ordinary course of business of a mercantile agent" in section 69(1) of the Sale of Goods Act is when acting "within business hours, at a proper place of business, and in other respects in the ordinary way in which a mercantile agent would act, so that there is nothing to lead a pledgee to suppose that anything wrong is being done, or to give him notice that the disposition is one which the mercantile agent had no authority to make":

Oppenheimer v. *Attenborough & Son* (1908), 1 K.B. 221 at pp. 230-1 adopted.

An owner of goods placed with a mercantile agent, sued an alleged purchaser for wrongful conversion. The purchaser relied on section 69(1) of the Sale of Goods Act.

Held, that the actual payment of money by the defendant to the agent does not destroy the fact of *mala fides* but the fact that the transaction is found not to be an ordinary sale, *i.e.*, a sale to one desirous of either using the goods or disposing of them to advantage, has a bearing on the question of good faith, and the proof of dishonesty of the agent is not sufficient. It must be shewn that the defendant acted in bad faith and the evidence should be such as to prove to the hilt the *mala fides* of the alleged sale. On the evidence a sale did not take place within said section 69(1) and the defendant was liable for conversion.

ACTION for damages for wrongful conversion of goods. The facts are set out fully in the reasons for judgment. Tried by MACDONALD, J. at Vancouver on the 7th of December, 1921. Statement

Symes, for plaintiff.
Robert Smith, for defendant.

1st February, 1922.

MACDONALD, J.: Plaintiff seeks to recover, as damages the value of a quantity of steel shingle bands, of which it was the owner, and which it alleges the defendant wrongfully converted. This property had been consigned by plaintiff from Judgment

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Chicago, Ill., to T. A. Walsh & Company Limited, at Vancouver, for sale on commission. Sales were to be made in the name of plaintiff as owner and it was bound to account to the plaintiff for the proceeds of such sales. A separate account was kept of the business and of the amount of the plaintiff's goods on hand, from time to time, in the warehouse of T. A. Walsh Company. It disposed, however, of 25,356½ pounds of these shingle bands, by delivery to the defendant, without making any proper entries in its books or depositing any amount in the bank to the credit of the plaintiff. Defendant contended that the goods were acquired, through a *bona fide* purchase for value in the ordinary course of business, and then by amendment, set up as a further defence, the provisions of section 69 of the Sale of Goods Act (R.S.B.C. 1911, Cap. 203). Subsection (1) of said section 69, is as follows:

"69. (1.) Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods made by him when acting in the ordinary course of business of a mercantile agent shall, subject to the provisions of this Act, be as valid as if he were expressly authorized by the owner of the goods to make the same: Provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same."

The corresponding Act in England is termed the Factors Act, 1889 (52 & 53 Vict., c. 45), and said subsection (1) is a counterpart of subsection (1) of section 2 of that Act. The trend of the trial was as to the applicability of this subsection, and whether the defendant, while admitting that the goods were at the time the property of the plaintiff, was thereby protected in their acquisition. Defendant repudiated any suggestion that it became possessed of the goods by way of a "pledge" and the sole ground taken was one of sale and purchase.

Judgment

In attacking the transaction, plaintiff contended that the facts, attendant upon the transfer to the defendant of 17,006½ pounds of shingle bands in December, 1920, and the balance, namely, 8,350 pounds in April, 1921, shewed that the T. A. Walsh Company Limited was not acting "in the ordinary course of business of a mercantile agent," and thus that the protection that might otherwise be afforded to the defendant under the Act did not exist.

The object of the legislation, both with respect to "sales" and "pledges," was that a person, who was, with the consent of the owner, in possession of goods, as a mercantile agent, should have the same rights of dealing with them, as if he were the actual real owner. The question, whether or no, the defendant believed, that the T. A. Walsh Company was in possession of such goods as the owner, or simply as a mercantile agent, may remain in abeyance and is not for the moment material. It will become important in considering the "good faith" of the transaction.

In *Oppenheimer* v. *Attenborough & Son* (1908), 1 K.B. 221, the meaning of the expression "when acting in the ordinary course of business of a mercantile agent" was considered. Buckley, L.J., at pp. 230-1, thought it meant a mercantile agent acting

"within business hours, at a proper place of business, and in other respects in the ordinary way in which a mercantile agent would act, so that there is nothing to lead the pledgee to suppose that anything wrong is being done, or to give him notice that the disposition is one which the mercantile agent had no authority to make."

Accepting this definition of the expression, then did the two deliveries of the steel shingle bands take place in a manner, which would be considered "in the ordinary course of business."

Judgment

T. A. Walsh Company Limited was a small organization, with apparently very little capital, and in December, 1920, was financially embarrassed. It was practically a one-man company, managed and controlled by T. A. Walsh, a brother of J. P. Walsh, who held a similar position with the defendant Company. Under these circumstances, T. A. Walsh sought assistance from his brother, J. P. Walsh. Dorothy Stafford gave evidence, as to what took place in December, at the first delivery of the shingle bands. She was, at that time, in the employ of the T. A. Walsh Company as stenographer and bookkeeper and did all the clerical work, though subsequently employed by the plaintiff. She stated that, she was well aware that the shingle bands then in the warehouse belonged to the plaintiff and had been received on consignment for sale. Under instruction she prepared an invoice, purporting to shew a sale by the T. A. Walsh Company to the defendant of 17,000

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pounds of shingle bands at 12c per pound. She explained how this particular transaction in December differed from other transactions in Acme shingle bands as follows:

"Acme goods were supposed to be invoiced on Acme invoices. They had a special invoice. In that way the money would be paid to the Acme Steel Goods that was received on it, and copies of the invoices were sent to Chicago."

It appeared that her employers had only been dealing in the plaintiff's goods since July previous, when the agency was obtained. In carrying out the terms of the agency, the proceeds of the goods received were, after sale as the goods of the plaintiff, to be deposited to the credit of plaintiff in a separate bank account. This course of proceeding was in all respects ignored.

Defendant was not engaged in the buying and selling of this commodity, and it is quite evident that the transaction simply arose through the request made by T. A. Walsh to his brother for assistance. Defendant, if it became the purchaser of the goods, would as to their further disposition, not be in any better position than the T. A. Walsh Company. The shingle mills were the most likely purchasers of the shingle bands for actual use, and they were not more accessible for business to the defendant, than to T. A. Walsh Company. The defendant would generally require to sell to such mills in order to realize their value. It is thus apparent that the transfer by the T. A. Walsh Company to the defendant was not an "ordinary sale" in the sense, that it was not a sale by a vendor to a purchaser desirous of obtaining goods with a view either of using them or disposing of them to advantage.

Judgment

It is common ground that the transaction was intended to benefit the T. A. Walsh Company and not the plaintiff. Miss Stafford was quite clear and emphatic in her evidence, as to the form of the transaction, not being in accordance with her understanding, as to the true intention of the parties. She considered the invoice in December was, to use her own term, "irregular," and so stated to T. A. Walsh, but he explained the irregularity, by stating that it was simply a matter of accommodation for a few days and that he had to give his brother security for the advance of $2,000. If I accept Miss

Stafford's recollection of the transaction, then in the words of Darling, J. in *Waddington and Sons* v. *Neale and Sons* (1907), 23 T.L.R. 464 at p. 465, "there really was no sale at all."

It was contended that the defendant believed, on reasonable grounds, that the T. A. Walsh Company were the actual owners of the goods in question; further, that if this contention were not accepted, then that under the subsection referred to, the whole question turns upon whether the defendant acted *bona fide* and comes within the meaning attached to the expression as previously outlined by Buckley, J. Was there to the knowledge of the defendant anything wrong or any circumstance "to lead the [defendant] to suppose anything wrong?" In considering this matter I might properly put to myself, the question that Lord Tenterden submitted to the jury, in *Evans* v. *Trueman* (1830), 1 M. & Rob. 10 and approved of by Lord St. Leonards in *Navulshaw* v. *Brownrigg* (1852), 2 De G.M. & G. 441 at p. 452:

"'Where there is no evidence of direct communication [as to ownership] you should consider whether the circumstances were such that a reasonable man and a man of business, applying his understanding to them, would know that the goods were not Nevitt's.'"

The actual payment of the money by the defendant to T. A. Walsh Company will not destroy the fact of *mala fides,* if I find it existed. It might be an incident, worthy of consideration, but is not in any sense conclusive.

Judgment

In *Gobind Chunder Sein* v. *Ryan* (1861), 9 Moore Ind. App. 141; 19 E.R. 695 at p. 704, the manner in which a Court should deal with "good faith" between a mercantile agent and a lender (purchaser) is outlined as follows:

"The tribunal deciding the issue, whether the jury, or, as there, the judges acting as a jury, must, ... categorically find the facts of want of good faith, and of notice to the lender of want of authority in the agent, or that he is acting *mala fide* in the transaction against his principal. The statute is silent as to the grounds on which the conclusion is to be arrived at; that is left to the ordinary principles of evidence. But, where the fact is so found, it would be as much against mere honesty as against the interests of commerce, properly considered, to afford any protection to the transaction."

I have already found that the transaction was not an ordinary sale, but this would of itself only have a bearing upon the question of good faith. It, as it were, creates an

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atmosphere, in which a person would be critical, as to the true nature of the transaction. Then further, in considering it, I think one should bear in mind the relationship existing between the parties, who are interested in opposing the alleged conversion.

T. A. Walsh and Company, by disposing of these goods to the defendant, acted in fraud of its principal and failed to comply with the contract of agency in many respects. It was required not only to sell the goods as the property of the plaintiff but to send copies of all invoices shewing such sales to Chicago. This would afford a check on the business. In this instance neither the sale of December nor that in the following April was so reported. It was agreed that the plaintiff would do all the accounting necessary, at its head office, and directly make collections for sales. It was also stipulated that the duty paid should be indicated in a separate item, so that the plaintiff might know, at all times, the net amount that its agent was securing on its behalf from customers for goods sold.

The dishonesty of T. A. Walsh on behalf of his company is not, however, sufficient. The plaintiff must assume the burden of satisfying me that the defendant acted in bad faith, and in so doing relies upon various circumstances as proving either directly or by fair inference that a "sale" of the goods did not take place.

Judgment

Miss Stafford expressed her belief that J. P. Walsh was present, at the time of the transaction in December, when the "irregularity" was discussed, and she was instructed to make out an invoice which, to her mind, was false, and was not a correct record of the transaction. As against her belief on this point J. P. Walsh is very positive that the transaction was what he termed a "straight" sale. There is no direct evidence to shew that he knew that the goods were not the property of the T. A. Walsh Company at this time. He states that he saw the invoices and that they apparently shewed an ordinary transaction of sale between the plaintiff and T. A. Walsh Company. He says, he first became aware of the true position of matters in June or July, 1921, but if he bases the time, on information received from Harry McColl, then he

must be mistaken, as McColl, a witness on behalf of the defendant, states that he advised J. P.Walsh before the 20th of May that the goods were only on consignment to the T. A. Walsh Company. I accept McColl's statement as to the time. Then J. P. Walsh was well aware in December, that the $2,000 his company was then paying the T. A. Walsh Company, would be applied in payment of his help, warehouse expenses, freight, etc. It was not intended to be applied in payment of the large quantity of plaintiff's goods then in the warehouse. These, he states, he thought had been bought on credit but was not asked whether he thought it probable that a business corporation would sell outright and without security to a company so involved as T. A. Walsh Company. He also knew at the time, that his father, employed by the T. A. Walsh Company, was in arrears for his wages and had already lost money invested in the Company. J. P. Walsh had assisted at the organization of the Company by endorsing a note for $10,000.

With the Company controlled by his brother, thus in financial difficulties, he was again approached in April for further assistance. The peculiarity of the whole transaction, then becomes more noticeable. On the 15th of April, J. P. Walsh wrote to his brother, drawing his attention to the purchase of the steel bands in December and stating that as he would like to use the money, "I think I will have to go into the market and sell them." He also refers to there being a likely drop in the price of iron, and that his company would take a big loss on the bands. He explains the tone of this letter by stating, that there was an understanding that he should not offer these bands in the market, in competition with similar stock held by the T. A. Walsh Company. Still, in the face of the prospective financial loss and probable drop in the price, referred to in his letter, on the 20th of April, 1921, he acquired a further large quantity of steel bands from T. A. Walsh Company, amounting to $1,012.02. J. P. Walsh, having intimated that the main object "in taking the bands was to help out the T. A. Walsh Company and keep it from going into liquidation," admitted that they were not for re-sale, at any rate at a profit, by stating, as to the first quantity, that it

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would certainly have been given back, if the $2,000 had been paid to his company. He still, however, adhered, in his evidence, to the position, that both transactions consisted of sale and purchase. This position was, in addition to those already outlined, attacked on other grounds. Particularly, stress was laid upon the fact that an account had been rendered by his company to T. A. Walsh Company, on July 2nd, 1921, shewing the disposition of the steel bands, which was inconsistent with such a position. This statement of account, as well as the letter of the 15th of April, came into possession of the plaintiff before action. It, coupled with the information afforded by Miss Stafford, doubtless formed the material upon which the plaintiff felt warranted in attacking the transactions. In cross-examination, J. P. Walsh, after reference had been made as to the $2,000 being paid back, and the steel bands covering that amount returned, was asked these questions:

"That is all you wanted, was security and not a sale? Because I felt sure that he would never be able to get $2,000 to get them back and he would know we would have to sell them.

"If the price of shingle bands had increased to 24 cents you would still have given your brother them back? Less my costs I suppose."

These replies, in addition to the statement, are worthy of special consideration. If Miss Stafford had been positive, as to J. P. Walsh being aware that the transaction in December was "irregular," and that she demurred on that account to an improper conversion of the goods, then I would accept her evidence, in preference to that of J. P. Walsh, especially in view of the relationship between himself and T. A. Walsh.

Judgment

The attack upon the defendant is such, that while the term "fraud" is not used, still it amounts to the same. Bearing this in mind, I think that the evidence should be such as to prove the *mala fides* of the alleged sale to the hilt. I have commented upon the nature of the transaction, and that defendant conceded that it was not an "ordinary" sale. This fact, coupled with such replies, statement and correspondence, corroborate Miss Stafford and are consistent with her "belief" that J. P. Walsh was present and heard the discussion as to irregularity of the disposition of plaintiff's goods.

It is beyond doubt that he did not, on behalf of his company, acquire the steel bands with a view of selling them when and

as he saw fit. I am satisfied that he had an understanding with the T. A. Walsh Company as to their disposition, and that any profit over and above the amount paid at the time should be accounted for and paid to such Company. It was also in the mind of J. P. Walsh, as a first alternative, that the T. A. Walsh Company might by repayment obtain a return of the steel bands within a reasonable time. In this view of the matter, on defendant's own admissions, the T. A. Walsh Company still retained a substantial interest in the steel bands. It was in the nature of a resulting trust. This interest was equitably possessed by the plaintiff, as owner of the goods, so wrongly disposed of by its agent. Defendant should, in any event, as it was aware, prior to the 20th of May, 1921, that the steel bands which it had acquired, had wrongfully come into its possession, have accounted therefor to the plaintiff. Defendant, notwithstanding such knowledge, paid to T. A. Walsh personally, $200 received from the proceeds of the sale of such goods. Then when the statement of July 2nd was rendered, it shewed a balance due of $118.88. This sum was also paid to T. A. Walsh Company, but by arrangement diverted for the use of Mrs. Nellie Walsh, mother of J. P. Walsh and T. A. Walsh.

In my opinion, however, I should, under the circumstances and for the reasons thus outlined, go further, and find that a "sale" of the steel shingle bands did not take place between T. A. Walsh Company and the defendant. The result is that the defendant fails in its contention and cannot obtain the aid of the Act in acquiring the plaintiff's goods, and are liable for conversion.

Judgment

The question then remains, what amount of damages should be allowed to the plaintiff. Accounts were rendered to T. A. Walsh Company by the plaintiff, subsequent to the plaintiff being aware of the defalcation and impairment of its stock of goods. A statement was rendered by plaintiff, shewing the amount claimed to be due by T. A. Walsh Company. It is now contended that the plaintiff is, by its actions, estopped from seeking redress from the defendant. I do not think this position tenable. The plaintiff did not, by anything done or

MACDONALD, J.

1922

Feb. 1.

ACME STEEL GOODS CO. OF CANADA v. WALSH CONSTRUCTION CO.

course pursued waive any rights it possessed, as against the defendant, for conversion of its goods: see on this point *Rice* v. *Reed* (1900), 1 Q.B. 54, where a somewhat similar action was brought, and it was decided that the plaintiff had not, through his dealings with his agent, elected to affirm a wrongful sale of plaintiff's goods, nor waive the right of action for tort against the purchaser of such goods. Lord Russell, C.J. at p. 64 states that the cases there referred to, establish two propositions:

"first, that an application for the proceeds of goods said to have been tortiously dealt with is not conclusive proof of election to affirm the transaction; and, secondly, that the receipt of part of the proceeds is not conclusive proof of election."

Judgment

Defendant is, however, entitled to the benefit of the actual state of account between the plaintiff and T. A. Walsh Company. It was stated during the course of the trial that a further credit, than that appearing in the account rendered, should be allowed, and it was agreed by plaintiff that any proper credit would be given.

If the amount which should be deducted from the value of the steel bands cannot be settled between counsel, then it may be determined, when settling the formal order for judgment. Judgment will be for the plaintiff for such amount with costs.

Judgment for plaintiff.

IN RE SUCCESSION DUTY ACT AND J. H. WALKER, DECEASED.

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

1922

Feb. 9.

IN RE SUCCESSION DUTY ACT AND WALKER, DECEASED

Succession duties—Promissory notes and agreements for sale in another Province—Liability in respect thereof—Situs of property—Mobilia sequuntur personam—R.S.B.C. 1911, Cap. 217.

The owner of certain agreements for sale and promissory notes that were made and were payable in another Province and had never been brought into this Province, died domiciled in British Columbia.

Held, that succession duties were payable on said assets in British Columbia by virtue of the maxim *mobilia sequuntur personam*.

Smith v. *The Provincial Treasurer for the Province of Nova Scotia and the Province of Quebec* (1919), 58 S.C.R. 570 followed.

APPLICATION by the executor of deceased under section 43 of the Succession Duty Act for determination by the Court as to what property of deceased was liable to succession duty in British Columbia. Certain debts were due deceased under agreements for sale of realty and promissory notes in the Province of Saskatchewan. Deceased was domiciled and resided in British Columbia at the time of his death, also his son to whom these assets were bequeathed. The instruments in question were in Saskatchewan at the time of his death and had never been in this Province. Counsel for the executor contended these assets were not liable to succession duty in this Province. Counsel for the Crown contended that the *situs* of these debts was in British Columbia under the definition of "all property situate in the Province" in the Succession Duty Act and also by virtue of the maxim *mobilia sequuntur personam*. Heard by HUNTER, C.J.B.C. at Chambers in Vancouver on the 27th of January, 1922. Statement

Sir C. H. Tupper, K.C., for the application.
Carter, contra.

9th February, 1922.

HUNTER, C.J.B.C.: In this case succession duties are claimed in respect of promissory notes and agreements for sale of land, all of which were made without the jurisdiction Judgment

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

1922

Feb. 9.

IN RE SUCCESSION DUTY ACT AND WALKER, DECEASED

and create obligations payable without the jurisdiction, and none of which documents have ever been brought within the jurisdiction.

By the British North America Act the Legislature is empowered to impose direct taxation within the Province in order to raise revenue for Provincial purposes. There are therefore two limitations, namely, that the taxation must be direct, and that it must be within the Province.

Had the matter been *res integra,* giving the language the meaning which would be in accordance with the ordinary understanding of men, one might have said that this was not "direct taxation within the Province." But the Supreme Court of Canada in *Smith* v. *The Provincial Treasurer for the Province of Nova Scotia and the Province of Quebec* (1919), 58 S.C.R. 570 in construing a similar statute, only not so explicit in its terms as our own, have held that it is so by reason of the maxim *mobilia sequuntur personam.* The propriety of the application of this rule was reaffirmed by the Court in *Barthe* v. *Alleyn Sharples* (1920), 1 W.W.R. 952, although that case dealt with a Quebec statute which is not *in pari* as it imposes a duty on the transmission or succession and not on the property itself. This latter case came before the Judicial Committee (38 T.L.R. 131), but the Board rested its decision on the ground that as the transmission took place within the Province to a person domiciled or resident within the Province, the duty was lawfully imposed and did not consider the applicability of the maxim to the construction of the British North America Act.

Judgment

It follows from the Supreme Court decision that if a man maintains a residence in Toronto where his children are being educated, and dies domiciled in British Columbia, that the contents of his Toronto residence are liable to British Columbia taxation, although he may never have had any intention of moving the assets to British Columbia. I find it difficult to persuade myself that such a result was ever contemplated by those who framed the enactment, in fact, I would have thought that by the use of the words "within the Province" they expressly intended that it should not be in the power of the

Province to tax property actually situate in another Province or elsewhere, but that each Province was to be confined to such as was within its own borders. Nor am I able to see any valid reason for resorting to a rule which may be useful in deciding questions of administration in the construction of the Act. However, the result is that by means of a maxim which says that things are in law what they may not be in fact, taxes may be exacted in respect of property outside the Province, and one can imagine the rapture of the first Provincial minister of finance who made the discovery that he might get at extra territorial property under the shield of this legal fiction, as well as the shock experienced by the subject of the first attack. It may well be that the rule is relevant in questions of taxation in those jurisdictions where the range of the taxation authority is limited only by international law, but I am unable to see its relevance to the construction of a statute which expressly limits the power to a given area.

Judgment

If Latin maxims are to be allowed to control the plain meaning of English statutes, then there seems to be some danger that the Court will become the temple of a mysterious cult, intelligible only to the initiated, instead of being preserved as the shrine of that common sense which all can understand. However, the question is settled so far as I am concerned, and there must be judgment for the Crown.

Judgment for the Crown.

COURT OF APPEAL

1922

March 10.

DOUGLAS LAKE CATTLE CO. v. REINSETH

DOUGLAS LAKE CATTLE COMPANY, LIMITED v. REINSETH.

Practice—County Court—Claim and counterclaim—Jury notice by defendant—Judgment on pleadings and admissions for plaintiff on claim—Trial of counterclaim ordered without jury—Appeal from interlocutory order—Order III., r. 18—Efficiency of.

In an action in the County Court for balance of account rendered the defendant counterclaimed and gave a jury notice. After giving judgment for the plaintiff on the pleadings and admissions in the examination for discovery the learned judge allowed the plaintiff's motion that the jury notice be struck out and the counterclaim be tried by the judge alone.

Held, on appeal, reversing the decision of SWANSON, Co. J. (MARTIN and MCPHILLIPS, JJ.A. dissenting), that where the amount claimed by the counterclaim exceeds $50 the defendant is entitled to give a jury notice and have the counterclaim tried by jury.

Per MACDONALD, C.J.A.: The counterclaim is just as much a part of the "action" for the purposes of the judgment which involves the trial as is the claim itself. The claim and counterclaim constitute the "action" and while they may be referred to as "action" and "counterclaim" and in many respects they are distinct, yet for the purposes of trial they together fall within the designation of "action." A trial having been commenced should be completed. The taking of an appeal from an order made in the course of the trial is to be deprecated.

APPEAL by defendant from an order of SWANSON, Co. J., of the 15th of December, 1921, striking out the defendant's notice of demand for a jury to try the action and that the defendant's counterclaim be tried by the Court without a jury. The plaintiff brought action in the County Court of Yale against the defendant for $135.70, the balance of an account rendered. The defendant counterclaimed for wrongful conversion of two steers valued at $400 and gave a jury notice. The jury was summoned and on the case being called for trial counsel for the plaintiff moved for judgment on the pleadings and the admissions in the defendant's examination for discovery, and judgment was given for the plaintiff. Plaintiff then moved to have the jury notice struck out and an order

Statement

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DOUGLAS LAKE CATTLE CO. v. REINSETH

was made that the jury notice be struck out and that the defendant's counterclaim be tried without a jury.

The appeal was argued at Victoria on the 26th of January, 1922, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

A. D. Macintyre, for appellant: A counterclaim is a proceeding in a counteraction and the learned judge was wrong in striking out the jury: see *McGowan* v. *Middleton* (1883), 11 Q.B.D. 464 at p. 468.

Abbott, for respondent: The defendant has no right to have his counterclaim tried by jury. It depends on the meaning of the word "action." A counterclaim is not a civil proceeding commenced in an action. Order V., r. 18, provides for counterclaim: see *Kinnaird (Lord)* v. *Field* (1905), 2 Ch. 361 at p. 366. It is not a proceeding under Order I., r. 1: see *Delobbel-Flipo* v. *Varty* (1893), 1 Q.B. 663; *Irwin* v. *Brown* (1888), 12 Pr. 639; *Bergman* v. *Smith* (1896), 11 Man. L.R. 364; Annual County Courts Practice, 1921, p. 189.

Argument

Macintyre, in reply, referred to Annual County Courts Practice, 1921, p. 492.

Cur. adv. vult.

10th March, 1922.

MACDONALD, C.J.A.: Order V., r. 18, of the County Court Rules entitles a defendant to set off or set up by way of counterclaim against the plaintiff's claim in an action, any right or claim whether sounding in damages or not, and the counterclaim is to have the same effect as a cross-action, so as to enable the Court to pronounce final judgment in the same action both on the original and the cross-claim.

MACDONALD, C.J.A.

In the case in appeal, a counterclaim was set up against the plaintiff's claim. Either party was entitled to give a jury notice since the claim as well as the counterclaim exceeded $50. The defendant served a jury notice; the jury was duly summoned and the action was ready for trial with a jury on the morning fixed for trial. The plaintiff's counsel moved for judgment on the claim, relying upon the pleadings and admissions of the defendant, and judgment was given accordingly.

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He then moved to have the jury notice struck out and to have the counterclaim proceeded with before the judge alone, and this motion was acceded to but the trial was postponed. Mr. *Abbott's* submission is that while defendant was within his right in serving a jury notice to try the claim of the plaintiff, the jury could try the claim of the plaintiff alone and not the counterclaim, and that when judgment was given on the claim, the counterclaim must have been tried by the judge without the jury, and this appears to have been the view taken by the learned County Court judge.

If Mr. *Abbott's* contention be right, then in no case can the jury try a counterclaim: in every case of a counterclaim when a jury is summoned to try the action there must be two distinct modes of trial. If this be the law it is most unfortunate and is entirely out of harmony with the spirit of modern British judicature, which seeks, if it does not virtually compel, an avoidance of multiplicity of actions by making it the duty of him who has a cross demand to set it up by way of counterclaim in his opponent's action. The intention in providing for the setting up of a counterclaim was that independent causes of actions should be consolidated by pleading, making it unnecessary that each should be commenced separately and tried separately, or consolidated by the Court and tried together.

MACDONALD, C.J.A.

If I am right in my understanding of the objects sought to be attained by the Judicature Acts and Acts and Rules founded upon the principles of the Judicature Acts, which our County Courts Act and Rules are, then the party who counterclaims, instead of commencing an independent action, was never intended to be deprived of so valuable a right as a trial of his cause by a jury because he adopted the simpler and less expensive method of prosecuting his right.

There are a number of decisions on the meaning of "action" and "plaintiff," as defined in the several Acts and sets of rules in which these terms are defined. It has been held that a counterclaim is not an "action"; it has been held that a claim and counterclaim are to be treated as one "action," and, again, that they are not one action. It has been held that a counterclaiming defendant cannot be said to be a plaintiff within the

definition; and again that he may be treated as a plaintiff. It has been held that the discontinuance of the action does not discontinue the counterclaim, and that a counterclaim is a proceeding by way of cross-action. No case has been decided upon our County Courts Act and Rules, and while the definition of "plaintiff" is the same in our County Courts Act as in the English Judicature Acts, yet the circumstances of its application have not been the same in any decided case as those which appertain to the case at bar. The nearest approach to a decision in point is *Kinnaird (Lord)* v. *Field* (1905), 74 L.J., Ch. 692, which is a decision of the English Court of Appeal and entitled to very great weight. In that case the Court thought that a counterclaiming defendant had no right *ex debito justitiæ* to a jury but that in exercise of its discretion (which is not given the County Court) the Court might direct an issue which ought to be tried by a jury to be so tried. It was really an application to transfer the case from the Chancery Division to the Queen's Bench for the purpose of enabling the case to be tried by a jury, but the Court decided the real question involved, namely, whether a counterclaiming defendant was entitled as of right to give a jury notice, and they held that he was not. While not disagreeing with the other two members of the Court, Vaughan-Williams, L.J., was inclined to take a broader view and hold that the counterclaiming defendant was entitled as of right to a jury had he been in the proper Court. That case was a decision upon a different rule. It is not very satisfactory in view of the doubts of Vaughan-Williams, L.J., and as I am not bound by it, I will give to our own Act and Rules such a construction as I think they properly bear, having regard to their context and object.

MACDONALD, C.J.A.

Now it appears to me that the definition of "plaintiff," which excludes a counterclaiming defendant, shews that the claim and counterclaim were to be considered parts of one action and that it was therefore not necessary to bring such a defendant within the definition of "plaintiff" to entitle him to a jury. In other words, it was deemed sufficient that he should be given the right as a defendant to serve a jury notice for the trial of the action, *i.e.*, the claim and counterclaim

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which were pleaded in the one action. If, therefore, the amount claimed either way by the original claim or by the counterclaim exceeds $50, either party is entitled to give a jury notice and to have both claim and counterclaim tried by jury.

If Order V., r. 18, be closely examined it will be found difficult to come to any other conclusion. That rule is itself a definition of "action." The Court is

"to pronounce final judgment in the same action both on the original and on the cross-claim."

The counterclaim is just as much a part of the "action" for the purposes of the judgment, which involves the trial, as is the claim itself. The claim and counterclaim constitute the "action," and while lawyers, for purposes of distinguishing them, may refer to them as "action" and "counterclaim," and in many respects no doubt they are distinct, yet for the purposes of trial they together fall within the designation of "action."

MACDONALD, C.J.A.

The course adopted in this case of taking an appeal from an order made in the course of the trial is to be deprecated. The trial having been entered upon ought to have been completed before any appeal is taken. If after the trial there are grounds of complaint against the judgment or any order or ruling made in the course of the trial, they can be ventilated in one appeal. I do not say that in no case should an appeal be taken until the trial is completed, but the well-established practice to complete a trial entered upon should not be departed from, unless for very exceptional reasons.

The costs should follow the event.

MARTIN, J.A.

MARTIN, J.A.: This appeal is, in my opinion, premature and therefore should not be entertained, because it is only one from an interlocutory ruling given during the course of the trial, which is not yet finished. I know of no authority to support such a proceeding, which imposes so unwarrantable a burden of expense and delay upon the litigants. I have recently remarked upon the legal impropriety of such a course in the case of *Bodnar* v. *Stuart* [(1922), *ante*, p. 411], and what occurred here confirms my views therein expressed.

The proper course to pursue, once the trial had begun, was

to proceed to try it to a conclusion in the ordinary way, and not to adjourn it in the middle, or at any stage of the hearing, with the view of obtaining the opinion of this Court upon the validity of a ruling given upon an objection taken to the jury upon the first day of the trial, or, *e.g.*, upon a ruling or an objection taken to the jurisdiction of the judge upon the second day, or upon a ruling on an application to issue a commission upon the third day, or upon a ruling on a motion to dismiss the action made upon the fourth day, since all these matters are interlocutory and form part of one continuous trial, and under our established practice and procedure there cannot be any appeal, or an indefinite succession of appeals, upon rulings during the trial, but only one final appeal, upon all the rulings, at the end of it.

It is obvious that to disrupt the course of a trial by adjourning it to allow an interlocutory appeal almost inevitably leads to expense and delay (apart from other aspects of the matter), MARTIN, J.A. because if the judge is right in his ruling then all the considerable expense and delay attendant upon the re-assembly of Court, counsel and witnesses have been thrown away, and even if the Court were wrong there is always the possibility that the party against whom the ruling has been given may ultimately have got judgment in his favour, or the disposition of the matter may have been acceptable, for various reasons, to both parties, and so any appeal would have been avoided.

The proper course, therefore, for us to adopt, is, in my opinion, to decline to entertain the appeal as being premature, and refer it back to the learned judge to proceed with and conclude the trial in the ordinary way, and as both parties were equally to blame in the course that was adopted there should be no costs of this abortive appeal.

I may add that in cases stated under the Criminal Code we have refused to entertain questions submitted till after conviction.

GALLIHER, J.A.: I agree in the reasons for judgment of the Chief Justice. GALLIHER, J.A.

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March 10.

DOUGLAS LAKE CATTLE CO. v. REINSETH

McPHILLIPS, J.A. would dismiss the appeal.

EBERTS, J.A. would allow the appeal.

Appeal allowed,
Martin and McPhillips, JJ.A. dissenting.

Solicitors for appellant: *North & Hetherington.*
Solicitors for respondent: *Grimmett & Parker.*

COURT OF APPEAL

1922

Jan. 17.

VOLANSKY v. THE NAT BELL LIQUORS LIMITED.

Practice — Garnishment — Bank — Affidavit in support — No address or description—"Forthwith," meaning of—R.S.B.C. 1911, Cap. 14, Secs. 3 and 7—B.C. Stats. 1913, Cap. 4, Sec. 3.

VOLANSKY v. NAT BELL LIQUORS LIMITED

An affidavit in support of an application to garnishee a bank under the Attachment of Debts Act gave the address of the garnishee as "Vancouver, B.C." without further description.

Held, that in the case of banks incorporated by Act of Parliament the address was a substantial compliance with the Act.

Joe v. *Maddox* (1920), 27 B.C. 541 distinguished.

Statement

APPEAL by defendant from the order of MORRISON, J. of the 9th of December, 1921, dismissing an application to set aside a garnishee order by MURPHY, J. upon the issuance of the writ. The appellant raised two points: (1) That the affidavit supporting the application for garnishee was defective in that there was no address given nor a proper description of the garnishee; (2) the order was not served forthwith in accordance with the requirement of section 3 of the Attachment of Debts Act Amendment Act, 1913, three days having elapsed between the issue of the garnishee order and its service on the defendant who lived in Vancouver and was always available for service.

The appeal was argued at Victoria on the 17th of January, 1922, before MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Sugarman, for appellant: The first objection is that the affidavit in support of the garnishee order does not give the address or description of the garnishee. "Vancouver, B.C." is not a sufficient address. The form is at the back of the Attachment of Debts Act Amendment Act, 1913, and see *Joe* v. *Maddox* (1920), 27 B.C. 541. The Royal Bank had several branches in Vancouver. The garnishee order was taken out on the 2nd of December but not served until the 5th. It must be served "forthwith," meaning "as soon as reasonably may be" under section 3 of the Act. This is not a compliance with the Act. The defendant was in Vancouver and could have been served any time. The Act must be construed strictly.

Argument

Beckwith, for respondent, not called upon.

The judgment of the Court was delivered by

MARTIN, J.A.: We are all of the opinion in the case of the banks incorporated by Act of Parliament, of which of course we are bound to take notice, that the address such as is given here is sufficient, that it does not really allow the introduction of any element of uncertainty, which is really what the Act is aiming at, and is a substantial compliance.

In respect of the second submission, that the order was not served "forthwith" on the debtor, we are also of the same opinion that there is a direct provision, as is evidenced by the language of the Act itself, which my brother GALLIHER drew attention to, providing for the consequences of such service.

Judgment

It follows that the appeal will be dismissed.

Appeal dismissed.

Solicitor for appellant: *E. R. Sugarman.*
Solicitors for respondent: *Grossman, Holland & Co.*

HUNTER, C.J.B.C.

1922

Jan. 25.

PARKER v. PARKER AND GORST.

Practice—Dissolution of marriage—Service of citation—Unable to locate respondent and co-respondent — Service dispensed with — Divorce rule 10.

PARKER v. PARKER AND GORST

Service of citation upon the respondent or co-respondent on a petition in a divorce or matrimonial cause, may be dispensed with if after a *bona fide* effort has been made to trace them, they cannot be found. *Cook* v. *Cook and Quaile* (1858), 28 L.J., Mat. 5 followed.

EX PARTE application to dispense with service of citation and petition on the respondent and co-respondent in a divorce action under Divorce rule 10. The respondent and co-respondent went to the United States in the year 1914. Efforts were made by every available means to obtain information as to their present whereabouts but without any success. Heard by HUNTER, C.J.B.C., at Chambers in Vancouver on the 25th of January, 1922.

Statement

Davies, for the application, referred to *Cook* v. *Cook and Quaile* (1858), 28 L.J., Mat. 5; *Deane* v. *Deane* (1858), 4 Jur. (N.S.) 148; *Parker* v. *Parker and Macleod* (1859), 5 Jur. (N.S.) 103.

Argument

HUNTER, C.J.B.C.: It appearing that all reasonable efforts have been made to effect service of the citation and petition on the respondent and co-respondent the petitioner will have leave to continue his action without effecting service on either. Costs in the cause.

Judgment

Order accordingly.

APPENDIX.

Cases reported in this volume appealed to the Supreme Court of Canada, the Exchequer Court of Canada, or to the Judicial Committee of the Privy Council:

CANADIAN TRADING COMPANY, LIMITED v. CANADIAN GOVERNMENT MERCHANT MARINE LIMITED (p. 509).—Affirmed by Supreme Court of Canada, 17th June, 1922. See 64 S.C.R. 106; (1922), 3 W.W.R. 197; 68 D.L.R. 544.

"FREIYA," THE v. THE "R.S." (p. 109).—Reversed by Exchequer Court of Canada, 7th January, 1922. See 21 Ex. C.R. 232; (1922), 1 W.W.R. 409; 65 D.L.R. 218.

GREENIZEN v. TWIGG *et al.* (p. 225).—Reversed by Supreme Court of Canada, 29th March, 1922. See 63 S.C.R. 158; (1922), 2 W.W.R. 71; 65 D.L.R. 101.

HAY v. ALLEN (p. 481).—Affirmed by Supreme Court of Canada, 31st May, 1922. See 64 S.C.R. 76; (1922), 3 W.W.R. 366; 69 D.L.R. 193.

KING, THE v. THE UNITED STATES FIDELITY & GUARANTY COMPANY AND QUAGLIOTTI (p. 440).—Affirmed by Supreme Court of Canada, 31st May, 1922. See 64 S.C.R. 48; (1922), 3 W.W.R. 180; 68 D.L.R. 297.

MCKINNON AND MCKILLOP v. CAMPBELL RIVER LUMBER COMPANY LIMITED (p. 471).—Reversed by Supreme Court of Canada, 10th October, 1922. See 64 S.C.R. 396; (1922), 3 W.W.R. 1069; (1923), 1 D.L.R. 29.

MARCHIORI v. FEWSTER (p. 251).—Affirmed by Supreme Court of Canada, 7th February, 1922. See 63 S.C.R. 342; 69 D.L.R. 351.

MARSHALL v. THE CANADIAN PACIFIC LUMBER COMPANY LIMITED, AND THE TRUSTEES CORPORATION, LIMITED (p. 270).—Affirmed by Supreme Court of Canada, 29th March, 1922. See (1922), 2 W.W.R. 266; 65 D.L.R. 461.

PUBLIC WORKS ACT AND N. F. MACKAY, *In re* (p. 1).—Affirmed by the Judicial Committee of the Privy Council, 14th February, 1922. See (1922), 1 A.C. 457; 91 L.J., P.C. 193; 127 L.T. 81; (1922), 1 W.W.R. 982; 63 D.L.R. 171.

SHANNON AND SHANNON v. CORPORATION OF POINT GREY (p. 136).—Affirmed by Supreme Court of Canada, 29th March, 1922. See 63 S.C.R. 557; (1922), 2 W.W.R. 625; 66 D.L.R. 160.

WILSON, ROBERT, WILLIAM WILSON, AND ROBERT WILSON SON & COMPANY v. MUNICIPALITY OF THE CITY OF PORT COQUITLAM (p. 449).—Affirmed by Supreme Court of Canada, 19th December, 1922. See (1923), S.C.R. 235; (1923), 1 W.W.R. 1025; (1923), 2 D.L.R. 194.

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STATUTES—*Continued.*

STATUTES—*Continued.*

SUCCESSION DUTY — *Fixed by auditor-general—Based on executor's valuation—Bond to secure payment—Real property never registered in name of deceased or her executor — Estate overvalued — Action on bond—Jurisdiction to revalue—"Coming into the hands," meaning of—R.S.B.C. 1911, Cap. 4, Sec. 114; Cap. 217.*] An executor under a will having made valuation of the estate on application for probate and the auditor-general determined the amount of succession duty based on said valuation, a bond was then given to secure payment of the succession duty under the Succession Duty Act. In an action on the bond, although the Court was of opinion the estate was largely overvalued, it was held that there was no jurisdiction to interfere with the amount so fixed, and although the real estate was never registered in the name of the deceased or of the executor (it having been devised to the deceased who made her husband executor and sole devisee under her will) they in turn took possession and received the profits thereof, and the succession duty therefore was payable, there being no distinction drawn as to whether the executor dealt with the estate in his capacity as executor or as devisee. *Held*, on appeal, affirming the decision of GREGORY, J., that as the valuation of the commissioner appointed under the Act was less than the executor's valuation of the estate there was no jurisdiction to review,