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 XXXI.

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.
THE HON. DAVID ALEXANDER McDONALD.

LOCAL JUDGE IN ADMIRALTY:

THE HON. ARCHER MARTIN.

DEPUTY LOCAL JUDGE IN ADMIRALTY:

THE HON. WILLIAM ALFRED GALLIHER.

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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REPORTS OF CASES

DECIDED IN THE

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OF

BRITISH COLUMBIA,

TOGETHER WITH SOME

CASES IN ADMIRALTY

STANDARD MARINE INSURANCE COMPANY LIMITED v. WHALEN PULP & PAPER MILLS LIMITED.

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STANDARD MARINE INSURANCE CO. LTD. *v.* WHALEN PULP & PAPER MILLS LTD.

Marine insurance — Floating policy — "Goods upon ships approved" — Material concealment—Liability.

The defendant held a floating policy of marine insurance in the plaintiff Company to cover wood pulp to be transported from Mill Creek near the City of Vancouver "in the ship or vessel called the steamers including risk per 'North Bend' Barge and 2 scows." A barge called the "Baramba" was chartered by the defendant from the Kingsley Navigation Company, Vancouver, and towed to Mill Creek. In the course of being loaded with paper pulp she sank at the defendant's wharf. The plaintiff Company paid the claim for insurance and commenced proceedings against the Kingsley Navigation Company, having been subrogated to the defendant's rights for damages. While that action was proceeding they claimed to have discovered that the defendant knew of the unseaworthiness of the "Baramba" prior to the loading and that they did not disclose this fact to the plaintiff, which resulted in the plaintiff discontinuing the action against the Kingsley Navigation Company and commencing this action to recover the insurance money paid on the policy. It was held by the trial judge that the "Baramba" was in fact unseaworthy although the defendant did not consider her so, but they did know that she had been refused insurance which fact should have been disclosed to the plaintiff Company and the plaintiff Company was entitled to judgment.

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Held, on appeal, reversing the decision of MURPHY, J. (MCPHILLIPS, J.A. dissenting), that although the defendant knew the "Baramba" was refused insurance, by reason of the assurances of the owners as to repairs, it undertook to return the barge in good condition, and in the absence of evidence of knowledge of unseaworthiness the Insurance Company cannot resist payment.

Per MACDONALD, C.J.A.: This was a floating policy and the Company was bound on a contract entered into before the facts came into existence which the plaintiff contends ought to have been disclosed. The rule as to the obligation on an insured to disclose all material facts does not apply at all events in all its strictness to the non-disclosure of matters arising after execution of the floating policy.

Per MARTIN, J.A.: The barge cannot, having regard to the nature of her employment, be held to have been unseaworthy. The term "seaworthy" is a variable one and means the present state of the ship's equipment adequate to her present risk, and the standard varies with the voyage and the class of ship. The onus of proving unseaworthiness is on the insurer.

APPEAL by defendant from the decision of MURPHY, J., of the 6th of June, 1921, in an action for the return of moneys paid under a certain open policy of insurance in ignorance of certain material facts that it was the duty of the defendant to disclose to the plaintiff, and for damages. In January, 1916, the plaintiff issued to the British Columbia Sulphite Fibre Company Limited a certain open policy agreeing to insure cargoes of wood pulp carried by certain steamers approved on voyage between certain ports. The name of the assured was by agreement changed to the defendant Company in June, 1917. The defendant Company carried wood pulp on various barges from Mill Creek to Vancouver and Seattle where it was transferred to other ships and carried to China and Japan. In February, 1919, the defendant hired the barge "Baramba" from the Kingsley Navigation Company Limited. It was towed to Mill Creek and on the 28th of February they proceeded to load the barge with paper pulp in the course of which the scow sank, the pulp being damaged and partly lost. The plaintiff paid $12,715.20 in accordance with the policy. The plaintiff claims the defendant failed to disclose certain material facts, *i.e.*, that the barge was unseaworthy, that insurance could not be obtained for the barge, that the Kingsley Navigation Company had told the defendant of the condition of the "Baramba" which facts should have been disclosed.

Statement

Judgment was given for the return of the insurance moneys paid by the defendant.

The appeal was argued at Vancouver on the 11th and 14th of November, 1921, before MACDONALD, C.J.A., MARTIN, MCPHILLIPS and EBERTS, JJ.A.

Mayers (*Douglas;* with him) for appellant: The question is as to the duty of an assured to disclose certain facts. The contract is a floating insurance of all goods carried by the defendant Company. The "Baramba" was a barge and sank in the course of loading. On the question of misrepresentation being sufficient to avoid a policy see *Ionides* v. *Pacific Insurance Co.* (1871), L.R. 6 Q.B. 674; and on appeal (1872), L.R. 7 Q.B. 517; *Harman* v. *Kingston* (1811), 3 Camp. 150; *Robinson* v. *Touray, ib.* 158; *Davies* v. *National Fire and Marine Insurance Company of New Zealand* (1891), A.C. 485 at p. 491. As to declarations of goods within the policy see *Dunlop Brothers & Co.* v. *Townend* (1919), 2 K.B. 127 at p. 134. On the question of non-disclosure see *Cory* v. *Patton* (1872), L.R. 7 Q.B. 304; *Lishman* v. *Northern Maritime Insurance Co.* (1875), L.R. 10 C.P. 179 at pp. 180-1; *Lane* v. *Nixon* (1866), L.R. 1 C.P. 412; *Readhead* v. *Midland Railway Co.* (1867), L.R. 2 Q.B. 412 at pp. 418 and 427; *Tully* v. *Howling* (1877), 2 Q.B.D. 182 at p. 188; *Thompson* v. *Hopper* (1858), El. Bl. & El. 1038 at p. 1049.

Argument

Davis, K.C., for respondent: The defendant did not tell the plaintiff that no insurance could be obtained on the barge nor did it disclose its condition. It knew it was unseaworthy. There was non-disclosure of a material fact that invalidates the policy. On the authorities innocent non-disclosure is sufficient to invalidate the policy. Any information material to the risk must be disclosed: see Arnould on Marine Insurance, 10th Ed., 795, par. 706; *Lynch* v. *Hamilton* (1810), 3 Taunt. 37; 12 R.R. 591. As to the effect of unseaworthiness see *Cantiere Meccanico Brindisino* v. *Janson* (1912), 12 Asp. M.C. 246; 28 T.L.R. 566. As to the word "approved" see *Smith* v. *Mercer* (1867), L.R. 3 Ex. 51 at p. 54. This barge was within the terms of the policy: see *Greenock Steamship Company* v. *Marine Insurance Company* (1903), 1 K.B. 367;

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Ajum Goolam Hossen & Co. v. *Union Marine Insurance Company* (1901), A.C. 362 at pp. 365-7.

Cur. adv. vult.

10th January, 1922.

STANDARD MARINE INSURANCE CO. LTD. *v.* WHALEN PULP & PAPER MILLS LTD.

MACDONALD, C.J.A.: The plaintiffs issued to the defendants a floating policy of marine insurance to cover wood pulp to be transported from Mill Creek, near Vancouver, "in the ship or vessel called the steamers approved, including risk of North Bend barge and 2 scows."

The defendant chartered a barge or scow called the "Baramba" from the Kingsley Navigation Company of Vancouver, and sent her to Mill Creek to be loaded, and while in the course of being loaded she sank at defendant's wharf. The claim for insurance was paid and after proceedings had been commenced against the Kingsley Navigation Company by the plaintiff, who had been subrogated, to defendant's rights, for damages, the plaintiff alleges that it discovered that the defendant was aware of the unseaworthiness of the "Baramba" prior to loading and had not communicated this fact to the plaintiff. It therefore discontinued that action and sued the defendant to recover the insurance money paid to them.

Mr. *Davis* in his argument at the trial submitted his case in these words:

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"We were asked to insure the cargoes and we undertook to admit seaworthiness of any vessel that was used; therefore, if the vessel was unseaworthy and defendant did not know about it, we were liable. And although we knew when we paid that she was unseaworthy, we did not know that the defendant had been aware of that and he had not told us and that is our whole cause of action."

Mr. *Mayers* argued that there was no such duty; that the policy being a floating one no subsequent non-disclosure could invalidate it. Had it been a ship contract and not a ship or ships contract, he admits his clients would have been liable.

"The contract of an underwriter who subscribes a policy on goods by ship or ships to be declared is, that he will insure any goods of the description specified which may be shipped on any vessel answering the description, if any there be, in the policy, on the voyages specified in the policy, to which the assured elects to apply the policy. The object of the declaration is to earmark and identify the particular adventure to which the assured elects to apply the policy. The assent of the assurer is not

required to this, for he has no option to reject any vessel which the assured may select":

Lord Blackburn in *Ionides* v. *Pacific Insurance Co.* (1871), L.R. 6 Q.B. 674 at p. 682.

Now, what defendant did know was that the "Baramba" was refused insurance. It had been told that she had been overhauled and was in good condition. It therefore undertook to insure her itself by agreeing to return her to her owners in good condition. The letters of Brennan, the defendant's manager at Mill Creek, were written after the event and are based on statements of the captain of the tug which brought the Baramba" to Mill Creek, made after the event. That they were not accepted as admissions, that the defendant knew of the unseaworthiness of the "Baramba" before the loss, is apparent from the judge's finding. He found, and he bases his judgment on that finding, that the defendant knew that insurance could not be got on the "Baramba." He finds her to have been unseaworthy but that the defendant did not consider her so. It appears from the argument at the trial, which is contained in the appeal book, that counsel did not call to the attention of the learned judge the fact that this was a floating policy, and that while the absence of full disclosure of all material facts before the contract was executed would vitiate it, that that rule does not at all events in all its strictness apply to non-disclosure of matters arising after execution of the policy. Here the contract had already been made before the facts came into existence which the plaintiff contends ought to have been disclosed. The Company was already bound, and in the absence of evidence of knowledge of unseaworthiness on the part of the defendant (and perhaps with such knowledge, though I do not decide this), the plaintiff could not resist payment.

MACDONALD, C.J.A.

I think the appeal should be allowed and the action dismissed.

MARTIN, J.A.: If the barge (or scow) "Baramba" were seaworthy this action cannot, in any event, lie, so that is the first question to be determined. The learned judge below found she was unseaworthy but that the defendant was unaware of it. I have very carefully considered the evidence on the

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point in the light of the decision of the Privy Council in the leading case of *Ajum Goolam Hossen & Co.* v. *Union Marine Insurance Company* (1901), A.C. 362; 70 L.J., P.C. 34, wherein the decision of the Supreme Court of Ceylon, finding that a ship which was unaccountably lost within 24 hours after leaving port was unseaworthy, was reversed. It must always be borne in mind that the term "seaworthy" is a variable one and means the then state of the ship's equipment adequate to her then risk and that the standard varies with the voyage and with the class of ship—Arnould on Marine Insurance, 10th Ed., Vol. 2, Secs. 687, 710, wherein it is said:

"That state of repair and equipment which would constitute seaworthiness for one description of voyage might be wholly inadequate for another; a ship seaworthy for the coasting or West Indian trade might be unseaworthy for a voyage to the Greenland Seas or the North-West Passage. Moreover, the extent of the warranty may be different for the same voyage at different seasons, or for the same voyage at the same season according to whether the ship is in ballast or loaded with one kind of cargo or another. And, as we have seen, the ship, though not fit to go to sea, may be fit for port or river risks, and it suffices that her state is commensurate to the risk."

MARTIN, J.A.

The onus of proving unseaworthiness is upon the insurer, and they lay much stress upon the fact that the scow sank at the wharf in Mill Creek, B.C., while being loaded with bales of pulp at both ends simultaneously, and after only 140 tons had been loaded she began to leak and sank so rapidly, on an even keel and without a list, that inside of thirty minutes there were four feet of water over the deck. But this same scow had only a few weeks before brought down (in tow) a load of pulp of 272 tons from the same place, and from February 4th to 18th had been used as a storage ship in Vancouver Harbour for a load of pulp, therefore it is a most unaccountable thing that after being towed up to Mill Creek, which is only 32 miles from Vancouver, for another load of pulp, she should have sunk after she had only taken on 140 tons. Aitken, the defendant's marine superintendent, who examined her before she left Vancouver, in tow of the tug "Prospective," swears she was in perfect shape to make that short trip in inland waters, and he answers the criticisms of Cullington, a marine surveyor, upon certain defects, where material, as being caused by the salvage operations, and takes the point that Cullington cannot

speak of her condition before that event, as he (Aitken) can. I have not overlooked the statements in the letters of Brennan, the defendant's resident manager at Mill Creek, but they are either largely hearsay or not of much real assistance.

It is unfortunate that there is no exact evidence about what happened in the loading at Mill Creek; that would, I think, have given a clue to the extraordinary thing that did happen. If I were entitled to speculate I should suspect some malicious or grossly negligent act, but as it is, in the language of the Privy Council in *Ajum Goolam's* case, *supra*, p. 371:

"All is conjecture. The real cause of the loss is unknown, and cannot be ascertained from the evidence adduced in this action. But underwriters take the risk of loss from unascertainable causes."

In my opinion, with all due respect, too much weight was attached by the learned judge below to the fact that the barge was not insured, but the evidence clearly shews that the majority of marine-insurance companies do not insure barges at all because they belong to a class of risk which, for local reasons given by the witness B. G. Phillips (who represents twelve companies) is regarded as undesirable, and if in the light of this explanation any adverse inference may still be drawn, it may reasonably be counterbalanced by the fact that the defendant was so well satisfied with the assurances of the barge's owners as to her recent repairs and first class condition that they, as their traffic manager explains, placed themselves in the position of insurers by undertaking to return the barge in as good condition as when she was chartered or to pay a specified sum in case of loss.

MARTIN, J.A.

The result is that, in my opinion, upon the whole incomplete evidence (which is really very little, if at all, in conflict) the barge cannot, having regard to the nature of her employment, be held to have been unseaworthy in the proper meaning of that term, and therefore the appeal should be allowed.

McPHILLIPS, J.A.: This appeal brings up for consideration a point of very considerable nicety in marine-insurance law.

MCPHILLIPS J.A.

Mr. *Mayers*, the learned counsel for the appellant, in a careful and able argument, developed the appeal upon the postulation that the learned trial judge had misconceived the principle

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of law upon which the case must necessarily be decided, that is, that the insurance was in its nature a floating policy, and all goods on whatever ships carried were insured and fell automatically under the policy once the insurance was effected.

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The learned counsel for the appellant strongly relied upon *Ionides* v. *Pacific Insurance Co.* (1871), L.R. 6 Q.B. 674; (1872), L.R. 7 Q.B. 517; and *Cory* v. *Patton* (1872), L.R. 7 Q.B. 304; *Lishman* v. *Northern Maritime Insurance Co.* (1873), L.R. 8 C.P. 216; (1875), L.R. 10 C.P. 179, might also be referred to. These cases are certainly forceful upon a similar state of facts, but here the fact is, and it is so found by the trial judge, that the ship upon which the goods were to be carried was uninsurable to the knowledge of the assured. If a ship be uninsurable surely that is a material matter and should be made known to the insurer. It, in my opinion, is cogent evidence of unseaworthiness. In the Marine Insurance Act, 1906 (6 Edw. 7, c. 41), which of course is not governing statute law with us, the enactment as to what is material may be said to be the effect of the cases which are binding upon us. It reads as follows:

> "Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk."

MCPHILLIPS, J.A.

(See *Ionides* v. *Pender* (1874), L.R. 9 Q.B. 531; *Rivaz* v. *Gerussi* (1880), 6 Q.B.D. 222; *Thames and Mersey Marine Insurance Company* v. *"Gunford" Ship Company* (1911), A.C. 529; *Seaman* v. *Fonereau* (1743), 2 Str. 1183).

Lynch v. *Hamilton* (1810), 3 Taunt. 37, and *Lynch* v. *Dunsford* (1811), 14 East 494, exemplify to what extent disclosure is requisite; there the policy was effected on goods on board "ship or ships." The assured did not inform the insurer that the "President," upon which the goods were, had been reported at Lloyd's as at sea deep and leaky. The suppression of the fact avoided the policy, although it turned out that the intelligence at Lloyd's was unfounded, the "President" never having been deep or leaky. Further, there are facts in the present case which establish reasonably that the assured was aware of the unseaworthiness of the ship, besides the uninsurability thereof, and see Lord Macnaghten in *Blackburn, Low*

& Co. v. *Vigors* (1887), 12 App. Cas. 531 at p. 543; 13 R.R. at p. 295).

The result of the cases would appear to conclusively shew that every concealment of a material circumstance, whether it should be by design or mistake, would result in the avoidance of the policy. It follows that the only safe course is to declare all that is known, then it will be for the underwriter to determine what he will do. The peril in any other course of procedure is that a judge or jury may determine that to be material which has not been disclosed and the policy avoided, and this may occur even where the concealment was without fraudulent intent, but only an error of judgment (see *Shirely* v. *Wilkinson* (1781), 3 Dougl. 41). Of course, if fraud entered into the contract it would make no difference whether that concealed was material or not. It has been said that no minute disclosure is necessary (see *Asfar & Co.* v. *Blundell* (1896), 1 Q.B. 123, 129; *Cantiere Meccanico Brindisino* v. *Janson* (1912), 3 K.B. 452), but can it reasonably be said that it was not material to make the disclosure that no insurance was obtainable upon the ship upon which the goods were to be carried, which is the present case? I am of the opinion that there can only be one answer and that is, that there was here the concealment of material facts, these being uninsurability and facts going to establish if not demonstrating the unseaworthiness of the ship, which facts should have been disclosed by the assured to the insurer.

MCPHILLIPS, J.A.

No doubt there is some conflicting evidence as to the unseaworthiness, but it is not unreasonable to say, upon the evidence, that there was knowledge in the assured as to the state of the ship which should have been made known by the assured to the insurer.

Mr. *Davis,* the learned counsel for the respondent, in his very able argument, laid great stress upon the point that this was a case of the loading of goods upon an unseaworthy ship, known to be unseaworthy by the assured, and the insistence upon the insurance placed thereon. I cannot say that the learned counsel, upon the facts, has stated the case at all too broadly. When there was known unseaworthiness in the

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assured, it matters not that seaworthiness was admitted by the insurer (see Buckley, L.J. in the *Cantiere* case, *supra,* at p. 469). It is true that under a floating policy it may be that the name of the ship is not known to the insurer, but that does not mean that the ship may be unseaworthy and that nevertheless the insurer is liable (see *per* Mansfield, C.J., *Lynch* v. *Hamilton* (1810), 3 Taunt. 37, 39; *Knight* v. *Cotesworth* (1883), 1 Cab. & E. 48; *Thames and Mersey Marine Insurance Company* v. *"Gunford" Ship Co.* (1911), A.C. 529). The insurance here was on "ship or ships" and is an exception to the general rule, and the insurance is *bona fide* when the assured is ignorant of the name of the ship by which the goods insured have been consigned. That was not the present case and withholding the name with the knowledge the assured had vitiated the policy (see Arnould on Marine Insurance, 10th Ed., at pp. 254, 255).

For the foregoing reasons, I am of the opinion that the appeal should be dismissed.

EBERTS, J.A.

EBERTS, J.A. would allow the appeal.

Appeal allowed, McPhillips, J.A. dissenting.

Solicitor for appellant: *D. S. Wallbridge.*
Solicitors for respondent: *Davis & Co.*

IN RE ALEXANDER *ET AL.* AND THE ESTATE OF SOLOMON WEAVER, DECEASED, AND THE VANCOUVER HARBOUR COMMISSIONERS.

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March 7.

IN RE ALEXANDER, WEAVER ESTATE, AND VANCOUVER HARBOUR COMMISSIONERS

Arbitration — Expropriation — Award—Appeal—"Superior Court"—Single judge—Jurisdiction — Right of Appeal — Form of order—Can. Stats. 1913, Cap. 54, Sec. 12; 1919, Cap. 68, Sec. 232.

A judge of the Supreme Court sitting in Court has jurisdiction to hear an appeal from an award under the Railway Act.

APPEAL by the trustees of the estate of Solomon Weaver, deceased, from the decision of MACDONALD, J., of the 4th of October, 1921, on appeal from an award by CAYLEY, Co. J., on the expropriation by the Vancouver Harbour Commissioners under the powers vested in them by The Vancouver Harbour Commissioners Act of certain lands held by the trustees of the estate of Solomon Weaver, deceased, being parcel "E" Foreshore District Lot 181, Vancouver, required for the construction of the "Ballantyne Pier." The arbitrator fixed the compensation to be paid for the property at $68,400. The learned judge below held he had no jurisdiction to hear the appeal.

Statement

The appeal was argued at Victoria on the 16th of January, 1922, before MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Mayers, for appellant.

Sir C. H. Tupper, K.C., for respondent, moved to quash the appeal. On the question of jurisdiction to hear this appeal *In re Kitsilano Indian Reserve* (1918), 25 B.C. 505, was decided on the old Act, R.S.C. 1906, Cap. 37, Sec. 209; see also *Birely* v. *Toronto, Hamilton and Buffalo Ry. Co.* (1898), 25 A.R. 88; *James Bay Ry. Co.* v. *Armstrong* (1907), 38 S.C.R. 511; *Rolland* v. *Grand Trunk R. Co.* (1912), 7 D.L.R. 441.

Argument

Mayers: Under section 232 (1) we are not allowed to elect and there are no tribunals with regard to which election would

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apply. The Dominion Act refers to all the Provinces and by section 2(7) of The Railway Act, 1919, the appeal is to the Supreme Court and not to the Court of Appeal.

Mayers, on the merits: There is jurisdiction in a single judge to hear an appeal from the award: see *Re Horsefly Mining Co.* (1895), 4 B.C. 165; *Rex* v. *Tanghe* (1904), 10 B.C. 297; *Darlow* v. *Shuttleworth* (1902), 1 K.B. 721; *Dallow* v. *Garrold* (1884), 14 Q.B.D. 543 at p. 546; *In re Robert Evan Sproule* (1886), 12 S.C.R. 140 at p. 182 *et seq.*

Tupper: Acts limiting or extending common law rights must be clearly expressed: see Halsbury's Laws of England, Vol. 27, p. 150, par. 283. There must be an election and he elected to go to the Court below. As to the right of appeal see *The Attorney-General* v. *Sillem* (1864), 10 H.L. Cas. 704; *In re Selman* (1920), 2 W.W.R. 539. As to the judge being *persona designata* see *National Telephone Company Limited* v. *Postmaster General* (1913), 3 K.B. 614. The appeal from the arbitrator is to the whole Court and not one judge: see *In re Scottish Ontario and Manitoba Land Co.* (1892), 21 Ont. 676. When the Dominion confers a jurisdiction the rules of practice and procedure do not apply and the Act does not confer on a single judge an authority to act. On the question of conferring jurisdiction see *Valin* v. *Langlois* (1879), 3 S.C.R. 1 at p. 74, affirmed (1879), 5 App. Cas. 115.

Argument

[MARTIN, J.A.: The citation at the top of the order "In Court" is improper. A Chamber order is headed "In Chambers," and all other orders are Court orders, in which, at the end, is always inserted—"By the Court."]

There is no appeal until publication of the award: see C.E.D., Vol. 1, p. 180; *Dumesnil* v. *Theberge* (1919), 57 D.L.R. 523. They were in the Court but not before the Court.

Mayers, in reply, referred to Cameron's Supreme Court Practice, 2nd Ed., 148-9; *The Ottawa Electric Company* v. *Brennan* (1901), 31 S.C.R. 311; *James Bay Ry. Co.* v. *Armstrong* (1907), 38 S.C.R. 511.

Cur. adv. vult.

7th March, 1922.

MARTIN, J.A.

MARTIN, J.A.: An appeal was taken, under section 232

of The Railway Act, 1919, Cap. 68, to the Supreme Court of this Province from an award made by the arbitrator, who is a County Court judge nominated so to act by section 219, which provides that arbitrators must now be judges of two classes, *viz.*, either of inferior or superior Courts, to meet local conditions. Section 232 provides for an appeal from such arbitrator, and it clearly means, in my opinion, that where he is a judge of an inferior Court, as here, the appeal lies to "a superior Court . . . . . of the Province in which the lands lie," but where he is a judge of a superior Court then the appeal lies to "the Court of last resort" of that Province, which here is this Court of Appeal. In accordance with this view of the section the present appellant appealed to the Supreme Court of this Province and the matter was entered for hearing before that Court constituted by a single judge in the ordinary way under section 5 of the Supreme Court Act, R.S.B.C. 1911, Cap. 58, which provides that "the Court may be held before the Chief Justice or before any one or more of the judges of the Court for the time being."

And section 37 provides:

"Subject to the Rules of Court, the judges, or one or more of them, shall take circuits for the transaction of all such business of the Court as it may be practicable and conducive to the interests of suitors and the convenient administration of justice to dispose of on such circuits, and for that purpose the judges, or one or more of them, may hold sittings for the purpose of taking evidence, and hearing causes and other matters, and transacting other business; and any such judges or judge while so sitting shall be deemed to constitute a holding or sitting of the Court."

MARTIN, J.A.

And *Cf.* also sections 44, 48 and 54, the last of which directs that:

"The judgments and orders made by a single judge shall have the force and effect of and be deemed, for all purposes, to be the judgments and orders of the Court."

But when the appeal was called before the said Court, constituted as usual by a single judge, he declined to hear it on the ground, as I understand his reasons, that it required the full bench of six judges of that Court to constitute it. In support of his view he relied upon the fact that under the former Railway Act, Cap. 37, R.S.C. 1906, Sec. 209, power was given to the judges of the superior Courts to pass general rules and orders in respect to appeals, which might amongst

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other things, "provide that any such appeal may be heard and determined by a single judge," but in the amended Act of 1919 the corresponding section, 232(2), is silent regarding the number of judges who may constitute the Court appealed to, and he infers from that circumstance that a single judge cannot do so. But with every respect, I am quite unable to take such a view. The question is now, just as it was before, under section 209—What is the legal constitution of that Provincial superior Court to which the Federal Parliament has submitted for adjudication this Federal matter? The answer must necessarily be found by referring to the Provincial statutes constituting such Court under section 92 (14) of the B.N.A. Act, and it is beyond argument that for the exercise of jurisdiction under Provincial laws the Court is "ordinarily constituted by a single judge"—*Rex* v. *Tanghe* (1904), 10 B.C. 297; and it is to me, at least, equally clear that where it is selected by the Federal Parliament as the tribunal to hear and determine Federal matters it does so in and by the ordinary way of its constitution and machinery, though it doubtless would be open to the Federal Parliament to require it to be extra-

MARTIN, J.A.

ordinarily constituted for that purpose, should it be deemed advisable.

With respect to the former provision in section 209 as to a single judge, that may well have been inserted *ex abundanti cautela,* or as being appropriate to certain Courts whose quorum is ordinarily formed of two (or more) judges, as was the former Divisional Court of this Province. There is nothing, of course, now to prevent all the judges of the Supreme Court here sitting on a case if it is deemed expedient, but the Court is in law, as it has been in practice since its establishment, ordinarily constituted by a single judge, and therefore the learned judge below had, and should have exercised his jurisdiction to hear the appeal; hence the order he made striking that appeal off the cause list should be set aside and it should be reinstated and heard in the usual way. The appeal therefore is allowed.

GALLIHER, J.A.

GALLIHER, J.A.: I agree in the judgment to be handed down by my brother MCPHILLIPS.

McPHILLIPS, J.A.: This is an appeal from the decision of Mr. Justice MACDONALD, that an appeal taken under section 232 of The Railway Act, 1919 (Canada), to the Supreme Court of British Columbia cannot be heard by a single judge of the Court but must be heard before all the judges of the Supreme Court. The appeal would seem, upon the facts of the present case, to be as of necessity to the Supreme Court as the appeal is not from an award of a judge of the Supreme Court. The learned counsel for the appellant contends, and as I think rightly, that the appeal should have been heard by Mr. Justice MACDONALD, as he had jurisdiction to hear it. In my opinion and with great respect to the learned judge, he erred in holding that he was without jurisdiction to hear the appeal. If we turn to section 5 of the Supreme Court Act (Cap. 58, R.S.B.C. 1911), it will be seen that the latter part of the section, dealing with the judges of the Supreme Court, their powers and privileges, reads as follows:

"The Court may be held before the Chief Justice or before any one or more of the judges of the Court for the time being."

It would appear that we have analogous statute law to that governing the Supreme Court of Ontario, and an appeal from an award under the earlier Railway Act (R.S.C. 1906, Cap. 37), Sec. 209, was held to be possible of being taken either to a judge in Court or to a Divisional Court (see *Re Potter & Central Counties R.W. Co.* (1894), 16 Pr. 16; *Re Montreal and Ottawa R.W. Co.* (1898), 18 Pr. 120; *James Bay Ry. Co.* v. *Armstrong* (1907), 38 S.C.R. 511; (1909), A.C. 624). *Birely* v. *Toronto, Hamilton and Buffalo Ry. Co.* (1898), 25 A.R. 88, was an appeal under the Dominion Railway Act of 1888, and it was to a single judge, namely, to Armour, C.J. The *James Bay Railway* case, *supra,* was from a decision upon an appeal from an award under The Railway Act (R.S.C. 1906, Cap. 37, Sec. 209, and Sec. 168, Cap. 58 of 1903), and the decision of Meredith, C.J. was treated as a judgment of the High Court of Ontario. Equally would the decision of Mr. Justice MACDONALD have been if he had heard the appeal —a judgment of the Supreme Court of British Columbia. It would certainly be highly inconvenient if an appeal from an award is not capable of being heard before a single judge of

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the Supreme Court of British Columbia sitting in Court. I find no provisions in the Supreme Court Act nor in the Rules of the Supreme Court which in any way restrict the powers of a single judge when sitting in Court, *i.e.*, he may exercise all the powers of the Court. The Supreme Court of British Columbia does not now sit as a Full Court, and as I view it one or more of the judges sitting in Court constitute His Majesty's Supreme Court of British Columbia. Further rules formulated under The Railway Act, Cap. 37, R.S.C. 1906 (see B.C. Gazette, 1918, Vol. 58, p. 3647), exist providing for the hearing of appeals from awards by a single judge sitting in Court. These rules are not abrogated by the repeal of that Act and the enactment of the Railway Act of 1919, which is stated to be an Act to consolidate and amend the Railway Act. The appeal is to a "Superior Court" (section 232(1), Railway Act, 1919). Now there can be no serious question of doubt as to how a superior Court is constituted. Of course, if the statute otherwise provides, the statute will control, but, when we have the statute providing that "the Court may be held before the Chief Justice or before any one or more of the judges of the Court for the time being" and there are no provisions of the Act nor any Rules of Court otherwise providing (see section 5, Cap. 58, Supreme Court Act, R.S.B.C. 1911), it is impossible to say contrary to the terms of the statute that a single judge of the Supreme Court sitting in Court is not "His Majesty's Supreme Court of British Columbia." When we arrive at that conclusion, it is manifest that any one of the judges of the Supreme Court sitting in Court has jurisdiction to hear an appeal from an award under The Railway Act (Cap. 68, 1919, Canada). If authorities are necessary to be referred to upon the point, with the greatest respect to all contrary opinion, I would refer to the Annual Practice, 1921, Vol. 2, at pp. 1905-6, where the words "the Court or a judge" are dealt with:

> "'The Court'—The words 'the Court' mean the Court sitting *in banc*—that is, a judge or judges in open Court; they do not include a judge at Chambers (*Baker* v. *Oakes* [(1877)], 2 Q.B.D. 171; *Re Davidson* (1899), 2 Q.B. 103; *Cf.* further, *Clover* v. *Adams* [(1881)], 6 Q.B.D. 622; and J.A. 1873, s. 39, Part V., *infra*, and (n.)). In *Cooke* v. *The Newcastle and Gateshead Water Co.* [(1882)], 10 Q.B.D. 332, 'Court' was held to mean a Divisional Court.

"The word 'Court' includes the judges thereof, see *Dallow* v. *Garrold* [(1884)], 14 Q.B.D. 543, and *Cf.* J.A. 1873, ss. 29, 30, 39."

Therefore, when all the statute law bearing upon the point and the still standing rules are borne in mind, it cannot be a matter of doubt that a judge of the Supreme Court of British Columbia sitting in Court is sitting in "a Superior Court" (section 232 (1), Railway Act, 1919, Canada), *i.e.*, His Majesty's Supreme Court of British Columbia (also see section 9, Cap. 58, Supreme Court Act, R.S.B.C. 1911), and, when you have the "Superior Court" thus properly constituted, the jurisdiction of the Court to hear the appeal from the award made under the Railway Act of Canada is conferred by the Railway Act of Canada, and it is in pursuance of that Act that the appeal is heard and an adjudication had.

I would allow the appeal.

MCPHILLIPS, J.A.

EBERTS, J.A. would allow the appeal.

EBERTS, J.A.

Appeal allowed.

Solicitors for appellants: *McLellan & White.*
Solicitor for respondent: *R. L. Maitland.*

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McKINNON AND McKILLOP v. CAMPBELL RIVER LUMBER COMPANY, LIMITED. (No. 2).

Judgment—Debt recovered—Interest—Date from which interest runs.

McKINNON v. CAMPBELL RIVER LUMBER CO.

The plaintiff was held entitled to recover a sum of money advanced to the defendant Company under a written agreement held in a previous action to be *ultra vires*, the defendant Company having applied said moneys in the payment of its debts. On the settlement of the judgment the registrar allowed interest on the sum advanced from the date of the loan until judgment.

Held, on appeal, that in the absence of any Provincial statute dealing with the recovery of interest and there being no valid written agreement providing for payment thereof, the plaintiff was not entitled to recover interest on the sum recovered.

Per McPHILLIPS, J.A.: A judgment of the Court of Appeal when drawn up should be dated as of the date when the decision was given and interest at the legal rate runs from that date.

Statement

MOTION by way of appeal from the settling of the judgment of the Court of Appeal (see 30 B.C. 471) by the registrar on a question of interest. The plaintiff obtained judgment for $65,000 being moneys advanced by the plaintiff to the defendant and interest was allowed by the registrar at 6½ per cent. from the date of the advance (April 9th, 1914) until judgment. Heard at Victoria on the 6th of February, 1922, by MACDONALD, C.J.A., McPHILLIPS and EBERTS, JJ.A.

Argument

Craig, K.C., for the motion: On the agreement nothing was said as to interest and we contend it was waived. In the statement of claim they ask for 5 per cent. and in the notice of appeal 6½ per cent., but not being argued they are abandoned: see *Warmington* v. *Palmer* (1901), 8 B.C. 344 at p. 346; Encyclopædia of the Laws of England, 2nd Ed., Vol. 7, p. 316. Interest is payable by custom in trade by contract or by statute: see *Page* v. *Newman* (1829), 9 B. & C. 378; *Calton* v. *Bragg* (1812), 15 East 223; *Fruhling* v. *Shcroeder* (1835), 2 Bing. (N.C.) 78. Laches may deprive a suitor of interest: see *Smith* v. *Hansen* (1892), 2 B.C. 153.

Martin, K.C., contra: It is all open to this Court: see

Rhoades v. *Lord Selsey* (1840), 2 Beav. 359; Halsbury's Laws of England, Vol. 21, p. 37, par. 74; *Caledonian Railway Co.* v. *Carmichael* (1870), L.R. 2 H.L. (Sc.) 56. This is not a question of damages but a question of agreement: see *Spartali* v. *Constantinidi* (1872), 20 W.R. 823 at p. 825; *Farr* v. *Ward* (1837), 3 M. & W. 25; *Marshall* v. *Poole* (1810), 13 East 98; *Becher* v. *Jones* (1810), 2 Camp. 428(n.); *De Havilland* v. *Bowerbank* (1807), 1 Camp. 50; *Hull and Selby Railway Co.* v. *North-Eastern Railway Co.* (1854), 5 De G.M. & G. 872.

Argument

Craig, in reply: There is no evidence to support the contention that the agreement was that interest should be paid.

Cur. adv. vult.

10th March, 1922.

MACDONALD, C.J.A.

MACDONALD, C.J.A. agreed in allowing the appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: This is an appeal from the settlement of the judgment of this Court, which allowed the appellants the sum of $65,000 as being moneys advanced to the respondent and which moneys went to the benefit of the respondent, all being paid out to discharge debts due and owing by the respondent, *i.e.,* the moneys were received by the respondent and were applied in the payment of debts of the respondent. It was first contemplated that the moneys would be secured by way of mortgage upon the property of the respondent, a saw-mill property, but, as that would have affected the financial standing of the respondent, an agreement to purchase certain shares in the North American Lumber Company held by McKinnon and standing in his name (he holding the shares as trustee for the respondent), was entered into and it was agreed that the shares would be purchased by the respondent at a fixed price, which would have resulted in the re-payment of the $65,000 and interest thereon at 6½ per cent. per annum. The period of credit was to be four years, the moneys then, together with interest, to be repaid. Upon action being brought to compel specific performance of this agreement, the agreement was held to be *ultra vires* of the respondent—beyond its corporate powers.

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Then this action was brought and the decision of this Court was as above stated.

When the formal order for judgment was settled by the registrar, interest was provided for from the 14th of April, 1914, at the rate of 6½ per cent. per annum until the 10th of July, 1922, the date of the judgment of this Court. The question now is, Can interest be allowed at the rate inserted in the judgment as settled by the registrar or at the legal rate of five per cent. per annum? This raises a very important question as to what the governing law of British Columbia is in the absence of a valid written agreement providing for the payment of interest. The question was considered in the Privy Council in *Toronto Railway* v. *Toronto City* (1905), 75 L.J., P.C. 36. That was a case that went from the Province of Ontario, and interest was allowed in the Courts of Ontario and affirmed in the Privy Council. In this Province, however, there is no statute law of the Province dealing with the matter. In Ontario, by the Ontario Judicature Act, 1897, s. 113, "interest shall be payable in all cases in which it is now payable by law or in which it has been usual for a jury to allow it." There are no decided cases upon the point in British Columbia. In view of the absence of statute law of the Province, it is clear that the law upon this point must be determined according to the law of England as it existed on the 19th of November, 1858 (English Law Act, Cap. 75, R.S.B.C. 1911). In *Toronto Railway* v. *Toronto City, supra,* Lord Macnaghten said, at pp. 37-8:

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"The question as to interest is not so simple. If the law in Ontario as to the recovery of interest were the same as it is in England, the result of modern authorities ending in the case of *London, Chatham and Dover Railway* v. *South Eastern Railway* (1893), A.C. 429; 63 L.J., Ch. 93, would probably be a bar to the relief claimed by the corporation. But in one important particular the Ontario Judicature Act, R.S.O. 1897, c. 51, which now regulates the law as regards interest, differs from Lord Tenterden's Act. Section 113, which is a reproduction of a proviso contained in the Act of Upper Canada, 7 Will. 4, c. 3, s. 20, enacts that 'Interest shall be payable in all cases in which it is now payable by law, or in which it has been usual for a jury to allow it.' The second branch of that section (as Mr. Justice Street observes) is so loosely expressed as to leave a great latitude for its application. There is nothing in the statute defining or even indicating the class of cases intended. But the Court is not left without guidance from competent authority. In *Smart*

v. *Niagara and Detroit Rivers Railway* (1862), 12 U.C.C.P. 404, Chief Justice Draper refers to it as a settled practice 'to allow interest on all accounts after the proper time of payment has gone by.' In *Michie* v. *Reynolds* (1865), 24 U.C.Q.B. 303 the same learned Chief Justice observed that it had been the practice for a very long time to leave it to the discretion of the jury to give interest when the payment of a just debt had been withheld. These two cases are cited by Osler, J.A., in *McCullough* v. *Clemow* (1895), 26 Ont. 467 which seems to be the earliest reported case in which the question is discussed. To the same effect is the opinion of Chief Justice Armour in *McCullough* v. *Newlove* (1896), 27 Ont. 627. The result, therefore, seems to be that in all cases where, in the opinion of the Court, the payment of a just debt has been improperly withheld, and it seems to be fair and equitable that the party in default should make compensation by payment of interest, it is incumbent upon the Court to allow interest for such time and at such rate as the Court may think right. Acting on this view, the Divisional Court and the Court of Appeal, consisting in all of seven learned judges, have given interest in the present case, though not without some hesitation on the part of Mr. Justice Britton, in the Divisional Court, and some hesitation on the part of Osler, J.A., in the Court of Appeal. Their Lordships have come to the conclusion that the judgment under appeal ought not to be disturbed. The question is one in which the opinion of those familiar with the administration of justice in the Province is entitled to the greatest weight. Their Lordships are not satisfied that the decision of the Court of Appeal, which evidently has been most carefully considered, is in any respect erroneous."

It is clear that the judgment of the Privy Council would have been the other way were it not for the statute law of Ontario and the authorities in that Province referred to by Lord Macnaghten. It is evident then that the controlling decision is *London, Chatham and Dover Railway Co.* v. *South Eastern Railway Co.* (1893), A.C. 429; 63 L.J., Ch. 93, a decision of the House of Lords. The head-note of the case aptly defines the judgment in the House of Lords and it reads as follows:

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"By an agreement and an award the profits of certain railway traffic were to be shared between two railway companies, accounts exchanged monthly and verified, and the balances paid by the 15th of the following month. A dispute arose whether certain traffic was included under the agreement; and in an action for account the official referee found a large sum to be due from the respondents to the appellants, and allowed interest on that sum:—*Held*, affirming the decision of the Court of Appeal (61 L.J., Ch. 294; (1892), 1 Ch. 120), that no interest was payable—because, first, there was no sum certain due 'by virtue of a written instrument at a certain time' under 3 & 4 Will. 4, c. 42, s. 28; secondly, no demand in writing for the amount with notice that interest would be claimed as required by the statute had been made; nor, thirdly, could interest be given by way of damages in respect of the wrongful detention of the money."

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It is true there was a written instrument in the present case, but it cannot be looked at as it has been held to be invalid, *i.e., ultra vires* of the Company (the respondent).

The situation then is, Can interest be allowed in the present case? The Lord Chancellor (Lord Herschell) at p. 98, in *London, Chatham and Dover Railway Co.* v. *South Eastern Railway Co., supra,* said: [the learned judge quoted from the beginning of the first paragraph to the end of the second paragraph, and the judgment of Lord Watson at pp. 98-9 and continued].

The judgment last referred to of the House of Lords was considered, as we have seen, in *Toronto Railway* v. *Toronto City, supra,* and, as above quoted, Lord Macnaghten said:

"If the law in Ontario as to the recovery of interest were the same as it is in England, the result of modern authorities ending in the case of *London, Chatham and Dover Railway* v. *South Eastern Railway* (1893), A.C. 429; 63 L.J., Ch. 93 would probably be a bar to the relief claimed by the corporation."

It would appear to me to be impossible, in view of the state of the law, to hold that interest could be awarded. Lord Shand expressed his regret in the *London, Chatham and Dover Railway Co.* v. *South Eastern Railway Co., supra,* in these words:

"I shall only add that I regret that the law of this country in regard to the running of interest is not like the law of Scotland, with which I am more familiar."

MCPHILLIPS, J.A.

I also have my regrets in the present case as the respondent has had the benefit of the moneys of the appellants for now some eight years and can only be required to pay the principal sum, namely, $65,000.

In passing I would refer to the *Rhymney Railway Co.* v. *Rhymney Iron Co.* (1890), 25 Q.B.D. 146. It was in that case held that:

"A claim in the writ for interest upon the amount claimed from the date of the writ till payment or judgment is not a good demand for the purposes of 3 & 4 Wm. 4, c. 42, s. 28, which provides for the allowance of interest in certain cases 'from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the time of payment.'"

I note that the judgment as drawn up is properly dated the 10th of January, 1922. It was lately held in the Court of

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Appeal in England in *Nitrate Produce Steamship Co.* v. *Shortt Brothers Ltd.* (1921), 66 Sol. Jo. 5, that the judgment must be entered as of the date the House of Lords gave its decision and that interest at the legal rate will only run from the date of the judgment in appeal, not from any earlier date. The appeal, in my opinion, should be allowed and the judgment as settled by the registrar should be amended by striking out the provision allowing interest.

EBERTS, J.A.

EBERTS, J.A. would allow the appeal.

Appeal allowed.

MORRISON *ET AL.* v. COMMISSIONERS OF THE DEWDNEY DYKING DISTRICT.

HUNTER, C.J.B.C.

1921

June 16.

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MORRISON v. COMMISSIONERS OF DEWDNEY DYKING DISTRICT

Damages—Injury to property by flood—Canal constructed by defendants—Breaking away of wall of canal—Non-repair—Misfeasance—Injury to reversion — Liability — "Act of God" — R.S.B.C. 1911, Cap. 69, Sec. 18(1)—B.C. Stats. 1913, Cap. 18, Sec. 52; 1919, Cap. 23, Sec. 6.

In an action for damages, the plaintiffs claiming that the improper construction and failure to keep in repair of a canal resulted in the flooding of their farm, a claim was made for injury to the reversion. The lease to the tenant had four years to run from the date of the flooding and evidence was adduced to the effect that by reason of the flooding the future selling price of the land would be affected. It was held on the trial that the reversioner was entitled to nominal damages.

Held, on appeal, reversing the decision of HUNTER, C.J.B.C., that a reversioner can only recover damages where the injury to the property is permanent so that it will continue to affect it when the reversioner comes into possession, and he is not entitled to damages in respect of a temporary injury on the ground that it affects the present saleable value of his reversion.

Held, further, affirming the decision of HUNTER, C.J.B.C., that on the evidence it was insufficiency of repair that caused the bank to give way and that the duty cast upon the Commissioners by section 18 of the Drainage, Dyking and Irrigation Act, 1911, to keep the canal in a proper state of repair was not relieved against by any subsequent legislation.

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Statement

APPEAL by defendants from the decision of HUNTER, C.J.B.C., in an action tried by him at Vancouver on the 22nd to the 29th of April, the 2nd to the 18th of May, and on the 16th of June, 1921, for damages for negligence in failing to properly construct, maintain and keep in repair the defendants' canal constructed through the plaintiffs' lands at Hatzic, B.C. Prior to 1911 water flowed through a river course along the westerly front to the plaintiffs' land southerly towards the Fraser River in its natural flow. In 1911 the Commissioners of the Dewdney Dyking District erected a dam across the river to the north of the plaintiffs' lands thereby raising the waters above into a lake and they then expropriated certain portions of the plaintiffs' lands and constructed a canal on said expropriated lands for the purpose of providing an outlet for carrying away said waters into the Fraser River. In 1915 the plaintiffs brought action against the defendants for the negligent and improper construction of the canal and after the trial and before judgment the parties agreed as to the judgment which provided that the plaintiffs should give a strip of 20 feet of land along the southern bank of the canal for a small amount and that the defendants should use said 20 feet for the proper construction and maintenance of the canal. The canal broke and the lands in question were completely inundated in the summer of 1920. The plaintiff Clark A. Morrison, who held said lands under a lease, claimed $14,000 for loss of crops and damages as to matters incidental to farming operations, and J. R. Morrison as reversioner claimed $14,000 damages.

S. S. Taylor, K.C., and *W. S. Deacon*, for plaintiffs.
A. H. MacNeill, K.C., and *Hamilton Read*, for defendants.

HUNTER, C.J.B.C.

HUNTER, C.J.B.C.: This case has lasted many days with great expense to the parties, and it is only another illustration of the difficulty that the Court is always under when it has to grope its way through evidence given by experts who are called in to assist the parties rather than assist the Court. In my opinion this is the class of case which would be much better tried by a Court sitting with assessors, but inasmuch as the parties have chosen to resort to the ordinary tribunal, then

one has simply to do the best he can to arrive at the best result after consideration of all the matters presented.

The action is one brought by a lunatic, by his wife as committee, for damages to the reversion and by the son as tenant for damages caused by the bursting of the canal which was erected under statutory authority by the defendants, whereby the plaintiffs' farm was flooded and the crops destroyed.

The property is situate on a peninsula surrounded by the Fraser River, the Hatzic Slough and the C.P.R. track, which forms part of the defendants' dyke. Part of the property is situate within the dyke, and the action is for negligence caused by damage to the property outside the dyke. The dyke itself and canal were built in the years 1911 and 1912 under authority then conferred by the Legislature, that is to say, the statute of 1911. It is common ground that it has been often repaired from time to time by the Commissioners, and generally through the aid of the parties resident in the neighbourhood, and by means of a man who was in charge of the pumping station.

On July 4th, 1920, the Fraser River annual flood had reached an elevation of 92 feet, to use the figures which have ordinarily been resorted to in the evidence, that is to say, by the gauge as established in connection with the level of the C.P.R. track. It reached its maximum of 93.92 feet upon July 18th. It gradually receded to 92 feet on the 26th, so that for the greater portion of that month the river was in high flood. It is common ground that the canal broke in the afternoon of July 15th, when the water had reached the elevation of 93.42 or 20 feet 6 inches measured by the Mission gauge. It reached its maximum, as I have already said, on July 18th, namely, 93.92, that is to say, an additional height of six inches after it broke through the canal. The plaintiffs claim that the damage which they suffered by the loss of their crops was occasioned through and by reason of negligence in the original construction of the canal, or at all events by negligence in its maintenance. The defendants deny that there was any negligence either in the construction or in the maintenance; further, in any event, assuming there had been any negligence, that damage would have been occasioned in any event by the addi-

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tional waters of the Fraser, namely, the extra six inches which came over, not only the bank of the canal, but over the protection dykes which had been established by the plaintiffs. There is no doubt that the original damage, in fact it is common ground that the original damage was in fact caused by the breach of the bank of the canal. At two o'clock on the afternoon of that day the plaintiffs, who were engaged in raising their protection dykes to keep out the oncoming flood, observed water coming over the bank of the canal, and in a short time it had torn a large gap through the bank of the canal, and immediately flooded practically the entire farm. So that *prima facie* there is a cause of action in respect of the breach occasioned by the water bursting through the canal. The defendants contend that they had done all they were required to do, having regard to all the circumstances.

They had expropriated a portion of the plaintiffs' land under the authority given by the statute, and had erected the canal under the superintendence of engineers, and had engineers occasionally visit the canal from time to time to see that it was in proper repair. It was contended that weep-holes, which had been placed in the lining of the canal, were the original source of the trouble, that the loose and friable sand which formed part of the constituent elements of the bank had been seeping through these weep-holes, and in that way had caused cavities to exist in the bank itself. There is no doubt about the existence of the cavities. It is common ground that the cavities did appear from time to time, and were from time to time filled in with rock and earth under the occasional superintendence of the different engineers.

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It was also contended on behalf of the defendants, and a large amount of expert evidence was given to demonstrate, if possible, that the real cause of this outbreak, the bursting of the water through the canal, was the eruption of a sand-boil. It was contended that the hydrostatic pressure which was caused by the mounting of the waters of the slough in the river had exerted such pressure that, owing to the friability and loose character of the formation of the ground, the waters coming in by reason of the seepage behind the canal itself, and which

were impossible in any event to keep out, naturally took the line of least resistance and caused a sand-boil to erupt at the toe of the bank, and in that way the damage was caused; and it is contended and set up as a matter of defence that this sand-boil, which is claimed to have started at the toe of the bank, or the place of least resistance, was, as the defendants call it, the act of God and forms a good defence to the action. It was also suggested that the bank may have been weakened by the depredations of rats, and that that also had some connection with the disaster.

There is no doubt, as I say, that the original damage was caused by the bursting through of this bank. Much debate was had on the question as to whether the water originally came over the concrete shell of the canal, which admittedly was placed there for the purpose of preventing the erosion of the bank, or whether it had come in by reason of the rising waters in the slough and in the river. I think the existence of the concrete shell one way or the other, for the purpose of determining the rights of the parties in this action, is absolutely immaterial. It is admitted that its chief and perhaps only function was to prevent the erosion of the bank. Assuming, then, that the concrete shell could not control the seepage, it comes down simply to this, was the bank of sufficient solidity to withstand the ordinary occurrences that would take place?

I think there is no question that nothing that the plaintiffs or defendants could have done would have prevented the water from getting behind and under the bank by reason of the seepage. It appears to me that, so far as I am able to judge the scientific evidence on such questions, it was inevitable and that as a yearly occurrence that the water should inundate the whole farm up to a certain level by reason of the seepage and therefore that the water could not be kept out by any concrete shell facing the bank; so that, in my opinion, it comes down to this, as to whether it was not the duty of the defendants in the circumstances to establish the bank of sufficient width and solidity to withstand such occurrences as sand-boils and water coming in by reason of seepage.

I do not think that I am concerned in this action to state

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what the rights of the parties would be had the plaintiffs raised their protection dykes to such a height as would have exceeded that of the bank of the canal. That is a question which I do not think comes in issue in this action, the evidence being that the waters originally burst through the bank of the canal, and ultimately, by reason of the extra flood of six inches, did come over the protection dykes which they raised.

In my opinion, it was the duty of the Commissioners, having regard to all the conditions, especially by reason of the knowledge which their engineers possessed, to make adequate provision against the possibility of flooding taking place by reason of the bank of this canal being burst. They knew the porous condition of the soil, they knew that it was merely a quicksand whenever it became saturated with water on which they were building the bank of this canal; at all events that there was a very unstable foundation, and therefore, in my opinion, it was all the more incumbent on them to so construct the bank as to prevent disaster arising from that source. I am quite willing to grant that the Commissioners are not insurers and not bound to anticipate unusual events, such, for instance, as the destruction of this canal by a bolt of lightning or by a tornado or by a waterspout or anything of that kind, but I am equally of the opinion that sand-boils and rat-holes are not acts of God and do not form a good defence to the action.

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It must be remembered that the provisions of the statute are not compulsory. The petitioners who initiated the building of this dyke were given the privilege by the statute for their own benefit, they were given authority by the statute to expropriate the property of their neighbours, that is to say, the plaintiffs in this suit. They chose to exercise that privilege for their own benefit. It seems to me that that carries with it the responsibility of so exercising that privilege that it shall not become a nuisance or source of danger to their neighbours, which in fact this canal did become, having regard to the conditions under which it was maintained. It must be remembered that there was no systematic or regular inspection of the canal. Occasionally an engineer, according to the evidence, came there and visited it, but remained no length of time. The

matter was apparently handed over to the control of a man who was not at all of scientific training or had any experience in these matters, who was in charge of the pumping station; and I think he did the best he could do to fill all these cavities as they appeared; but I think substantially the whole trouble was that the bank was not built of sufficient width and solidity to withstand known yearly occurrences, having regard to the unstable foundation on which it was put, and having regard to the certainty of damage if the canal gave way.

There was one other defence raised, and that was that the damage would have occurred in any event by reason of the extra six inches of water, which was shewn by the evidence to have come over the farm on July 17th, that is to say, during the three days following the bursting of the bank of the canal. As to that I apprehend that where the natural consequence of a given act of negligence is to produce a certain result, it is for the defendants who claim that that result would have taken place in any event from some other cause, to shew affirmatively that it was so, and not leave it to speculation on the part of the Court.

There was evidence given that at the very time the bank burst the plaintiffs were engaged and were using men for the purpose of raising the protection dykes all around their farm. Roughly speaking, they had to contend with an extra two inches every twenty-four hours for three days, and whether it was possible for them to have kept out the extra six inches in the time that was at their disposal, and with the resources that were at their disposal, I am absolutely unable to say, although I have had the advantage of a view of the locality. The mind of the Court is in a state of doubt on that point, and I think it was incumbent on the defendants to positively shew beyond any reasonable doubt that it was impossible for the plaintiffs, under the circumstances, to have escaped the consequences of the further rising of the flood. Under these circumstances I do not think that it is a good defence, any more than it would be in the case of a man who is negligently run over by an automobile and immediately following on the heels of the first accident another automobile, in a similar way, runs over him.

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I do not think that the first automobile could escape paying damages on the mere suggestion that the same accident would have occurred and the same or similar injuries would have been caused by the second automobile doing the same thing.

Now with regard to the damages, I have a great deal of doubt as to what should be allowed. With respect to the plaintiff Mrs. Morrison, who is claiming for damages to the reversion, I think that the damages can only be nominal.

With respect to the tenant, the son Clark Morrison, whose crops have been destroyed, the claim originally put forward was certainly very largely over-estimated. I find, for instance, that the claim as originally presented claimed for 60 acres of hay, whereas as a matter of fact there were only 33 acres; he claimed for 24 acres of oats, whereas as a matter of fact there were only about 15 acres; he claimed for 2 acres of potatoes where there was only 1 acre, and so on. I have come to the conclusion that so far as the plaintiffs' estimate of their damage is concerned I must practically disregard that and have resort to what evidence there was, which was of an indifferent character.

There are, of course, the income-tax returns; but apart from the fact that they are *res inter alios* and apart from the fact that there was room for misinterpreting the requirements of the law and that they were not made out by Clark Morrison himself, I doubt whether they are of any real relevancy, as the true question is what was the value of the crop at the time of its destruction and not what was the taxable income after making all proper deductions.

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There was evidence given by three persons more or less disinterested, one man in particular, the fruit inspector, Clarke, whose evidence I regard as the most reliable and who appeared to have had considerable experience of farming in this district. He states that in normal times the return from this farm would have been somewhere between three and four thousand dollars a year. I have, of course, also to take into account the possibilities that this particular crop might have come to nothing by reason of untoward climatic conditions, or that there may have been no real value when it was harvested on account of

market conditions, or that other accidents may have happened which would have prevented any real return from it—I have to take all these possibilities into account. On the whole I think the sum of $3,600 would be a reasonable amount to allow.

There will be judgment accordingly, but only one set of costs.

From this decision the defendants appealed. The appeal was argued at Vancouver on the 18th, 21st, 22nd, 29th and 30th of November, 1921, before MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

A. H. MacNeill, K.C. (*Hamilton Read,* with him), for appellants: The powers of the Commissioners are compulsory. There is first the Act of 1897 (R.S.B.C. 1897, Cap. 64), and the 1911 revision (Cap. 69, Sec. 18(1)) is the same. There is then the Act of 1913 (Cap. 18, Sec. 52) in which the word "duty" is changed to "power." In its natural state this farm would have been flooded in any event and the question is whether in law there can be any liability on our part when under natural conditions they would have been flooded any way, and it is impossible to deal with sand-boils. The Commissioners acted on the engineers' advice and carried out their instructions. Failure to perform additional works (other than those originally contemplated) does not make them liable: see *Corporation of Raleigh* v. *Williams* (1893), A.C. 540; *Hemphill* v. *McKinney* (1915), 21 B.C. 561 at p. 567; *Hornby* v. *New Westminster Southern Railway Company* (1899), 6 B.C. 588; *Green* v. *The Chelsea Waterworks Company* (1894), 70 L.T. 547. On the question of the creation of a nuisance see *Attorney-General* v. *Cory Bros. & Co.* (1921), 1 A.C. 521 at pp. 539-40. They used all reasonable care: see *Carstairs* v. *Taylor* (1871), L.R. 6 Ex. 217; *Anderson* v. *Oppenheimer* (1880), 5 Q.B.D. 602; *Dixon* v. *Metropolitan Board of Works* (1881), 7 Q.B.D. 418; *Dumphy* v. *Montreal Light, Heat and Power Company* (1907), A.C. 454. We say the powers are not permissive but compulsory: see *Canadian Pacific Railway* v. *Parke* (1899), A.C. 535 at p. 546. We were authorized by

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statute to acquire these lands for a certain purpose which we did and we cannot be subject to an action for nuisance: see *Thomas* v. *Birmingham Canal Co.* (1879), 49 L.J., Q.B. 851; *Green* v. *The Chelsea Waterworks Company* (1894), 70 L.T. 547 at p. 549; *Dunn* v. *The Birmingham Canal Company* (1872), 42 L.J., Q.B. 34; *Snook* v. *The Grand Junction Waterworks Company (Limited)* (1886), 2 T.L.R. 308. On the question of statutory authority see *East Fremantle Corporation* v. *Annois* (1902), A.C. 213 at p. 218; *Forbes* v. *Lee Conservancy Board* (1879), 4 Ex. D. 116. At most it is only a case of non-feasance: see *Municipality of Pictou* v. *Geldert* (1893), A.C. 524; *Municipal Council of Sydney* v. *Bourke* (1895), A.C. 433 at p. 444; *Von Mackensen* v. *Corporation of Surrey* (1915), 21 B.C. 198; Mayne on Damages, 8th Ed., pp. 7-8.

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S. S. Taylor, K.C., for respondents: On the authorities it should not be necessary for me to discuss the evidence: see *McHugh* v. *Union Bank of Canada* (1913), A.C. 299 at p. 308; *Khoo Sit Hoh* v. *Lim Thean Tong* (1912), A.C. 323 at p. 325; *Dominion Trust Company* v. *New York Life Insurance Co.* (1919), A.C. 254 at p. 257. There was no great pressure here to create the shooting up of water or geiser as there was only a five-foot head. We say the defective construction was the cause of the flooding and, secondly, there was misfeasance owing to lack of repair. On the first point they did not construct in accordance with specifications. In *Williams* v. *The Corporation of the Township of Raleigh* (1892), 21 S.C.R. 103 at pp. 132-3; (1893), A.C. 540 at p. 550, the Ontario statute is different. They did not plead that we should proceed by arbitration; the Court should decide: see *Cameron* v. *Cuddy* (1914), A.C. 651. The *Williams* case, *supra,* which is explained in *Spratt* v. *Township of Gloucester* (1920), 54 D.L.R. 275 at p. 278 does not apply here; see also *Coe* v. *Wise* (1864), 5 B. & S. 440 at pp. 450-4; *Sanitary Commissioners of Gibraltar* v. *Orfila* (1890), 15 App. Cas. 400 at p. 412; *Metropolitan Asylum District* v. *Hill* (1881), 6 App. Cas. 193 at pp. 212-3. As to liability for nuisance they could have done this work without nuisance so they cannot plead pro-

tection of the statute: see *Geddis* v. *Proprietors Bann Reservoir* (1878), 3 App. Cas. 430 at p. 456; *Oliver* v. *Horsham Local Board* (1893), 63 L.J., Q.B. 181 at p. 185; *Great Central Railway* v. *Hewlett* (1916), 2 A.C. 511 at pp. 519 and 522. This case does not come within the phrase "act of God": see *Baldwin's Lim.* v. *Halifax Corporation* (1916), 85 L.J., Q.B. 1769 at p. 1774; *Mayor and Corporation of Shoreditch* v. *Bull* (1904), 90 L.T. 210. They are guilty of misfeasance: see *Dawson & Co.* v. *Bingley Urban Council* (1911), 80 L.J., K.B. 842 at p. 848; *Thompson* v. *Bradford Corporation* (1915), 84 L.J., K.B. 1440; *McClelland* v. *Manchester Corporation* (1911), 81 L.J., K.B. 98 at p. 106; *Hawthorn Corporation* v. *Kannuluik* (1906), A.C. 105 at pp. 108-9; *Greenock Corporation* v. *Caledonian Railway* (1917), 86 L.J., P.C. 185 at pp. 193-5; and *Morrison* v. *Sheffield Corporation* (1917), 86 L.J., K.B. 1456 at pp. 1458-9 particularly as to repair; see also *Gallsworthy* v. *Selby Dam Drainage Commissioners* (1892), 1 Q.B. 348 at p. 353. On the question of non-repair by public bodies see *Cowley* v. *Newmarket Local Board* (1892), A.C. 345 at pp. 349-350; *Borough of Bathurst* v. *Macpherson* (1879), 4 App. Cas. 256 at pp. 265-6; *City of Vancouver* v. *McPhalen* (1911), 45 S.C.R. 194 at pp. 211-216; *The Mersey Docks Trustees* v. *Gibbs* (1866), L.R. 1 H.L. 93 at pp. 104-5 and 107-8; *Leighton* v. *B.C. Electric Ry. Co.* (1914), 20 B.C. 183; *Woodward* v. *Vancouver* (1911), 16 B.C. 457; *Cooksley* v. *Corporation of New Westminster* (1909), 14 B.C. 330 at p. 337. This judgment can be sustained on defective repair. You can protect your own lands: see *Gerrard* v. *Crowe* (1920), 90 L.J., P.C. 42 at p. 45 *et seq.*; *The King* v. *Commissioners of Sewers for Pagham, Sussex* (1828), 8 B. & C. 355. We can raise our own dyke as high as we please. On the question of seeping through see *Nitro-Phosphate and Odam's Chemical Manure Company* v. *London and St. Katharine Docks Company* (1878), 9 Ch. D. 503 at pp. 526-7.

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W. S. Deacon, on the same side: As to whether the farm would have been flooded any way, a case has not been made

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out here to bring it within *Corporation of Raleigh* v. *Williams* (1893), A.C. 540.

MacNeill, in reply.

Cur. adv. vult.

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MARTIN, J.A. would allow the appeal in part.

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GALLIHER, J.A.: The only question involved in this appeal is one of liability. The amount of damages given, if liability is found, is not in dispute, except as to nominal damages granted the plaintiff Ellen M. Morrison. With respect to these latter damages, I am of the opinion that they cannot be awarded.

Evidence was adduced to the effect that by reason of the flooding the future selling price of the lands would be affected and the claim was made for injury to the reversion. The lease to the present tenant had some four years to run from the date of the flooding. This very point is dealt with in *Rust* v. *Victoria Graving Dock Company and London and St. Katharine Dock Company* (1887), 36 Ch. D. 113, on an appeal from Mr. Justice Chitty. There it was held that a reversioner can only recover damages where the injury to the property is permanent, so that it will continue to affect it when the reversioner comes into possession, and he is not entitled to damages in respect of a temporary injury on the ground that it affects the present saleable value of his reversion.

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This case is referred to and distinguished in *Tunnicliffe & Hampson, Limited* v. *West Leigh Colliery Company, Limited* (1906), 2 Ch. 22. In adverting to the *Rust* case, Collins, M.R. says at p. 28:

> "The plaintiffs' land had been flooded and certain houses damaged, and the Court of Appeal, while allowing the expense of repairing the houses and the rent during the repair, disallowed a sum estimated by a referee as a loss likely to arise from reduced rental for four years, after the repairs were completed, in consequence of the prejudice against the neighbourhood caused by the flood,"

and distinguishes the case then under consideration from the *Rust* case. The circumstances in the *Rust* case are very similar to the case at bar, but, be that as it may, the matter seems set at rest by the decision of the House of Lords in the *Tunnicliffe*

case, *supra,* reversing the judgment of the Court of Appeal: (1907), 72 L.J., Ch. 102; (1908), A.C. 27. That action was brought by the owners of cotton mills for damages for subsidence caused by the mining operations of the defendants, and the question was whether such damages ought to include compensation for the depreciation of the selling value of the property due to the apprehensions which a purchaser might be expected to entertain of the possibility of future damage. The facts in that case were much stronger than in the *Rust* case, *supra,* or in the case at bar, yet the House of Lords held such could not be awarded. Lord Macnaghten, at p. 104 of the Law Journal Reports, puts it thus:

"I think that this case is concluded by authority. In my opinion it is impossible to reconcile the judgment under appeal with the principles laid down in this House in *Backhouse* v. *Bonomi* [(1861)], 34 L.J., Q.B. 181; 9 H.L. Cas. 503 and *Darley Main Colliery Co.* v. *Mitchell* [(1886)], 55 L.J., Q.B. 529; 11 App. Cas. 127.

"It is undoubted law that a surface owner has no cause of action against the owner of a subjacent stratum who removes every atom of the mineral contained in that stratum unless and until actual damage results from the removal. If damage is caused, then the surface owner 'may recover for that damage,' as Lord Halsbury says in *Darley Main Colliery Co.* v. *Mitchell,* 'as and when it occurs.' The damage, not the withdrawal of support, is the cause of action. And so the Statute of Limitations is no bar, however long it may be since the removal was completed; nor is it any answer to the surface owner's claim to say that he has already brought one or more actions and obtained compensation once and again for other damage resulting from the same excavation.

"If this be so, it seems to follow that depreciation in the value of the surface owner's property brought about by the apprehension of future damage gives no cause of action by itself. That was the conclusion reached by Chief Justice Cockburn in his dissentient judgment in *Lamb* v. *Walker* [(1878)], 47 L.J., Q.B. 451; 3 Q.B.D. 389, which was approved in this House in *Darley Main Colliery Co.* v. *Mitchell.* I think, as the Chief Justice thought, that this conclusion necessarily follows from the principles asserted by the noble and learned Lords who took part in *Backhouse* v. *Bonomi,* and particularly by Lord Cranworth and Lord Wensleydale."

And Lord Ashbourne, at p. 105:

"To give damages for depreciation because a purchaser, from the fear of future damage, would give less after the subsidence would be a method of doing that which the law as laid down in this House would not sanction. Chief Justice Cockburn well put the position in his judgment in *Lamb* v. *Walker,* which has been accepted as law: 'Taking the view I do of that decision (*Backhouse* v. *Bonomi*), I am unable to concur in holding that, in addition to the amount to which he may be entitled for actual

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damage sustained through the excavation of the adjacent soil by the defendant, the plaintiff is entitled to recover in respect of prospective damage, that is to say anticipated damage expected to occur, but which has not actually occurred and which never may arise.' "

And the Lord Chancellor (Lord Loreburn) at p. 106:

"To say that the surface land would sell for less because of the apprehension of future subsidence is no doubt true. To say that the depreciation in present value caused by that apprehension ought to be included as an element of compensation is, in my view, unsound. For that is asking compensation, not for physical damage which has in fact arisen, but for the present influence on the market of a fear that more such damage may occur in future."

On the appeal against the remaining plaintiff's judgment, the case is one of very considerable difficulty owing to the peculiar condition of the soil in that neighbourhood, and the fact that so much technical evidence of experts has been taken, differing more or less on crucial features of the case. I agree with the learned trial judge that cases of this sort are much better tried with the aid of assessors skilled in this sort of work, but, like him, we have to grapple with it as best we can.

After several days spent in reading the evidence, examining the exhibits and trying to understand and apply them, I find no little difficulty in arriving at a conclusion on the facts. Much evidence has been adduced as to the method of construction and the materials used therein, and while I think we must regard all the experts as competent men, still, we find a sharp line of cleavage between the experts on one side and on the other. This is more particularly noticeable as between the plaintiffs' expert Hermon and the defendants' experts.

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Mr. Hermon goes very carefully into the method of construction and the material that should have been used, and while it may be that to have followed out his ideas would have resulted in a safer and better structure (which defendants' experts dispute), still, under the authority of the statute under which the Commissioners proceeded with the work, if they have fulfilled all the requirements of that statute (and I think we must hold under the evidence that they have), then they have erected a structure in accordance with approved plans and specifications, and any subsequent changes made have been in the nature of strengthening rather than weakening the bank.

It is to be regretted that defendants were unable to procure

the specifications upon which the work carried out by Webster was based, but there is the evidence of the engineers on the work that these plans and specifications were carried out absolutely, and we would not, I think, be justified in casting any doubt upon that.

The problem of dyking in this district, and many other districts along the Fraser, is a difficult one, owing to the depth of quicksand underlying the surface and which, when the river rises in flood, becomes strongly impregnated with water, but I would hold, upon the evidence, that this has been intelligently dealt with and that there was not faulty construction of the dyke or canal.

The defendants raise the further point that by reason of the rise in water between the 15th of July (the day the dam broke) and the 18th, the plaintiffs' land would have been flooded in any event from another source not controlled or affected by these works. There is conflicting evidence on this point, but I would hold that with the assistance the Morrisons had on hand they could have taken care of that gradual rise of water within the two days by continuing to do what they were engaged on at the time the bank broke, *viz.*, raising the level of their natural dyke or ridge of high land.

Then there is the theory that a sand-boil bursting up within a few feet of the toe of the dyke (which they class as an act of God) was the cause of the bank breaking. The existence of a break in the surface of the ground near the dyke is established, but the evidence as to the effect of this is not sufficiently definite and convincing to enable me to hold that such was the case. It seems to me that it was the lack of or insufficiency of repair that caused the bank to give way when the time of stress came. This, I think, is a fair inference to be drawn from the evidence as a whole.

I would prefer to put the defendants' liability, if any, on this ground, as it seems to me better established than that of faulty construction. If this finding of fact is well founded, it remains only to consider whether, under the statute, a liability to repair and maintain is cast upon the defendants. The work was constructed in 1911 and 1912, but I think it necessary to

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go back to the consolidation of the British Columbia statutes of 1897, being chapter 64 of those statutes. Under the head of "Powers and Duties of Commissioners," and at section 18(1) we find the Commissioners are given power to build, make, operate, etc., dykes, dams, etc., and goes on to recite:

"And it shall be their duty to execute or cause to be executed the works . . . . and to see that the same are duly operated and maintained in a proper state of repair."

This section is carried through in the Revised Statutes of 1911, Cap. 69, without change. This Act (the Drainage, Dyking and Irrigation Act) was again consolidated and amended in 1913, Cap. 18, and section 52 of that Act takes the place of section 18 of the Revised Statutes of 1911. Section 52, as amended by section 6 of Cap. 23, of 1919, reads as follows:

"The Commissioners shall have power to execute or cause to be executed, the works shewn upon the plans referred to in sections 29 and 51 hereof, filed as aforesaid, or decided upon in accordance therewith, and to see that the same are duly operated and maintained in a proper state of repair. In executing, maintaining and operating the said works, the Commissioners shall have power to construct, build, dig, make, operate, and maintain such dykes, dams, weirs, flood-gates, ... as they may deem advisable for draining, dyking, or irrigating the lands in the district: provided that no such works shall be executed until plans shewing the location thereof have been deposited in the Land Registry Office pursuant to the provisions of this Act, and that no works injuriously affecting natural or artificial waterways shall be executed until approved by the Minister of Lands. It shall be their duty to attend to the making, levying and collecting of taxes, and to properly apply all sums collected, and generally to carry out the provisions of this Act."

Had section 18(1) of Cap. 69, R.S.B.C. 1911, remained without change, I think there can be little doubt that the plaintiffs could maintain an action and that the defendants would be liable. The point came before this Court in *McPhalen* v. *Vancouver* (1910), 15 B.C. 367, where we held the City liable for non-repair. This case was carried to the Supreme Court of Canada and our judgment affirmed (45 S.C.R. 194). Their Lordships in the Supreme Court dealt fully with the leading English cases bearing upon the subject, including cases in the House of Lords and Privy Council, and I need not do more than refer to that case.

The point to be decided then is: Has the change in our statute above referred to weakened the effect of that case as an

authority, as applied to the existing change? In my view it has not, though it has made the matter more difficult to determine. The duty cast upon the Commissioners in the original statutes to maintain in a proper state of repair (in viewing the intention of the Legislature), if it is to be deemed to be relieved against by subsequent enactments, those enactments should either be in express words, or at all events in such language as would enable us to say the Legislature must have so intended. It is true the wording has been altered in the repealing Act, and had the duty not been before expressly imposed we might find difficulty in concluding liability. Where we find words directly imposing a duty and no express words relieving against that duty in a later statute, we are then entitled to gather from the Act generally what was the intention of the Legislature.

Now turning again to section 52 of the Act of 1913, the words are:

"The Commissioners shall have power to execute, or cause to be executed, the works shewn upon the plans . . . . and to see that the same are duly operated and maintained in a proper state of repair."

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It seems to me that a reasonable construction of those words would be to say that the power to construct and the power to maintain in proper repair run together. The Commissioners are not compelled to construct, and if they do not no question of repair could of course arise, but if on the other hand they decide to construct and do construct, are they free from any duty or obligation to repair under the statute? Once having exercised their powers of construction of what would, if allowed to go into disrepair, be a dangerous menace under flood conditions, I can scarcely conceive of a Legislature intending to relieve them of a duty previously imposed in express words, unless they in just as express words so intimated.

In the result the appeal against Ellen M. Morrison is allowed, and as against the other plaintiff, dismissed.

MCPHILLIPS, J.A.

McPHILLIPS, J.A.: I am in agreement with the judgment of my brother GALLIHER.

Appeal allowed in part.

Solicitors for appellants: *Hamilton Read & Jackson.*

Solicitor for respondents: *W. S. Deacon.*

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CANADIAN CREDIT MEN'S TRUST ASSOCIATION v. JANG BOW KEE

CANADIAN CREDIT MEN'S TRUST ASSOCIATION, LIMITED v. JANG BOW KEE AND YIN SHEE.

Bankruptcy — Authorized trustee — Action — Unsuccessful on appeal — Personal liability for costs—Jurisdiction—Can. Stats. 1919, Cap. 36, Secs. 63 and 68(2)—Bankruptcy Rules 54(3) and 71.

The Court of Appeal when acting as a Court of Appeal in Bankruptcy has absolute jurisdiction over costs.

On motion to the Court of Appeal by the authorized trustee in bankruptcy (who had been successful in an action in the Court below but unsuccessful in the Court of Appeal) to vary the settling of the judgment by the registrar which made him personally responsible for the costs of the opposite party:—

Held, per MACDONALD, C.J.A. and GALLIHER, J.A., that in section 68(2) of The Bankruptcy Act which provides that "subject to the provisions of this Act and to General Rules, the costs of and incidental to any proceeding in Court . . . . . shall be in the discretion of the Court." The word "Court" has impliedly a wider meaning than that given in the interpretation clause, and said section applies to the Court of Appeal. In the present case the clause making the trustee personally liable should not be struck out.

Per MARTIN, J.A.: The combined effect of the section and rules of The Bankruptcy Act governing appeals is that appeals thereunder coming before the various Appeal Courts are to be disposed of in all respects both as to subject-matter and costs as if they were ordinary appeals, the expansion of the meaning of "Court" is therefore unnecessary and the motion should be dismissed.

MOTION by way of appeal from the settling of the judgment of the Court of Appeal by the registrar who inserted a clause in the judgment making the unsuccessful appellant personally responsible for the costs. The Quong Tai Chong Company made an assignment on the 27th of December, 1920, and the plaintiff was, pursuant to the provisions of the Act, made the authorized trustee. On the 1st of December, 1920, the defendant Jang Bow Kee, who was a partner in Quong Tai Chong Company, transferred certain property to his wife, the defendant Yin Shee. The plaintiff brought action to set aside the conveyance as made with the intent to defeat and defraud the creditors of Quong Tai Chong Company. The plaintiff succeeded on the trial but judgment was given against it on

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appeal. Heard at Victoria on the 8th of February, 1922, by MACDONALD, C.J.A., MARTIN, GALLIHER and EBERTS, JJ.A.

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O'Brian (*Brown, K.C.*, with him), for the motion: This question is governed by the recent judgment of this Court in *Bond* v. *Conkey* (not reported). The trustee succeeded below but failed here. The jurisdiction is under section 63 of The Bankruptcy Act. There is no inherent jurisdiction as to costs. Section 68(2) provides that the costs are in the discretion of the Court. Under the Bankruptcy Rule 54(3) the trustee is not personally liable for costs unless for some special reason the Court otherwise orders. The English rule only applies where the trustee is a defendant: see Baldwin on the Law of Bankruptcy, 11th Ed., 882. Under *Bond* v. *Conkey* section 63 does not apply when sitting as a Court of Appeal but in this case the Court was sitting in bankruptcy. As to his personal liability see Williams on Bankruptcy, 12th Ed., 355; Baldwin, 201 and 271; *Ex parte Leicestershire Banking Company. In re Dale* (1884), 14 Q.B.D. 48.

Argument

O'Dell, contra: Rule 71 provides that appeals in bankruptcy matters are regulated by the rules of the Court hearing the appeal. This does away with his argument and leaves the matters entirely in the discretion of the Court. One of the rules of the Court is that costs follow the event.

O'Brian, in reply.

Cur. adv. vult.

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MACDONALD, C.J.A.: These proceedings were taken by the authorized trustee, under an assignment pursuant to The Bankruptcy Act, made by one Jang Bow Kee. They were commenced in the Bankruptcy Court to set aside a conveyance on the ground of fraud. They were successful and on appeal to this Court the appeal was allowed. The registrar inserted in the judgment of this Court a clause directing the unsuccessful appellant to pay the costs of the respondents personally and this motion is made to vary the formal judgment by striking out the personal order against him.

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The Bankruptcy Act, Sec. 2(*l*), defines "Court" or "the

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Court" to mean, unless the context otherwise requires or implies, the Court which is invested with original jurisdiction in bankruptcy under the Act, and such Court in this Province is the Supreme Court (section 63(*a*)). By the same section 63, subsection 3(*b*), the Court of Appeal of British Columbia is constituted an Appeal Court of Bankruptcy. Then section 68 (2) declares that "subject to the provisions of this Act and to General Rules, the costs of and incidental to any proceeding in Court . . . . shall be in the discretion of the Court." Rule 54 (3) of the general rules provides that,

"where an action is brought by or against an authorized trustee as representing the estate of the debtor, or where an authorized trustee is made a party to a cause or matter, on his application or on the application of any other party thereto, he shall not be personally liable for costs unless the judge before whom the action, cause or matter is tried for some special reason, otherwise directs."

The General Rules, 68 to 71 inclusive, deal with appeals to the Appeal Court and provide for the giving by the appellant of security for the costs of the appeal, and rule 71 declares that,

"subject to the foregoing Rules, appeals to the Appeal Court in any bankruptcy district or division shall be regulated by the Rules of such Court [the Court of Appeal of British Columbia], for the time being in force in relation to appeals in civil actions or matters."

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Such rules do not extend to or deal with the question of costs, that subject being dealt with by a section of the Court of Appeal Act. It is true that the section of the Act has been imported into the rules for convenience by the compiler of the rules, but it is not in fact a rule at all. The English Bankruptcy Act gives an appeal to the Court of Appeal in Bankruptcy, but provides that, subject to the bankruptcy rules, the Court shall be governed by the provisions of Order LVIII. of the Rules of the Supreme Court, which gives the Court discretionary power over costs. It is, therefore, as if Order LVIII. were incorporated in The Bankruptcy Act. Had the rules of the Court of Appeal of British Columbia been like the English rules, there would be no difficulty in this case. The Bankruptcy Act and Rules make no provisions other than what I have adverted to with respect to the jurisdiction of the Appeal Court over costs. And yet it is apparent from the provisions requiring security for costs of an appeal to be given, that Parliament contemplated the Appeal Court in Bankruptcy

having jurisdiction over the costs. The Appeal Court of Bankruptcy has only the jurisdiction given it by the Act; it is a statutory Court. The Appeal Court of Bankruptcy, by section 63, subsection (3), is vested with and, I think, confined to power and jurisdiction, except as varied by general rules, to pronounce the order or decision which ought to have been pronounced by the Court appealed from. Subject to said rules, it follows the procedure of the Court of Appeal of British Columbia, but the power to give costs is not a matter of procedure. In the common law Courts this power was statutory, commencing with the Statute of Gloucester, 6 Edw. I. In the Court of Chancery it seems to have been inherent in the Court, but whatever the powers of these Courts were as to costs inherent or otherwise, there are no words, I think, in The Bankruptcy Act which confer the jurisdiction of those Courts upon the Appeal Court of Bankruptcy, except that specifically mentioned, *viz.*, to pronounce the judgment which the Court below ought to have pronounced, and, if I am not in error in my construction of the Act, jurisdiction over costs.

It remains, therefore, to consider whether upon the true construction of the several sections of The Bankruptcy Act to which we have been referred, either expressly or by necessary implication, the Appeal Court has been given power over costs. This, I think, depends upon the construction to be put upon the word "Court." It will be seen that "Court," unless the context otherwise requires or implies, is to be taken to mean the Court of original jurisdiction. Now the provision for the giving of security for costs of an appeal, I think, necessarily implies that the Appeal Court should have jurisdiction over costs, and therefore the true construction of said section 68 (2) is that Parliament there made use of the word "Court" in a broader sense than that defined in the interpretation clause; in other words, "Court" has impliedly in this connection a wider meaning than in the definition. Such a construction will give effect to the manifest intention of Parliament and obviate the absurdity of holding that Parliament intended to make provision for security for costs of a Court which otherwise would have no jurisdiction to award costs. I think, therefore, that section 68 (2) is applicable to the Appeal Court.

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General Rule 54 (3), above mentioned, does not call for or admit of the construction which I have placed upon section 68 (2). I think that rule must receive the narrower construction. It refers to costs of an action and the trial thereof. It is the "judge" who is directed to give the costs in the manner there stated and not the Court.

On this construction of section 68 (2) the Appeal Court has untrammelled discretion over costs, and in the exercise of that discretion in the present case I would not strike out of the formal judgment the clause making the trustee personally liable. It may be thought that this conclusion is at variance with the decision of the Court of Appeal in *Bond* v. *Conkey,* not yet reported. That was an appeal to the Court of Appeal of British Columbia, a Court constituted by authority of the Provincial Legislature, while the Appeal Court of Bankruptcy is a Court constituted by authority of the Dominion Parliament. A new jurisdiction is given to the former Court, which it is to exercise in accordance with The Bankruptcy Act and Rules and the practice therein pointed out. In that case the action was commenced before the receiving order was made. After the bankruptcy the plaintiff applied for security for costs of the action on the ground that the defendant had become a bankrupt. An order was made that the security be given within a time specified, otherwise the action should stand dismissed. After the expiration of the time and after the action according to the order stood dismissed, the trustee in bankruptcy moved to be made a party and to be permitted to defend. That application was dismissed. An appeal was taken to the Court of Appeal of British Columbia, and was dismissed. Counsel for the trustee invoked said section 68 of The Bankruptcy Act and the General Rule 54 (3), and submitted that the costs of the appeal should not be made payable by the trustee personally. His application was dismissed on the ground that the Act and rule were inapplicable to the Court of Appeal, which they clearly were, the whole proceeding both in the Court below and in the Court of Appeal being entirely outside The Bankruptcy Act and Courts. It is clear that the decision in that case as to costs was right and that the statutory provision

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governing the Court of Appeal of British Columbia was applicable and the appeal being dismissed, that the costs should be ordered to follow the event.

We have, however, in this case an entirely different situation: we have proceedings commenced in bankruptcy under The Bankruptcy Act and carried from the Court of original jurisdiction in bankruptcy to the Appeal Court of Bankruptcy. In support of the construction which I have put upon section 68 (2) I refer to *In re Estate of Sir William Van Horne, Deceased* (1919), 27 B.C. 269, where I ventured to read the words "net value" in accordance with the context rather than with the definition given in the Act. In the interpretation of the section of the Act there in question, the Succession Duty Act, Cap. 217, R.S.B.C. 1911, there were no such words as we find in this Act, "unless the context otherwise requires or implies," yet that decision was upheld in the Privy Council, *sub. nom. Royal Trust Company* v. *Minister of Finance* (1921), 3 W.W.R. 749; [(1922), 1 A.C. 87], where notwithstanding the definition, the meaning of the words "net value" were made to conform to the context in order to carry out what appeared to their Lordships to be the intention of the Legislature.

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MARTIN, J.A.: This is a motion to vary the registrar's settlement of the judgment we pronounced herein on January 24th last, whereby the appeal of Jang Bow Kee *et al.* from the Supreme Court of British Columbia in bankruptcy was allowed as against the trustee in bankruptcy (the Canadian Credit Men's Trust Association, Ltd.) of the Kwong Tai Chong Co. In drawing up the formal order the registrar inserted a clause directing the said trustee to pay personally the costs of the appeal which it had unsuccessfully resisted, complying in this respect with the settlement I made in Chambers of the judgment we delivered in *Bond* v. *Conkey* (on a motion by a trustee in bankruptcy for leave to appeal in an ordinary action in the Supreme Court) based primarily upon the general principle laid down by the Privy Council in *Pitts* v. *La Fontaine* (1880), 6 App. Cas. 482; 50 L.J., P.C. 8, which settlement was affirmed by this Court on August 2nd last, when the matter was reheard by it and the review of my settlement being considered to be

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in effect a rehearing *de novo* of the motion before me in Chambers, and not an appeal (for which no provision is made) I, at the request of my brothers, took part in the rehearing. Upon that rehearing the matter was fully debated and my brother MCPHILLIPS made the following observations when judgment was delivered as aforesaid at the close of the argument:

"I am of like opinion, I think Mr. Justice MARTIN took the right view; and I would shortly put it upon this ground, that rule 54, subsection (3), as I read it, has no application to this Court of Appeal. 'The Court in awarding costs,' the rule starts out, 'may direct,' etc., and that is a controlling provision, applicable to all the other sections. And when I look into the interpretation of 'Court,' it is unquestionably confined to the Bankruptcy Court, and I do not see anything strange in that provision, because I think the intention of Parliament was to put in the Winding-up Act, and all these Acts, something in the form of a code, for the benefit of the decisions of the various judges, when it comes to carrying out the provisions of the Act, in so far as application is made to them. The parties, then, have had the benefit of these decisions, and if they wish to go further, and if they have gone outside of the code they know that they must go with the incidental risk. And in this case the incidental risk is that, in accordance with the cases which Mr. *Mayers* has referred to in England, which I think are apposite and absolutely binding in effect upon this Court, the trustee in coming into this Court has come in with the incidental risk, which is that he shall have to pay costs out of his own estate first; and the question whether he shall be entitled to recoup himself out of the estate in which he has acted is another matter not before this Court. And it is right and proper too, if he does go into the Bankruptcy Court, that the trustee should not go there vicariously, and carelessly generally, but he should go with all due and proper security against his own estate, which he imperils should he not so go, unless there is a cause that warrants him going."

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But it is submitted that as our judgment in that case was given in a purely Provincial matter in the course of an ordinary appeal in this Provincial Court, and since this is a Federal matter, though in this Court, we are a special statutory tribunal, exercising a Federal jurisdiction under The Bankruptcy Act, 1919, Cap. 36, therefore our said decision does not apply to the costs of the present appeal, which should be governed by said Act, and unless said rule 54 or section 68 gives us jurisdiction we cannot award them.

This submission necessitates a close examination of The Bankruptcy Act and Rules.

The only interpretation of "Court" to be found in the Act is in section 2, whereby it is enacted that—

"In this Act, unless the context otherwise requires or implies, the expression,—(*l*) 'Court' or 'the Court' means the Court which is invested with original jurisdiction in bankruptcy under this Act."

This interpretation is carried into the Rules by No. 2 thereof, but with the addition, in italics, that "unless the context or *subject-matter* otherwise requires," etc.

By section 63 (1):

"The following named Courts are constituted Courts of Bankruptcy and invested within their territorial limits . . . . with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy. . . . ."

And the Court so "named" for British Columbia is "the Supreme Court of the Province."

Appeals from that Court of first instance are provided for by subsection (3) of the same section 63, as follows:

"The Courts in this subsection named are constituted Appeal Courts of Bankruptcy, and, subject to the provisions of this Act with respect to appeals, are invested with power and jurisdiction to make or render on appeal asserted, heard and decided according to their ordinary procedure, except as varied by General Rules, the order or decision which ought to have been made or rendered by the Court appealed from. All appeals asserted under authority of this Act shall be made,—

"(*b*) In the Provinces of British Columbia, Manitoba and Saskatchewan, to the Court of Appeal of the Province;

"(*f*) In the Yukon Territory, to the Court of Appeal of the Province of British Columbia."

After reading all the Act and Rules I find that whenever the Appeal Court is referred to it is so designated throughout them, *e.g.*, in section 74 (under "Review and Appeal") and in rules 68-71 (*sub tit.* "Appeals to Appeal Court"), and it is clear therefore, unless the meaning of "Court" in rule 54 is to be expanded because the interpretation under said section and rule so "requires or implies," having regard to "the context or subject-matter," that it must be restricted to the Court of first instance. Is there anything then which requires that expansion? It certainly is not necessary if the Act has otherwise sufficiently provided for the "subject-matter" of costs in appeal. It is clearly provided for in the said group of rules 68-71, in an important particular, *viz.*, security for the costs of an appeal, which is the first place, to the extent of $100, are directed "at or before the time of entering an appeal" to be lodged in the Court (*i.e.*, appealed to) "to satisfy in so far

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as the same may extend, any costs that the appellant may be ordered to pay," and power is given to the Appeal Court "in any special case [to] increase or diminish the amount of such security or dispense therewith." So here is a fund in Court to satisfy so far as may be "any costs that the appellant may be ordered to pay," and such a general provision must be regarded at least as contemplating the exercise by the Appeal Court of its jurisdiction over costs in its ordinary way in all appeals brought before it from whatever source, and which it may order to be paid by the proper party. This view is confirmed by rule 71, the last of the said group, as follows:

"Subject to the foregoing Rules, appeals to the Appeal Court in any bankruptcy district or division shall be regulated by the Rules of such Court, for the time being in force in relation to appeals in civil actions or matters."

This means that, subject to the special provisions made in the rules (*i.e.*, 68-70), appeals from the Bankruptcy Court are to be dealt with by the Appeal Court in all respects as in ordinary civil appeals, and indeed it is so declared by said sub-section (3) of section 63, already cited, which declares that appeals are to be "heard and decided according to their ordinary procedure." So we find that proceedings before the Appeal Court are "regulated" by its rules and also by its "ordinary procedure." I regard these words as being used necessarily in their broadest sense to cover all that ordinarily takes place in a Court of Appeal in the course of its ordinary hearing and disposition of the appeal before it, and not as being confined to formal Rules of Court which are, in this Province for instance, promulgated by the Lieutenant-Governor in Council under section 72 of the Supreme Court Act, R.S.B.C. 1911, Cap. 58, and not by the Court. There are many "Rules of Court" in the true sense which govern the exercise of the jurisdiction of this Court which are not to be found in such Rules but are to be found in the Court of Appeal Act, R.S.B.C. 1911, Cap. 51, and in the Court's unwritten code of rules which have been long firmly established in it and its predecessor, the former Full Court. One striking example is the awarding of the costs of a great variety of motions during the hearing—such as to quash for want of jurisdiction; to

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extend time for appeal; to enter appeal books; for security; to admit fresh evidence; to amend appeal books; or of adjournment, about all of which not a printed or written word is to be found in rules or statutes, yet this Court has from legal time immemorial awarded them without question, and it has repeatedly decided that it has power to dismiss an appeal with costs though it has no jurisdiction to entertain it. On the other hand section 23 of the Court of Appeal Act confers in terms a power of costs on preliminary objections, and the latest formal Rules of Court 872 B. and C., promulgated on July 31st, 1920, respecting the cost of appeal books, confer upon us the power of costs over appeal books, as we decided in *Dominion Trust Co.* v. *Brydges* (1921), [30 B.C. 264]; 3 W.W.R. 391, though they are, as I therein pointed out, p. 394, quite distinct from the costs of the "event" of the appeal which are covered by section 28 of said Act, and the costs of the other motions above mentioned are equally distinct from those of the "event." It must not be forgotten that this Court in its administration of the joint principles of equity and common law is the inheritor of the powers of those Courts in England and possesses certain inherent powers over costs, subject of course, to legislative restriction (here, under said section 28) some of which are those noted by the Chief Justice in *Dominion Trust Co.* v. *Brydges, supra,* at p. 393, thus:

"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." MARTIN, J.A.

And after noticing the practice of depriving successful litigants of costs for misconduct, he goes on to say:

"That was the exercise of the inhert 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* (1917), 25 B.C. 29; (1918), 1 W.W.R. 435."

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And he concludes by saying that "the new rule neither adds to, nor detracts from this inherent jurisdiction."

At p. 394, I expressed the opinion that we had inherent jurisdiction over the matter, as did also my brother GALLIHER.

It follows from all this that, in my opinion, the combined effect of the said sections and Rules of The Bankruptcy Act is that appeals thereunder coming before the various Appeal Courts are to be disposed of in all respects, both as to subject-matter and costs, as if they were ordinary appeals, and therefore there is no necessity for expanding the meaning of "Court" under said rule 54. This matter of Provincial Courts exercising Federal jurisdiction has been considered in our judgment delivered three days ago in *In re Alexander, Weaver Estate, and Vancouver Harbour Commissioners* (1922), [*ante* p. 11]; 1 W.W.R. 1254, wherein I said, p. 1256:

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"It is to me, at least, equally clear that where it [a Provincial Court] is selected by the Federal Parliament as the tribunal to hear and determine Federal matters it does so in and by the ordinary way of its constitution and machinery, though it doubtless would be open to the Federal Parliament to require it to be extraordinarily constituted for that purpose, should it be deemed advisable."

See also *Bilsland* v. *Bilsland* (1922), 1 W.W.R. 718.

I am, therefore, of opinion that we are bound by our prior decision in *Bond* v. *Conkey,* and that the settlement of the judgment herein by the registrar in pursuance of it was right, and therefore this motion should be dismissed with costs.

GALLIHER, J.A.

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

EBERTS, J.A.

EBERTS, J.A. agreed in dismissing the motion.

Motion dismissed.

Solicitors for appellants: *Livingston & O'Dell.*
Solicitors for respondents: *Ellis & Brown.*

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Municipal corporation—Powers of council—By-law—Resolution discounting fares on ferry—Right of action by ratepayer—Injunction—Irreparable injury—Attorney-General as necessary party.

An order was made granting an interlocutory injunction in an action to restrain a municipal corporation from operating a municipal ferry under a resolution which provided for the allowing of a discount on the regular fares.

Held, on appeal, reversing the order of MURPHY, J. (GALLIHER and EBERTS, JJ.A., dissenting), that the order be discharged.

Per MACDONALD, C.J.A., and MCPHILLIPS, J.A.: The plaintiff had not suffered any special damage and if it could be said that the action lay because there might be damage to the public then the Attorney-General is a necessary party.

Per MARTIN, J.A.: The plaintiff had not shewn that he had suffered irreparable injury.

APPEAL by defendant from two orders of MURPHY, J., of the 17th and 29th of November, 1921 (see 30 B.C. 336) granting an injunction restraining the Corporation from issuing, honouring, or accepting passes on the municipal ferries from North Vancouver to Vancouver City provided for by resolution of the Municipal Council under powers conferred on the Council by by-law No. 392 of the Corporation. The plaintiff is a ratepayer of the City of North Vancouver and said Corporation is the owner of the municipal ferries and the municipal council passed a by-law empowering said Council to issue to every *bona fide* resident or ratepayer who produces a certificate from the city clerk that he is such, a book of 20 tickets per month, and that each *bona fide* resident or ratepayer be entitled to 21 tickets per month for each book of 30 commutation passenger tickets purchased by him. An injunction was granted by MURPHY, J. until trial on the 17th of November, 1921, and an application to set aside said order on the 29th of November following was dismissed. Statement

The appeal was argued at Victoria on the 11th of January, 1922, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

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Argument

Mayers (*A. C. Sutton,* with him), for appellant: There are three objections to the injunction: (a) The plaintiff has no interest to maintain the action; (b) there is no irreparable damage, in fact no damage at all; (c) the proper remedy was under the Municipal Act. Under the resolution free passes were to be given to persons who purchased a certain number: see *Robertson* v. *City of Montreal* (1915), 52 S.C.R. 30; *Dechene* v. *City of Montreal* (1894), A.C. 640; *Dundee Harbour Trustees* v. *D. & J. Nicol* (1915), A.C. 550; *MacIlreith* v. *Hart* (1908), 39 S.C.R. 657 at pp. 661-2. As to his right of action see *Towers* v. *African Tug Company* (1904), 1 Ch. 558 at p. 566. On the question of damages see *Elmhirst* v. *Spencer* (1849), 2 Mac. & G. 45; *Johnson* v. *Shrewsbury and Birmingham Railway Co.* (1853), 3 De G.M. & G. 914 at p. 931; *Dyke* v. *Taylor* (1861), 3 De G.F. & J. 467; *Attorney-General* v. *Cambridge Consumers Gas Co.* (1868), 4 Chy. App. 71 at p. 83; *Fletcher* v. *Bealey* (1885), 28 Ch. D. 688. He must shew he sustained substantial injury. He could not bring this action without the Attorney-General: see *Corporation of Oak Bay* v. *Gardner* (1914), 19 B.C. 391. There is another appropriate remedy: see *Keay* v. *City of Regina* (1912), 2 W.W.R. 1072 at p. 1076; *Hope* v. *Hamilton Park Commissioners* (1901), 1 O.L.R. 477. There is a distinction between a private trust and a public one: see *Evan* v. *The Corporation of Avon* (1860), 29 Beav. 144 at p. 149.

Davis, K.C. (*Burns,* with him), for respondent: He has not argued the merits but confines himself to preliminary objections. As to his right to bring action a ratepayer can bring action on behalf of all ratepayers where money or property is involved. The *Robertson* case does not apply as there it is a public right. He can bring an action when money is involved: see Meredith & Wilkinson's Canadian Municipal Manual, 415-9. A ratepayer is distinguished from a "resident" as he has responsibilities that a resident has not: see *Dundee Harbour Trustees* v. *D. & J. Nicol* (1915), A.C. 550 at p. 558. The Attorney-General is not required as a party in an *ultra vires* action which affects property rights. On the question of irreparable damages see *Robertson* v. *City of Montreal*

(1915), 52 S.C.R. 30; *City of London* v. *Town of Newmarket* (1912), 20 O.W.R. 929.

Mayers, in reply, referred to *Cory* v. *The Yarmouth and Norwich Railway Company* (1844), 3 Hare 593 at p. 603.

Cur. adv. vult.

10th March, 1922.

MACDONALD, C.J.A.: In my opinion the plaintiff had no right to bring this action; it should have been brought, if at all, in the name of the Attorney-General. The plaintiff has suffered no special damage, the most that has been contended for him is that, as a ratepayer of the City of North Vancouver, his interests will be injured by the acts complained of. Armour, C.J.O., in *Hope* v. *Hamilton Park Commissioners* (1901), 1 O.L.R. 477 at p. 479 succinctly states the law as follows:

"The rule is that no person may institute proceedings with respect to wrongful acts, which if of a private nature are not wrongs to himself, and if of a public nature do not specially affect himself, and this rule applies equally to *ultra vires* transactions."

The subject is dealt with very fully in *Robertson* v. *City of Montreal* (1915), 52 S.C.R. 30, where there was much difference of opinion. Mr. Justice MURPHY, in the Court below, distinguishes that case from the case at bar by saying that the plaintiff there "had no interest *qua* ratepayer different from the interest of any resident of the City," while he thought in the case at bar, the plaintiff *qua* ratepayer had an interest different from that of a mere inhabitant of the City. In other words, because the ratepayers of the City of North Vancouver may suffer an injury as such, they have a special interest apart from the inhabitants generally, which entitles the plaintiff as one of them to bring this action. With respect, I am unable to agree with this view of the law; the injury must be peculiar to the plaintiff to entitle him to bring the action, or must affect him in a manner different from that of others generally. I do not think any distinction can be drawn between the ratepayers of the Municipality and the public generally sufficient to found this action in the plaintiff. The learned judge no doubt had in mind the class of cases referred to by the learned Chief Justice of the Supreme Court

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in *Robertson* v. *City of Montreal, supra,* and which he illustrates by the case of *Crampton* v. *Zabriskie* (1879), 101 U.S. 601, and in our own Courts is exemplified by *Dundee Harbour Trustees* v. *D. & J. Nicol* (1915), A.C. 550, where it was held that the person there rated could bring the action. The Harbour Commissioners were a *quasi*-private corporation with a limited membership, having funds specially applicable to the purpose for which the corporation was brought into being, and were therefore trustees of the funds and the property of the corporation. The defendant, on the other hand, is a municipal corporation acting on behalf of the general inhabitants of the city as well as on behalf of those who are ratepayers. They have a ferry licence and are operating a public ferry with funds not specially allocated to that purpose. The injury, if any, done in this case, is one which affects all ratepayers at least equally with the plaintiff; he suffers no peculiar damage and the action therefore, assuming that it lies at all, should have been brought in the name of the Attorney-General.

I would allow the appeal.

MARTIN, J.A.

MARTIN, J.A.: This appeal should, in my opinion, be allowed on the ground that it cannot be said, in the proper sense, that any irreparable damage will be suffered by the plaintiff, if indeed there will be any damage at all, which is, in my opinion, doubtful, as the matter now presents itself, though in view of the pending trial I express no decided view thereupon, nor upon the other points that have been raised, because I think it better that the action should proceed to trial and all questions at issue be determined as soon as may be.

GALLIHER, J.A.

GALLIHER, J.A.: I would dismiss the appeal, agreeing in the conclusions reached by the learned trial judge.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: With great respect to the learned judge who granted the injunction, I cannot persuade myself that it is a proper case in which an injunction should have been granted. I cannot see that it all comes within the accepted scope of being, upon a review of the facts, just or convenient. In truth the injunction is highly inconvenient to the City Cor-

poration, and I cannot see that the plaintiff has established even a *prima facie* case of special damage or injury sustained by himself (see *Elmhirst* v. *Spencer* (1849), 2 Mac. & G. 45 at p. 50). At most, and I do not really consider that it is so, there might be damage or injury to the public, but upon that phase of the matter the action would not be properly constituted, the Attorney-General not being joined. This Court passed upon that point in *Corporation of Oak Bay* v. *Gardner* (1914), 19 B.C. 391 (also see *Hope* v. *Hamilton Park Commissioners* (1901), 1 O.L.R. 477, and *Evan* v. *The Corporation of Avon* (1860), 29 Beav. 144, the Master of the Rolls at p. 149). Then as to the necessity that there be special injury sustained by the plaintiff himself to give *status* to bring the action we have the case of *Robertson* v. *City of Montreal* (1915), 52 S.C.R. 30, and I would in particular refer to the judgment of the Chief Justice at pp. 31-2. Here we have a ferry, the case in the Supreme Court had reference to auto-busses. The analogy is complete enough, and I would refer to the judgment of Mr. Justice Duff at pp. 72, 75, and Mr. Justice Brodeur at p. 76. It occurs to me that the *Robertson* case is conclusive and, as there held, in the absence of evidence of special injury sustained by the plaintiff he had no *status* entitling him to bring the action (also see *MacIlreith* v. *Hart* (1908), 39 S.C.R. 657, Davies, J., at pp. 661-2).

MCPHILLIPS, J.A.

In view of the opinion at which I have arrived, it really is unnecessary to trench upon or deal with the merits, but in passing I would refer to the case of the *Attorney-General* v. *Cambridge Consumers Gas Co.* (1868), 4 Chy. App. 71, which was a well-constituted one, that is, the Attorney-General was joined, and the matter for consideration was the disturbance of the pavement of a town by an unincorporated gas company without lawful authority for the purpose of laying down gas-pipes, and it was held not to be a nuisance so serious and important that a Court of Equity would interfere by injunction preventing the doing of the work. There as here, after all, there would be the interference with operations that are of public advantage. I would particularly refer to what Sir W. Page Wood, L.J., said at pp. 83-4. Then the present case is

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by no means one of irreparable injury (see *Fletcher* v. *Bealey* (1885), 28 Ch. D. 688).

The learned counsel for the respondent strenuously argued that the questioned resolution was *ultra vires* as going beyond the authority given by by-law No. 392, Sec. 13, and it was so decided by the learned judge. I cannot agree with this. It is clear to me that all that has been done is well within the purview of the by-law approved by the Lieutenant-Governor in Council. The authority extended was to "grant free transportation and authorized the issues of passes to whom they [the Council] may deem it advisable in the interests of the City to do so." I fail to see that that which has been done in any way transcends the authority given the City Council. It was pressed that the passes were not only to ratepayers but to residents of North Vancouver, not residents necessarily of the City of North Vancouver; that if there was a profit it might well be said that it would enure to the advantage of the ratepayers of the City, but if a loss it would be a loss falling upon the ratepayers of the City only. Whilst this may be true yet the ferry, after all, is in its nature a public utility, and to carry the public generally is a matter of public advantage and it assuredly will add to the revenue to have the public patronage, and the decision must be that of the City Council, the authorized authority. Is it reasonable that there should be interference at the suit of one or more of the ratepayers? That would mean chaos and possible destruction of the ferry service so essential to the advancement of the City in that a very large proportion of the inhabitants of the City of North Vancouver and the surrounding districts as of necessity require this ferry service to go to and from their work in the City of Vancouver lying across Burrard Inlet, which is the stretch of water the ferries traverse. The learned counsel for the respondent also greatly relied upon *Dundee Harbour Trustees* v. *D. & J. Nicol* (1915), A.C. 550, and that portion of the judgment of Mr. Justice Duff in the *Robertson* case at p. 63 where that learned judge said:

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"What I have said has, of course, no necessary bearing upon any right a ratepayer might be supposed to have to impeach proceedings of the council to impose a tax or rate exigible from such ratepayer."

Could it be said that anything might reasonably ensue which would create the incidence of taxation? Mr. Justice Duff refers to something which might be said to favour an action such as the present one, but I fail to see its imminence. The ferry service is being carried on—if at a loss it means taxation, if at a profit the possible lessening of taxation—but there is no threatened taxation consequent upon the course being pursued, and in any case, as I view it, we have here an *intra vires* step duly and properly authorized supported by the authority of an approved by-law passed within the ambit of statutory authority conferred upon the Municipality. It would seem to me that the contention put forward by the learned counsel for the respondent does not fall within the ratio of *Dundee Harbour Trustees* v. *D. & J. Nicol,* nor within the quoted language of Mr. Justice Duff. Further, the present case well falls within the language used by Mr. Justice Duff earlier on that same page 63, namely:

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"The governing body of a municipal corporation exercising law-making powers affecting the rights of all His Majesty's subjects presents a very different hypothesis from a corporation administering private property only. For excess of power in the first case (which is a wrong against the corporation or against the public as a whole) the appropriate remedy seems to be by way of some proceeding at the instance either of the Corporation itself or of an authority representing the public."

Upon the whole I am of the opinion that the injunction was wrongly granted; in any case the action is not properly constituted to admit of the cause of action set up being adjudicated upon, there being no case of special damage or injury sustained by the respondent, and it is not a case of interference with any proprietary rights.

EBERTS, J.A.

EBERTS, J.A. would dismiss the appeal.

Appeal allowed,
Galliher and Eberts, JJ.A. dissenting.

Solicitor for appellant: *A. C. Sutton.*
Solicitors for respondent: *Burns & Walkem.*

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VIPOND v. GALBRAITH

VIPOND v. GALBRAITH AND THE BRENNAN LAKE LUMBER COMPANY LIMITED.

Company law—Directors sole owners of company—Vote themselves salaries — Director as secretary of company — Right to lien — Judgment — Creditors' action to set aside—R.S.B.C. 1911, Caps. 243 and 93, Sec. 2 —B.C. Stats. 1919, Cap. 92.

Three directors constituting the whole body of shareholders of a lumber company voted themselves salaries of $5,000 a year each as president, manager and secretary-treasurer respectively. The company shut down, but under resolution the officers' salaries were to continue for the following year, the secretary-treasurer staying in charge of the works, there being evidence of his having made one small sale of lumber and doing some piling and sawing. The plaintiff who had supplied the company with logs brought action to recover the purchase price. The secretary-treasurer upon being served with the plaintiff's writ immediately filed a lien under the Woodman's Lien for Wages Act and obtained judgment by default. The plaintiff obtained judgment in his action some days later. An action to set aside the default judgment for a lien was dismissed.

Held, on appeal, reversing the decision of MURPHY, J., that in the circumstances of this case the defendant was not entitled to a lien under the Woodman's Lien for Wages Act.

Per MCPHILLIPS, J.A.: The judgment obtained by the official for the enforcement of his lien is null and void against the creditors of the company on the ground that it had been obtained by collusion with the company with the intent of defeating and delaying its creditors and giving a preference.

Statement

APPEAL by plaintiff from the decision of MURPHY, J., of the 3rd of October, 1921, in an action to have a default judgment of the 5th of May, 1921, in favour of the defendant Galbraith against the defendant The Brennan Lake Lumber Co. for $5,133.33 for wages and for a lien and all subsequent proceedings set aside and to restrain the defendant Galbraith from proceeding under the judgment and restraining the defendant Company from disposing of its lumber. Galbraith and two others (Miller and Johnston) formed the defendant Company in February, 1920, for the purpose of milling lumber at Brennan Lake. The capital was $15,000, the three men to pay $5,000 each. Galbraith paid $5,000 but the other two paid only

$2,000 each. In March, 1920, they purported to pass a resolution at a meeting of the directors giving themselves a salary of $5,000 each as president, manager and secretary-treasurer, respectively. In November, 1920, the mill shut down and with the exception of a little hauling no other work was done, only one sale of $300 worth of lumber being made in the following year by Galbraith. In December, 1920, Miller and Johnston went to Victoria leaving Galbraith at the mill where he merely acted as a watchman doing substantially no other work. There was evidence of the three owners arranging that their respective salaries should continue for the following year. The plaintiff Vipond had contracted to supply logs and a certain number of the logs supplied not having been paid for he issued a writ on the 21st of April, 1921, which was served on Galbraith the same day and he signed judgment on the 30th of May, 1921. On being served with Vipond's writ, Galbraith went to Victoria and on the 23rd of April swore out an affidavit of lien under the Woodman's Lien for Wages Act for his salary, the affidavit being filed in the proper office of the Court. He issued a writ to enforce the lien on the 27th of April and obtained a default judgment against the Company on the 5th of May, 1921. The trial judge dismissed the action.

Statement

The appeal was argued at Victoria on the 2nd of February, 1922, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Mayers, for appellant: The circumstances do not constitute a lien and if they did there was fraud in claiming and enforcing the lien as against creditors, the judgment being obtained with the intention of defeating creditors. The resolution by themselves as directors allotting salaries to each is illegal. After the mill was shut down in November, 1920, with the exception of making one small sale of lumber nothing was done by Galbraith. The Act was intended to protect workmen who had a valid claim for wages earned. The learned judge below treated him as a watchman but directors cannot vote themselves salaries especially as against creditors of the company: see *In re George Newman & Co.* (1895), 1 Ch. 674. The Fraudulent Preference Act incorporates 13 Eliz., Cap. 5, Secs. 2 and 3.

Argument

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If we shew there was collusion between the judgment creditor and the Company that is sufficient to set the judgment aside: see *Edison General Electric Company* v. *Westminster and Vancouver Tramway Company* (1897), A.C. 193. There is no difference between a consent judgment and a default judgment in this regard. On the question of the statute of Elizabeth see *Penny* v. *Fulljames* (1920), 1 W.W.R. 555.

Higgins, K.C., for defendant Galbraith: These men were high-class artisans. They did not draw their salaries, they only took what they required for living. The logs taken from Vipond were paid for, the others were in his possession. He is not a creditor under 13 Eliz. The three men were the sole owners and the resolution as to salaries was regular: see *In re Oxted Motor Co.* (1921), 90 L.J., K.B. 1145; *In re Express Engineering Works, Limited* (1920), 1 Ch. 466. He actually worked in cutting and hauling timber and obtained a judgment *in rem*: see 2 Sm. L.C., 12th Ed., p. 776. A change of the property to money does not affect the principle: see *Minna Craig Steamship Company* v. *Chartered Mercantile Bank of India, London and China* (1897), 1 Q.B. 460. A judgment by consent or default is as effective as a contested case: see *In re South American and Mexican Company. Ex parte Bank of England* (1895), 1 Ch. 37; 2 Sm. L.C., 12th Ed., p. 713. He cannot set aside a judgment *in rem* by collateral proceedings. They did not take proceedings under the Lien Act and are barred. Once he consented to sale and payment of money into Court he cannot then say there is no lien after consenting to it: see *Rex* v. *Paulson* (1921), 1 A.C. 271; *Salomon* v. *Salomon & Co.* (1896), 66 L.J., Ch. 35 at p. 45; *Inland Revenue Commissioners* v. *Sansom* (1921), 90 L.J., K.B. 627; *Glegg* v. *Bromley* (1912), 3 K.B. 474 at p. 492; *MacDonald* v. *Crombie* (1885), 11 S.C.R. 107.

Argument

V. B. Harrison, for defendant Company, adopted the argument of Mr. *Higgins.*

Mayers, in reply: As to this being a judgment *in rem* see *Bank of Montreal* v. *Haffner* (1884), 10 A.R. 592 at p. 599; *King* v. *Alford* (1885), 9 Ont. 643; *Minna Craig Steamship Company* v. *Chatered Mercantile Bank of India, London and*

China (1897), 1 Q.B. 460 at p. 465. A judgment *in rem* never operates by default, you must prove your case: see *Earl of Bandon* v. *Becher* (1835), 3 Cl. & F. 479 at pp. 510-11.

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Cur. adv. vult.

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

MARTIN, J.A.: In my opinion, upon the peculiar facts of this case, no lien exists. It is apparent from the reasons given by the learned judge below that he entertained a substantial doubt about the matter, and upon further consideration I find myself unable to sustain the judgment, because I think it has overstepped the somewhat uncertain scope of the statute, which, in the interest of all concerned, requires further definition.

MARTIN, J.A.

GALLIHER, J.A.: Although there is room for argument as to how far the Act as amended, up to the present, can be carried, I cannot bring myself to the view that a woodman's lien attaches in the circumstances of this case. It seems contrary to the very history and purposes of the Act. I would allow the appeal.

GALLIHER, J.A.

MCPHILLIPS, J.A.: The appeal, in my opinion, should succeed. Without entering into all the details, it is evident that the real incorporators of the Company, three in number, of whom the appellant Galbraith was one, entered into a venture so arranging matters that they would each receive salaries of $5,000 a year, they then being all the directors of the Company, the appellant Galbraith being the secretary-treasurer; and now the respondent Galbraith is a judgment creditor of the Company following upon the establishment of a lien under the Woodman's Lien for Wages Act.

MCPHILLIPS, J.A.

The judgment and lien are attacked in this action upon the following grounds: (a) That the facts and circumstances surrounding the case did not admit of there being a lien established; that the appellant Galbraith did not come within the purview of the Act, being the secretary-treasurer of the Company with a fixed salary, and that even apart from that did not establish, even if he did come within the purview of the Act,

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that he did work entitling a lien being declared; (b) that there was fraud in claiming and enforcing the lien as against creditors and that it was a preference and the obtaining of the judgment against the Company, known to be insolvent, was the obtaining of a judgment with intent to defeat and delay the creditors.

In my opinion, the facts fully support the submission of the appellant upon this appeal, and that the judgment and lien must be set aside—the lien, of course, falls if the judgment falls, being merged therein.

There can be no question upon the facts that the whole transaction was fraudulent from its inception and the respondent Galbraith was privy to the fraud, the Company facilitating the establishment of the lien and the obtaining of the judgment (see *Ex parte Reader. In re Wrigley* (1875), L.R. 20 Eq. 763 at p. 766, Sir James Bacon, C.J., "a more suspicious case cannot well be imagined"). Now the present case is one that in all its ramifications, commencing with the incorporation of the Company, establishes the palpable intention to exhaust all its assets to the delay and hindrance of creditors if any should come upon the scene. When they did they only found a totally emasculated undertaking, if the judgment and lien are to be held to be effectively obtained. In this connection it is only necessary to refer to the illegal resolution whereby each of the three parties who really constituted the Company were to receive a salary of $5,000, and this at the commencement of things (*In re George Newman & Co.* (1895), 1 Ch. 674 at pp. 685-6). The governing law in the various Acts at present extant with respect to insolvents is the equal distribution of the property and effects of insolvents, and acts which are done with the object of preventing an equal distribution are fraudulent within the meaning of the statute law. Can it be successfully said upon the facts of the present case, that the acts done were not done with the object of preventing an equal distribution of the property and effects of the Company? It would certainly be an act of temerity to so contend, in my opinion. Unquestionably it is well portrayed in the present case that all that which is challenged was done with the object of preventing an equal distribution of the property and effects of the insolvent Com-

MCPHILLIPS, J.A.

pany (see *Young* v. *Waud* (1852), 8 Ex. 221 at p. 234; 22 L.J., Ex. 27), and it is not essential that there should be actual moral fraud but that which has been done is a fraud within the meaning of the statute law (*Allen* v. *Bonnett* (1870), 5 Chy. App. 577; *In re Wood* (1872), 7 Chy. App. 302 at p. 305; *Ex parte King* (1876), 2 Ch. D. 256 at p. 263; 45 L.J., Bk. 109; *Ex parte Payne* (1879), 11 Ch. D. 539; *In re Jukes* (1902), 2 K.B. 58; 71 L.J., K.B. 710; *Young* v. *Fletcher* (1865), 3 H. & C. 732; 140 R.R. 705; *In re Slobodinsky* (1903), 2 K.B. 517). It cannot be successfully contended that there is a valid lien here because it is supported by a judgment (the judgment, of course, is invalid also in my opinion, as previously expressed, upon the ground of fraud and collusion). I would refer to what Eldon, L.C., said in *Colclough* v. *Bolger* (1816), 4 Dow 54 at p. 64:

"The sales ought not to be held valid, though they have the colour of the protection of a decree of a Court of Equity."

That judgment was a collusive one (and there is really no difference between consenting and facilitating judgment) the facts amply support. The following language of Sir Richard Couch, who delivered the judgment of their Lordships of the Privy Council in *Edison General Electric Company* v. *Westminster and Vancouver Tramway Company* (1897), A.C. 193 at p. 198, is much in point in the present case:

"It is plain from the evidence that there was an agreement between the tramway company and the bank the effect of which was that the bank should have a judgment, and that their judgment should have priority to the appellants' judgment, the object being, as Mr. Ward said, that the bank should be in a position to protect the company, if possible, so as to carry it on. The case comes within the provision in the section. It has been argued for the respondents that the confession must be fraudulently given. The section does not use that word; but the giving a judgment by confession by a person in insolvent circumstances voluntarily or by collusion with a creditor with intent to defeat or delay his creditors, or to give a preference to one of them over the others, is treated by the statute as a fraudulent act. Their Lordships approve of the decision of the Court of Appeal for Ontario in *Martin* v. *McAlpine* [(1883)], 8 A.R. 675.

"Their Lordships are of opinion that the statute makes the bank's judgment null and void as against the creditors of the tramway company. They will, therefore, humbly advise Her Majesty to reverse the decree and order of the Supreme Court on the trial and on the appeal, and to declare the judgment of the bank against the tramway company to be

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null and void, and to order the executions issued thereon and the certificates thereof registered as a charge against the lands of the company to be set aside and cancelled, with costs of the suit, including costs of the appeal to the Supreme Court, but with liberty for the appellants to apply to the Supreme Court for any consequential relief for the purpose of enforcing their judgment. The respondents, the Bank of British Columbia, must pay the costs of this appeal."

There was here the apparent intent in placing the lien and obtaining judgment of defeating the appellant in this appeal of the rightful fruits of a judgment to be recovered following the then pending action of the appellant (*Penny* v. *Fulljames* (1920), 1 W.W.R. 555), and the fraudulent intent of the directors will, through them, be attributed to the Company, and further it was the respondent Galbraith's intention to get a benefit for himself.

I cannot accede to the contention made at this bar that the attacked judgment is a judgment *in rem* and must conclude all the world and absolutely establishes the lien. In my opinion, the present case is not within the principle as stated in 2 Sm. L.C., 12th Ed., at p. 779:

"The universal effect of a judgment *in rem* depends, it is submitted, on this principle, *viz.*, that it is a solemn declaration, proceeding from an accredited quarter, concerning the *status* of the thing adjudicated upon; which very declaration operates accordingly upon the *status* of the thing adjudicated upon and, *ipso facto*, renders it such as it is thereby declared to be."

MCPHILLIPS, J.A.

The judgment *in rem* is always "as to the *status* of the *res.*" What *res* have we here? At most all that we have is a lien followed by a judgment; it is not complicated by a situation of a sale of timber held to be the subject of a woodman's lien, and some innocent purchaser on the scene. As to what would happen in such a case, I express no opinion (see *Minna Craig Steamship Company* v. *Chartered Mercantile Bank of India, London and China* (1897), 1 Q.B. 460 at p. 465).

That the action is well founded and the judgment challenged and its validity disproved is dealt with by Lord Brougham in *Earl of Bandon* v. *Becher* (1835), 3 Cl. & F. 479 at p. 510:

"Where you appear as an actor, object to a decree made in another Court, upon which decree your adversary relies; and you may, either as actor or defender, object to the validity of that decree, provided it was pronounced through fraud, contrivance or covin of any description, or not in a real suit or if pronounced in a real and substantial suit between parties who were really not in contest with each other."

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In the present case the action is properly brought to set aside the challenged judgment, and the evidence well entitles it to be declared that the judgment of the respondent Galbraith against the Company, is null and void as against the creditors of the Company, being obtained by collusion with the Company with intent to defeat and delay its creditors and to give a preference to one of them over the others, thereby doing that which is treated by the statute law as a fraudulent act. The executions issued and any certificate of judgment or lien should also be set aside and cancelled and all necessary consequential relief. It follows that, in my opinion, the appeal should be allowed.

Appeal allowed.

Solicitor for appellant: *F. S. Cunliffe.*
Solicitor for respondent Galbraith: *Frank Higgins.*
Solicitor for respondent Company: *V. B. Harrison.*

YOUNG v. THE NORTHERN LIFE ASSURANCE COMPANY OF CANADA.

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YOUNG v. NORTHERN LIFE ASSURANCE CO.

Insurance — Note accepted for third premium — Not paid when due — Amount of note paid two days after death of insured—Money accepted by agent without knowledge of death of insured—Condition of policy as to reinstatement.

A note was accepted for the third premium on an insurance policy but not paid when due. A few days after the note was due the insured was drowned and two days later his wife paid the amount of the note to the defendant Company's agent in Vancouver who accepted the money and gave the usual receipt, not knowing of the insured's death. The policy contained a proviso that "if, within the first three years . . . . . default be made in the payment of any premium due, or obligation given in settlement thereof, then this policy shall, *ipso facto*, become void, but it may be reinstated within two years from the date of lapse, upon the production of evidence of insurability satisfactory to the Company and the payment of all overdue premiums and

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any other indebtedness," etc. In an action to enforce payment of the amount of the policy:—

Held, that the note being overdue and unpaid at the death of the insured the policy was void. The subsequent acceptance of payment of the amount of the note by an agent of the Company without knowledge of the insured's death was not a waiver of the breach of the condition so as to effect reinstatement of the policy.

McGeachie v. *The North American Fire Insurance Company* (1894), 23 S.C.R. 148 followed.

ACTION to recover on a life-insurance policy. The facts are set out fully in the reasons for judgment. Tried by CLEMENT, J. at Vancouver on the 13th of March, 1922.

Brydon-Jack, for plaintiff.
Crisp, for defendant.

16th March, 1922.

CLEMENT, J.: The late F. C. Young was drowned on the 17th of May, 1921, and his widow brings this action on a policy of insurance which her husband had taken out in February, 1919. The premium for the third year was payable on the 20th of February, 1921, or in any case (allowing for the 30 days of grace) on or before the 22nd of March, 1921. For this premium a note was given which fell due on May 13th, 1921. This note was, in my opinion, an "obligation given in settlement" of the premium within the meaning of the condition hereinafter quoted; it was not paid at its maturity; but on the 19th of May, 1921, the plaintiff paid the amount of the note to the defendant Company's agent in Vancouver, who gave her the usual official receipt. The insured, as I have found, had died two days before, of which fact the defendant Company's agent had no knowledge. The policy provides as follows:

Judgment

"9. REINSTATEMENT: If, within the first three years that this policy is in force, default be made in the payment of any premium due, or obligation given in settlement thereof, then this policy shall, *ipso facto*, become void, but it may be reinstated within two years from the date of lapse, upon the production of evidence of insurability satisfactory to the Company and the payment of all overdue premiums and any other indebtedness to the Company under the policy, together with compound interest at the rate of six per cent. per annum."

The situation, then, on the 19th of May, 1921, was this, that

the policy had become void, subject to possible reinstatement on proof of continued insurability. Such proof was, of course, out of the question. The official receipt given to the plaintiff on the 19th of May, 1921, has printed on the back in red ink a copy of the condition I have above quoted, so that, in my opinion, no question of waiver can possibly arise, particularly as the agent in Vancouver sent to the plaintiff on the very same day a request for evidence of insurability, enclosing a form for signature by the insured and by a medical examiner. On this, of course, nothing was or could be done.

On these facts it appears clear that the plaintiff cannot recover. See *McGeachie* v. *The North American Fire Insurance Company* (1894), 23 S.C.R. 148. To my mind it borders on the nonsensical to suggest that the defendant Company knowingly shouldered a liability for $2,000 in return for a relatively small premium, and, without knowledge, no question of waiver can arise.

Judgment

The action is dismissed with costs.

Action dismissed.

SUNDER SINGH v. McRAE AND McRAE.

Practice—Appeal from County Court to Court of Appeal—Notice of appeal —Service on solicitor—Continuance of authority of solicitor.

Notice of appeal from a judgment in the County Court was duly served on the respondent's solicitors, acceptance of service was refused, and no intimation was given as to whether they were still acting for the respondents. On a motion to quash:—

Held, MCPHILLIPS, J.A. dissenting, not to be good service.

Per MACDONALD, C.J.A.: Where there is no rule of Court such as r. 3 of Order VII., applicable to the case then if there remained nothing to work out under the judgment, the solicitor in the action cannot, without fresh instruction, accept service of a notice of appeal. His retainer expires when the action is at an end.

Per MARTIN and GALLIHER, JJ.A.: Where nothing at all remains to be done or to be worked out in the Court appealed from the retainer is at an end, and service of the notice of appeal on him is entirely unauthorized as he has no authority to receive it.

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SUNDER SINGH v. MCRAE

Statement

APPEAL by plaintiff from the decision of LAMPMAN, Co. J., of the 14th of November, 1921, whereby the plaintiff's claim was allowed in part and the defendant's counterclaim was allowed in part. The defendants moved to quash the appeal on the ground that the notice of appeal was not properly served. Judgment was delivered in the action on the 14th of November, 1921, and on the 14th of February, 1922, the defendants' solicitors were served with a notice of appeal. Acceptance of service was refused and no statement was made as to their still acting as solicitors for the defendants.

The appeal was argued at Vancouver on the 7th of March, 1922, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Argument

D. S. Tait, for appellant.

Lowe, for respondents, moved to quash the appeal on the ground that the notice of appeal was not properly served: After judgment and up to the time of service of the notice of appeal on us we had not been retained on the appeal. The appeal is a new proceeding: see *Langan* v. *Simpson* (1919), 27 B.C. 504. On the question of service on a solicitor not retained see Annual Practice, 1922, p. 48. Here we have two distinct Courts. Order XXIII., r. 5, only has reference to proceedings in the Court below. The notice of appeal should be served on the party: see *Reg.* v. *Justices of Oxfordshire* (1893), 2 Q.B. 149 at p. 152.

Tait, contra: These solicitors continued to act for the respondents after service of the notice of appeal on them and the service is sufficient: see *Kilbourne* v. *McGuigan* (1897), 5 B.C. 233; *Arthur* v. *Nelson* (1898), 6 B.C. 316; *Lady de la Pole* v. *Dick* (1885), 29 Ch. D. 351. *Reg.* v. *Justices of Oxfordshire* (1893), 2 Q.B. 149 does not override the *Lady de la Pole* case. On the question of retainer see *Hett* v. *Pun Pong* (1890), 18 S.C.R. 290.

Cur. adv. vult.

21st March, 1922.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The rule is well established by the decision of the Court of Appeal in England in *Reg.* v. *Justices*

of Oxfordshire (1893), 2 Q.B. 149, that where there is no rule of Court such as r. 3 of Order VII., applicable to the case, then if there remained nothing to work out under the judgment, the solicitor in the action cannot without fresh instructions accept service of a notice of appeal. In other words, his retainer expires when the action as such is at an end. The practice in this Province follows along the same lines, *Arthur* v. *Nelson* (1898), 6 B.C. 316. In that case the Court held, following *Lady de la Pole* v. *Dick* (1885), 29 Ch. D. 351, that so long as something remains to be done in the action, the solicitor's retainer continues and he may accept a notice of appeal. In these two cases the judges did not decide the wider question as to whether or not the retainer in the litigation extended beyond the action to appeals which might be taken from the judgment. They simply decided that so long as something remained to be worked out under the judgment his retainer continued so as to entitle him to accept notice of appeal. The case in the Court of Appeal above referred to, decides the *status* of a solicitor in cases not covered by the rule, and where nothing remains to be worked out under the judgment, and decides that his retainer is at an end when there remains nothing to be done in the action and that he cannot accept notice of appeal without fresh instructions from his client.

MACDONALD, C.J.A.

In this case nothing remains to be done in the action. Each party has succeeded on claim and counterclaim for an equal amount and neither party was given costs. That is an end of the action and applying the principle of *Reg.* v. *Justices of Oxfordshire, supra,* the solicitor's retainer had expired before notice of appeal was served upon him, and he was therefore not a person upon whom notice of appeal could properly be served.

MARTIN, J.A.: I wish to state my reasons briefly, and they are simply these: that this is a very exceptional case, because it appears by a perusal of the judgment that was made below that there is absolutely nothing at all that remains to be done or to be worked out in the Court appealed from, even as to costs. In such case, as I read the authorities, whatever might be said in other circumstances, the retainer was at an end, and it is in

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the interest of the client that he should not be committed to the responsibilities or obligations of further litigation without giving further instructions. Therefore, it seems to me that, following out that practice which is a very useful one for the protection of the client, we must declare that the service was entirely unauthorized because the solicitor had no authority to receive it, for he did not, for the purpose of appeal, represent his client any longer.

GALLIHER, J.A.

GALLIHER, J.A.: My brother MARTIN has expressed my view of the matter.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: This is a motion to quash the appeal upon the ground that the notice of appeal was only served on the solicitor for the defendants in the action in the County Court, not upon the defendants. It would appear that the order for judgment, which is of date the 14th of November, 1921, leaves nothing to be worked out, as the amount found due the plaintiff upon the claim is met by the same amount allowed the defendants upon the counterclaim and neither party was awarded costs. However, the plaintiff is appealing from the judgment and served notice of appeal on the defendants' solicitor on the record on the 14th of February, 1922. The solicitor refused to accept service, but nevertheless was served with the notice of appeal, which he did not refuse to take, and he made no statement that he was not still the solicitor for the defendants or assign any reason for not admitting service, other than he wished to reserve all his rights. When the notice of appeal was served the order for judgment had not been taken out. This was not done until the 24th of February, 1922. The solicitor on the record, the same solicitor, attended on the 24th of February, 1922, upon the settlement of the order for judgment and did not then state, nor did he at any time state, that he was not still the solicitor for the defendants. On the 21st of February, 1922, the solicitor for the plaintiff applied to LAMPMAN, Co. J. to amend his notes made at the trial, and on the 24th of February, 1922, the solicitor for the defendants appeared and took the preliminary objection that leave could not be granted, that the appeal was a nullity as the defendants

had not been served with the notice of appeal. This objection was, however, overruled by the learned County Court judge, and the solicitor for the defendants then stated that he reserved all such objections. Upon this motion to quash the solicitor has sworn that he is a member of the firm of solicitors who are the solicitors for the defendants, and that he was the counsel at the trial in this action for the defendants. Now the situation is this: Can it be said that the notice of appeal has been effectively given? Section 121 of the County Courts Act (Cap. 53, R.S.B.C. 1911) provides that the rules governing appeals from the Supreme Court shall govern appeals from the County Court to the Court of Appeal. This brings in Order VII., r. 3, and the solicitor is deemed to be the solicitor of the party he appeared for "until the final conclusion of the cause or matter." In England the further words "whether in the High Court or the Court of Appeal" have been added, but even previous to these added words, the practice would appear to have been to look upon service upon the solicitor on the record as sufficient, no change of solicitor being filed as provided for by Order VII., r. 3, as note in the Annual Practice, 1922, p. 1097:

"Service on the solicitor on the record of the party is good service although he has ceased to act (*Lady de la Pole* v. *Dick* [(1885)], 29 Ch. D. 351; and see now O. 7, r. 3)."

MCPHILLIPS, J.A.

It is true we have not the added words, but it may be well said that these words were words added out of abundance of caution. That we have not these added words does not conclude the matter. "Until the final conclusion of the cause or matter" are words that call for interpretation, and if it had been necessary to interpret them to decide *Lady de la Pole* v. *Dick, supra,* there is no doubt, in my opinion, but it would have been decided that service on the solicitor on the record was sufficient and constituted good service of the notice of appeal. Observe what Bowen, L.J. said at p. 354:

"There can be no doubt that the authority of the solicitor continues until final judgment; but have you investigated the question how far it continues after final judgment?"

And Cotton, L.J.:

"It would be very inconvenient for it not to continue as long as there is a right of appeal."

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Fry, L.J. said, at p. 357:

"I give no opinion on the question whether the authority of the solicitor on the record continues as long as the right of appeal exists."

Now it becomes necessary for this Court to decide this point, and in deciding it it will be a decision not only governing appeals from the County Court, but as well from the Supreme Court, as it is upon the practice and procedure of the Supreme Court that the matter has to be determined (section 121, County Courts Act, Cap. 53, R.S.B.C. 1911). I cannot advise myself that there can be a "final conclusion of a cause" until the time for appeal has passed. An appeal results in determining what the judgment of the Court below should have been; it may be an affirmance, reversal or variation, and until the time for appeal has passed it cannot be said that there has come a "final conclusion" and if an appeal be taken the person to serve with the notice of appeal is, in accordance with all reason, the solicitor on the record. In passing it may be observed that in Holmested's Ontario Judicature Act, 4th Ed., at p. 1091, this is stated:

"The retainer of a solicitor continues after judgment, so as to make service of notice of appeal on him good service on the client until the client takes proper steps to inform his opponent that he has withdrawn his authority: *Lady de la Pole* v. *Dick* [(1885)], 29 Ch. D. 351."

In Daniell's Chancery Practice, 8th Ed., Vol. 2, p. 1130, it is stated:

MCPHILLIPS, J.A.

"Service of notice of appeal on the solicitor on the record for any party to the proceedings is good service, even though such solicitor states that he no longer acts for the party."

Note (*r*) is referred to at the same page (1130), which reads:

"Order VII. 3. This rule sets at rest the difficulty which was raised in *De la Pole* v. *Dick* [(1885)], 29 Ch. D. 351."

In *Hett* v. *Pun Pong* (1890), 18 S.C.R. 290, Strong, J., at p. 295, said:

"In *Lady de la Pole* v. *Dick* [(1885)], 29 Ch. D. 351 it was held that solicitors continued to represent their client after judgment, without any further retainer, for the purpose of appealing against the judgment, and this decision proceeded upon the principle that the retainer of the solicitor does not terminate with the judgment but continues thereafter, in the case of the solicitor of the party recovering the judgment for the purpose of obtaining the fruits of it, and in the case of the solicitor of the party condemned by it for the purpose of defending him against the execution."

Each case must be decided upon its special facts. Can it

be said that there has been "a final conclusion of the cause" when there is the absolute constitutional right of appeal that may be exercised and is being exercised in the present case? It is common sense, if nothing else, that the solicitor on the record is the proper party to serve the notice of appeal upon. Apart from questions of practice, it is trite law that notice to the solicitor is notice to the client, and here we have the solicitor making an affidavit as late as the 3rd of March, 1922, in support of this application to quash, stating that he is a member of a firm of solicitors who are the solicitors for the defendants, and he is still the solicitor on the record. In the face of this, is it possible to give effect to this motion? With every respect to all contrary opinion, it, in my opinion, would be a travesty upon the law to so decide. Some reliance was placed upon the case of *Reg.* v. *Justices of Oxfordshire* (1893), 2 Q.B. 149. That case was referred to by Lord Coleridge, J., in *Godman* v. *Crofton* (1914), 3 K.B. 803 at p. 811. Lord Coleridge said:

"The case of *Reg.* v. *Justices of Oxfordshire* (1893), 2 Q.B. 149 turned on the terms of s. 31, sub-s. 2, of the Summary Jurisdiction Act, 1879, which are in substance the same as those in the Act we are considering. But there had been no service upon the solicitor in that case, because the facts shew that at the time of service he had ceased to represent the respondent. In *Holloway* v. *Coster* (1897), 1 Q.B. 346 the ground of the decision is that it is sufficient if the notice reaches the person to whom it is to be given although it is not personally served upon him. The case, however, upon which I rest my judgment is that of *Pennell* v. *Churchwardens of Uxbridge* [(1862)], 31 L.J., M.C. 92, where Blackburn, J., delivering the opinion of the Court, held that a solicitor acting for an appellant had presumably authority to receive a case on behalf of the appellant. Inasmuch as the case was not transmitted to the Court within three days after the appellant had received it, the Court could not allow the appeal to be entered, but Blackburn, J. clearly expresses the view that where a solicitor acting for one party does an act which is fairly within the scope of the authority conferred upon him the other side may assume that he still retains his position and has authority to accept notice. In the present case the solicitors had acted for the respondent; there was evidence to shew that they were still so acting when this notice was received; they were agents of the respondent to receive the notice; the reasonable inference is that they received it on behalf of their client, and there being no evidence to the contrary we think that the terms of the statute have been complied with. The officer of the Court must therefore draw up the order."

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Can there be any question here that the solicitor is not still acting for the defendants? He has sworn to it, what more is

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needed? Further, can it be doubted that the notice of appeal has reached the defendants although it has not been served upon them? It is really idle to contend otherwise. The case of *Reg.* v. *Justices of Oxfordshire, supra,* offers no obstacle at all upon the facts of the present case. As Lord Coleridge put it, "there had been no service upon the solicitor in that case, because the facts shew that at the time of service he had ceased to represent the respondent." In the present case at the time of the service the solicitor served was the solicitor upon the record, was then acting, and even after the service of the notice of appeal was acting for the defendants (respondents), and as pointed out made an affidavit supporting this motion to quash, shewing that he was still their solicitor (see Scrutton, J., in *Bayley* v. *Maple and Co. Limited* (1911), 27 T.L.R. 284 at p. 285). It may well be said that for nearly half a century in the Province of Ontario and in this Province as well, the practice has always been to serve the solicitor upon the record with the notice of appeal. It would not only be "very inconvenient" to now hold otherwise, but be destructive of a well-recognized practice extending over, as I have said, half a century or more. Why should we be asked to determine such a point at this late date, and particularly why should we determine it on this motion, which lacks even a scintilla of merit? The solicitor on the record says he is the solicitor for the defendants, and the defendants have each sworn that they have not been served with the notice of appeal, the affidavits being drawn and filed by the firm of which the solicitor on the record for the defendants is a member. That there has been no express decision upon the point is not determinative of the matter. This Court of Appeal is as well entitled to pass upon the question as the Court of Appeal in England, and in deciding as I do that the notice of appeal is good and sufficient, being served upon the solicitor upon the record, I venture to say that that would have been the decision of the Court of Appeal in England and the Court of Appeal of Ontario, if it had ever become necessary to decide the matter.

Motion granted, McPhillips, J.A. dissenting.

Solicitors for appellant: *Tait & Marchant.*
Solicitors for respondents: *Moresby, O'Reilly & Lowe.*

IN RE HAGEL AND THE LAW SOCIETY OF BRITISH COLUMBIA.

HUNTER, C.J.B.C.

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Legal Professions Act — Application for entry as applicant for call— Refusal by Benchers—Mandamus—R.S.B.C. 1911, Cap. 136.

The Court will not grant a *mandamus* to compel the Benchers of the Law Society to admit an individual as a member of the Society with a view to his qualifying himself to be called to the bar.

IN RE HAGEL AND THE LAW SOCIETY OF BRITISH COLUMBIA

MOTION for a writ of *mandamus*. Rule *nisi* calling upon The Law Society of British Columbia to enter the name of Percy E. Hagel as an applicant for call to the Bar of British Columbia and to call him. Mr. Hagel was first a member of the Yukon Bar. He then went to Winnipeg and was called to the Bar of Manitoba. While practising there he was convicted of a criminal offence and served a term of imprisonment. On his release he was reinstated as a member of the Bar of Manitoba. He subsequently came to British Columbia and applied for entry, and was allowed to take the examination required by applicants from other Provinces who are in good standing on the understanding that his call, if successful, would be subject to the completion of his application and of it being passed upon by the Benchers. He passed the examination but the Benchers at the meeting following the examination refused his application for entry and refused to call him. Heard by HUNTER, C.J.B.C. at Vancouver on the 24th of March, 1922.

Statement

McPhillips, K.C., for The Law Society of British Columbia: Hagel applied to the Benchers to be entered as an applicant for call. He passed his examination but was never entered as an applicant. The Benchers have discretion as to whom they shall call and no power is given to any one else to call any person and my submission is there is no power in the Court to interfere. It has been decided in England that a *mandamus* will not lie: see *The King* v. *The Benchers of Lincoln's Inn* (1825), 4 B. & C. 855. The case is referred to in Halsbury's

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Laws of England, Vol. 2, p. 362; and Vol. 10, p. 9. Whether the Society is incorporated or not does not affect the case. Even if *mandamus* lies, the Benchers in their discretion may say they do not see fit to put the applicant on the list: see *Reg.* v. *The Great Western Railway Company* (1893), 69 L.T. 572 at p. 573; *In re Forbes, an Advocate* (1896), 2 Terr. L.R. 423 at p. 425. There would be no use issuing writ even if it could issue: see *Rex* v. *The Mayor and Aldermen of London* (1832), 3 B. & Ad. 255 at p. 268.

Argument

Stuart Livingston, contra: Hagel complied with all the requirements of the rules of The Law Society on his application and was allowed to take the examination, which he passed. The Benchers give no reason for refusing to call him and no hearing was given him on that occasion: see the judgment of Harrison, C.J. in *Cameron et ux.* v. *Wait* (1878), 3 A.R. 175. They admit the right to make application by letting him take his examination and passing him: see the judgment of Haggerty, C.J., in *Hands* v. *Law Society* (1890), 17 A.R. 41 at p. 48; also the judgment of Osler, J. at p. 62. As in that case there arises here a legal right. He has complied in every way with the Act and the rules and has a legal right to be called. He should have been refused (if at all) before going to the expense and trouble of taking his examination. They have never attempted to shew good cause for the refusal.

HUNTER, C.J.B.C.: I understand the point has never been expressly decided as to whether there is a right to admission, and I am of opinion that, after hearing learned counsel for both sides, that there is no such right and that therefore this application cannot succeed.

Judgment

Once a person has been admitted or called, he has a right which can be protected. The statute gives the right of appeal in the case of disbarment to the judges of the Supreme Court in their visitorial capacity, but it is significant that there is no right of appeal given in the event of the refusal by The Law Society to call or admit. In the next place, it is expressly enacted that the Benchers may call to the bar and admit persons who comply with certain conditions, including proof of good character and reputation. Obviously the question of

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whether such proof has been made is within the peculiar province of the Benchers, and I think it was the intention of the Legislature to entrust the decision in such matters to the Benchers, and therefore in the absence of any power being given to review their decision, the Court has no jurisdiction to substitute its own view of what is sufficient proof for that of the Benchers. There is no right of admission, but only a privilege on compliance with certain conditions to the satisfaction of the Benchers and the privilege becomes a right only after admission. I might add that I think that the discretion to call or to admit ought to be left exclusively to the Benchers, and that it would not be in the public interest to permit any right of review. It must be evident that a judge is not in as good a position to pass on a matter of this kind as the Benchers, who may interview and question the applicant, and a true estimate of character is more likely to be correctly made by the majority of a number who are fully competent to consider the matter than by a judge who might find himself more or less hampered by strict rules of law and procedure. There is a latitude and discretion in such a matter inherent in such a tribunal as the Benchers which is not available to a Court.

Judgment

Motion refused.

McDONALD *ET AL.* v. BRUNETTE SAW MILL COMPANY, LIMITED.

HOWAY, CO. J.

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McDONALD v. BRUNETTE SAW MILL CO.

Woodman's lien — Contract to fall and buck timber — "Workmen and labourers"—Scope of—R.S.B.C. 1911, Cap. 243, Secs. 37 and 38.

The defendant, a sawmill company, contracted with L. and F. whereby the latter agreed to log all suitable timber on a certain claim and deliver it boomed at the mouth of the Lillooet River. On the following day L. and F. entered into a contract with the plaintiffs whereby the plaintiffs agreed to fall and buck all timber on said claim at 85 cents per thousand "to the satisfaction of their employers," the employers to furnish all tools for the work and the plaintiffs to be allowed to draw wages at $4.50 a day. The plaintiffs on completion of the work brought action for the sums due, against the company because of its non-compliance with the provisions of sections 37 and 38 of the Woodman's Lien for Wages Act.

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McDONALD v. BRUNETTE SAW MILL CO.

Held, that the plaintiffs were contractors and not labourers, that the payments due them were not "wages" within the meaning of the Act and the action should be dismissed.

ACTION for wages against the Sawmill Company under sections 37 and 38 of Woodman's Lien for Wages Act, the Company having paid the contractors without requiring the production of receipted pay-roll. The facts are set out fully in the reasons for judgment. Tried by HOWAY, Co. J. at New Westminster on the 20th of March, 1922.

H. I. Bird, for plaintiffs.

G. E. Martin, for defendant.

25th March, 1922.

HOWAY, Co. J.: This case raises the neat question whether the plaintiffs were workmen and labourers engaged and employed in the obtaining, supplying, or furnishing of logs and timber within the meaning of sections 37 and 38 of the Woodman's Lien for Wages Act. In another form the question is whether the moneys due to them were wages within these sections.

The facts are not in dispute and have been agreed upon by the parties, who very properly have brought up for decision this question upon which the right to maintain this action manifestly rests. The defendants and Messrs. Lawry and Fulton on the 30th of August, 1917, made an agreement whereby the latter agreed to log all the suitable timber on the "John Stewart claim" and to deliver it boomed and ready for towing at the mouth of the Lillooet River. On the next day the following document was prepared between Lawry and Fulton, the contractors, and the plaintiffs. Though it does not appear to have been signed by the plaintiffs, it is agreed that it represents the arrangement under which the plaintiffs worked on the logs for Lawry and Fulton.

Judgment

"McDonald & Co. hereby agree to fall and buck all timber on the John Stewart claim on the Lillooet River to the satisfaction of their employers for the sum of 85 cents per thousand, final settlement to be made when the logs are boomed and scaled at the mouth of the Lillooet River. Their employers agree to furnish all tools in connection with the work and allow them to draw wages at the rate of $4.50 per day."

It is clear that the claim of McDonald & Co. is primarily against Lawry and Fulton for the work done under this con-

tract, but it is claimed that under sections 37 and 38 of the Woodman's Lien for Wages Act the defendant is liable. The sections provide in substance that every person entering into a contract with another for the supplying of logs or timber must, before making any payment thereunder, require the production of a pay-roll of the wages due and owing to the labourers or workmen, which pay-roll may be in the form in the Schedule, and if payments are made without the production of such pay-roll such person shall be liable to the workmen or labourers for the amounts due to them. For the purposes of this application, I take it, that all facts necessary to raise the point of law, above set out, are admitted.

The sections have their source in "An Act for the protection of Workmen's Wages," B.C. Stats. 1888, Cap. 40. In C.S.B.C. 1888 this statute found its way into the Mechanics' Lien Act, Cap. 74, sections 25, 26 and 27. The Schedule which was in the original Act was transferred without alteration. The sections were re-enacted in the Mechanics' Lien Act, 1891, Cap. 23, Secs. 26, 27 and 28 and in the revision of 1897, still continued as a part of the Mechanics' Lien Act, sections 26, 27 and 28, but the Schedule was altered so as to be used under section 12 of that Act, as well as under these special sections. In 1910 the sections were transferred from the Mechanics' Lien Act to the Woodman's Lien for Wages Act, by chapter 54. Thence they passed into the revision of 1911 as a part of the last-mentioned Act, carrying the Schedule in its altered form. The fact that these sections were allied with section 12 of the Mechanics' Lien Act which provided for the posting up of receipted pay-rolls upon the works, and that the form of pay-roll specified in the Schedule was the same, gives colour to the construction that the labourers referred to are those who are employed at a specified wage per day. The marginal note says "Receipted pay-rolls of woodmen's wages must be produced." And as Collins, M.R. said in *Bushell* v. *Hammond* (1904), 73 L.J., K.B. 1005 at p. 1007, "the side-note, also, although it forms no part of the section, is of some assistance, inasmuch as it shews the drift of the section." So, too, the Schedule which contains the form in which a pay-roll may be drawn, while not conclusive, may be looked at for the purpose

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of ascertaining what was the intention of the Legislature in passing the enactment. This form appears only to contemplate the inclusion of persons employed at a daily or monthly wage.

The terms of the contract by McDonald & Co. shew that the plaintiffs were, in realty, contractors to "fall and buck" at 85 cents per thousand. Stress has been laid on the expression that they are to do the work "to the satisfaction of their employers," but this argument carries too far, for I observe that in the original contract between the defendants and Lawry and Fulton, who are plainly contractors, there is a clause that the "timber is to be logged off and all timber removed therefrom to the satisfaction of the company's timber man."

The term "wages" carried an idea of a personal remuneration, while this document provides for remuneration to an unknown number of people who are or may be included in the firm of McDonald & Co. One could hardly speak properly of wages due McDonald & Co., but one could so speak of moneys due to McDonald & Co. under their contract. The use of the terms "wages" and "pay-roll," the form of the Schedule and the history of the legislation shew that though "wages" itself may be broad enough to include remuneration for piece work, yet here the particular form of wages that is being protected is the daily or monthly form. In my opinion, however, the plaintiffs are not even in the position of persons who are labourers paid by the piece, but are, in realty, independent contractors, free to regulate for themselves the hours of their labour and to work as and where it best pleased themselves.

Judgment

The plaintiffs have no contract with the defendants. Under common law, of course, the defendants would not be liable to them. To make the defendants liable they must be brought within the statute as persons who have paid money to the contractors without obtaining a pay-roll of the wages.

I am of opinion that the plaintiffs were contractors and not labourers within the Act, and that payments due to them were not wages within the meaning of the Act. The action must, therefore, be dismissed with costs.

Action dismissed.

ROYAL BANK OF CANADA v. HUMPHREYS AND HUMPHREYS.

CLEMENT, J.

1922

March 27.

ROYAL BANK OF CANADA v. HUMPHREYS

Promissory notes—Guarantee—Statute of Limitations.

The wife of the maker of certain promissory notes guaranteed that the husband would pay, the guarantee being given after the liability of the husband was overdue. The guarantee was signed on the 26th of October, 1915, and this action was commenced on the 26th of October, 1921.

Held, that the action was in time and the plaintiff entitled to succeed. *Garden* v. *Bruce* (1868), 37 L.J., C.P. 112 followed.

ACTION against a husband for balance due on certain promissory notes and against the wife upon a guarantee that the husband would pay. The wife signed the guarantee on the 26th of October, 1915, when the liability of the husband was overdue and a writ was issued in this action on the 26th of October, 1921. The necessary facts are set out in the reasons for judgment. Tried by CLEMENT, J. at Vancouver on the 21st of March, 1922.

Statement

Sir C. H. Tupper, K.C., and *R. H. Tupper*, for plaintiff.
Robinson, for defendants.

CLEMENT, J.: This is an action against husband and wife; against the husband for the balance due on certain promissory notes and against the wife upon her written guarantee that the husband would pay. At the trial I gave judgment against the husband, and also against the wife as to all her defences other than that of the Statute of Limitations, as to which I reserved judgment.

Judgment

At the time when the wife signed the guarantee, October 26th, 1915, the liability of the husband was overdue, and it is upon this peculiarity that the point as to the Statute of Limitations (21 Jac. I., c. 16, as re-enacted in this Province) arises, the action not having been begun until the 26th of October, 1921. Mr. *Robinson* quite properly admits that where a note, for instance, falls due on a certain date, the

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debtor has the whole of that day within which to pay, and that therefore the statute does not begin to run until that day has completely ended, so that an action begun on the same day of the month six years thereafter would be in time. But here, he contends, the wife's liability arose on the instant she signed the guarantee and he argues that that day must be included in the six-year period which, as he contends, expired at midnight of the 25th of October, 1921. If so, the action against the wife is too late by one day. I was much surprised to learn from counsel that there is no reported case deciding this point under this particular statute. But Mr. *R. H. Tupper,* in his able and very helpful argument for the plaintiff, contended that the same point had been decided in his favour in cases under other statutes of limitation and in cases where the time limit had been imposed by contract or will, and that the same principle should apply here.

I may say that for the purposes of this judgment I am assuming that Mr. *Robinson* is right in contending that the wife's liability arose at the moment she signed the guarantee, that is during the day of October 26th, 1915. *Sir Charles Tupper* argued strongly against this view, but in the opinion I have formed it is unnecessary to consider this branch of the argument further.

Judgment

After going with some care through all the cases cited to me, I am clearly of opinion that Mr. *R. H. Tupper's* view of the authorities is correct, and that this action was begun in time.

Rather curiously, I examined Banning on Limitation of Actions and stumbled upon a case in which the point had been passed upon under this very statute by a strong Court, but passed upon without discussion, upon the admission of counsel. This case is *Garden* v. *Bruce* (1868), 37 L.J., C.P. 112. The plaintiff in that case had lent the defendant money. The obligation to repay arose at once on the lending of the money and the statute then began to run. The point seriously contested was as to the true date of the loan. It had been made by a cheque dated 14th June, 1861, but the cheque had not been cashed until the 21st of June. The action was begun on the

21st of June, 1867. Counsel for the defendant made this concession: "If it" (that is, the statute) "runs from the 21st of June, 1861, the action no doubt is in time as the older cases to the contrary are now no longer law." It is to me inconceivable that so strong a Court as Bovill, C.J., Keating, J., Montague Smith, J., and Willes, J., would have accepted this admission if there was any doubt in the mind of any member of the Court as to its correctness. It was held that the statute began to run from the date when the cheque was cashed and judgment went for the plaintiff.

In view of *Garden* v. *Bruce* I content myself with a simple citation of the cases which I presume counsel in that case had in mind when he made the admission above quoted, and which in my opinion fully justified the admission. See *Hardy* v. *Ryle* (1829), 7 L.J., M.C. (o.s.) 118; 9 B. & C. 603; *Webb* v. *Fairmaner* (1838), 7 L.J., Ex. 140; and the cases cited in those two cases. For a later case, see *Radcliffe* v. *Bartholomew* (1891), 61 L.J., M.C. 63.

Judgment

There will be judgment against both defendants, with costs. Counsel can no doubt settle the figures. If not, the case can be spoken to.

Judgment for plaintiff.

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LITTLE v. THE ATTORNEY-GENERAL FOR BRITISH COLUMBIA.

Constitutional law—Liquor—Importation from another Province—Tax on liquor so imported—Trade and commerce—Indirect taxation—B.N.A. Act, Sec. 121—B.C. Stats. 1921, Cap. 30, Secs. 54, 55 and 56.

The plaintiff, who lived in Vancouver, imported a case of rye whisky from the Province of Alberta. On its arrival he asked the Liquor Control Board for the necessary labels prescribed by the Government Liquor Act when the Board demanded $11 tax under section 55 of said Act. An action for a declaration that the plaintiff was under no obligation to pay said sum and that said section 55 was *ultra vires*, was dismissed.

Held, on appeal, affirming the decision of CLEMENT, J. (MARTIN, J.A. dissenting), that the imposition by section 55 of the Government Liquor Act of a tax on any liquor not purchased from a vendor at a Government store is *intra vires* of the Provincial Legislature.

Held, further, that section 121 of the British North America Act refers only to the levying of customs duties or other similar charges, and the words "admitted free" in said section means free of any species of tax that is aimed directly or indirectly at the prevention of the importation of said articles.

APPEAL by plaintiff from the decision of CLEMENT, J., of the 21st of November, 1921, in an action for a declaration that the plaintiff was under no obligation to comply with the demand of the Liquor Control Board for payment of a certain sum on whisky imported from Alberta. The facts are that the plaintiff, who lived in Vancouver, purchased a case of rye whisky from a firm in Calgary, Alberta. When it arrived in Vancouver the plaintiff wrote asking for labels for the whisky from the Board and in answer the Board wrote demanding a tax on the whisky of $11. The plaintiff refused to pay and brought this action which was dismissed (see 30 B.C. 343).

Statement

The appeal was argued at Victoria on the 10th and 11th of January, 1922, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Argument

Davis, K.C., for appellant: Sections 54-5 and 6 of the Government Liquor Act deal with taxation. If section 55

applies to transactions with other Provinces it is *ultra vires* for the following reasons: (1) It is in contravention of section 121 of the British North America Act; (2) by reason of the decision in *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (1896), A.C. 348 as being an interference with inter-provincial trade. It interferes with trade and commerce. They have not a right to impose a direct tax that is in effect a condition upon its being brought into the Province, and the tax is put on to prevent people buying outside and compelling them to buy from the local Board. Next, when Dominion legislation interferes with the Province the Dominion shall prevail: see *Attorney-General for Canada* v. *Attorney-General for Quebec* (1921), 1 A.C. 413 at p. 423. Prohibiting importation is interference with inter-provincial trade: see *Great West Saddlery Co.* v. *Regem* (1921), 90 L.J., P.C. 115. Is it fair to say that because you are first allowed to get it in your possession it makes any difference, in fact he pays by reason of getting it from Alberta: see *Attorney-General of Manitoba* v. *Manitoba Licence Holders' Association* (1902), A.C. 73 at pp. 79-80.

Mayers, for respondent: The only effect of section 53 is that if section 55 be *ultra vires* it saves the rest of the Act. Section 55 does not deal solely with imported liquor nor does it deal with all imported liquor, for instance, when it is brought in for sale in other Provinces, as then it is not subject to the tax. As to the tax being a condition precedent to liquor being imported section 121 says products of the different Provinces shall be admitted free, but this is a direct tax which is totally different from a customs duty which is the bulwark of indirect taxation. This is a direct tax pure and simple: see *Gold Seal Ltd.* v. *Dominion Express Co.* (1921), 3 W.W.R. 710. The Province can prohibit liquor entirely if they wish to do so and can therefore take the less stringent position that they have now adopted. In *Attorney-General of Manitoba* v. *Manitoba Licence Holders' Association* (1902), A.C. 73, the argument of Blake, K.C. goes further than the present British Columbia Act: see also *Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. 575 at p. 585.

Argument

Davis, in reply.

Cur. adv. vult.

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MACDONALD, C.J.A.: I am of the opinion that the learned trial judge has come to the right conclusion. The tax in question is a direct tax: *Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. 575; *Workmen's Compensation Board* v. *Canadian Pacific Railway Company* (1920), A.C. 185. It is, therefore, *prima facie* at least, within No. 2 of section 92 of the British North America Act, giving exclusive powers of legislation in respect thereto to the Provincial Legislatures. I do not think there is any force in the contention that the tax is in effect a customs duty, or even that it is an attempt on the part of the Province to prevent the importation of liquor into the Province by imposing a prohibitory tax in furtherance of the scheme of the Liquor Act to vest in the Province a monopoly of the liquor traffic. While it is a maxim of our law that that which cannot be legally done directly cannot be legally done indirectly, yet it is not true that the Provincial Legislature cannot do that which is within its legislative powers, because the effect of what it does may indirectly affect those subjects over which the Parliament of Canada has been given jurisdiction.

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If there were no such Act on the statute book as the Liquor Act and the Province had put a heavy tax on liquor within the Province held for private or domestic consumption, it could hardly have been contended that such a tax would have been illegal though the effect of it would have been to reduce the quantity of liquor imported into the Province and thus to lessen the revenue of the Dominion from customs duties. But because the tax is part of the scheme of the Liquor Act, or at all events, is authorized by a section of that Act, it is contended that it must be otherwise. As was said by Mr. Justice Duff, in *Gold Seal Limited* v. *The Attorney-General for the Province of Alberta* (1921), 62 S.C.R. 424, the distinction between legislation in relation to a particular subject and legislation which merely affected that subject must be kept clearly in mind when construing legislation of the Dominion, or of one of the Provinces. A high tax on any commodity the subject of import into British Columbia will have the effect of lessen-

ing the volume of importation and thus will affect the Dominion's revenue from customs' duties, but if the tax is within the power of the Province to impose that fact does not make the imposition of the tax illegal.

But if it be inferred from the context of the Liquor Act that section 55, the section which imposes the tax complained of, was not passed in the interest of the revenue, but as a means of controlling the liquor traffic in the Province, yet its imposition, in my opinion, would still be within the power of the Province.

If for the purposes of the Act, liquor once within the Province may be controlled by prohibition of its sale in the Province under the powers assigned to Provincial Legislatures to legislate upon matters of a local or private nature in the Province, I can see no reason why the power should not be held to extend to the imposition of a tax on liquor with the view of effectuating or assisting in that control.

MACDONALD, C.J.A.

I would therefore dismiss the appeal.

MARTIN, J.A.: This is an appeal by the plaintiff from a judgment [reported 30 B.C. 343] upholding the validity of a tax of $11 imposed by the Liquor Control Board of this Province on a case of Canadian rye whisky purchased by the plaintiff from the Gold Seal, Limited, at Calgary in the Province of Alberta, and imported by him into this Province.

Objection is taken to the imposition of the tax on the ground that it is *ultra vires* of this Province as being contrary to two sections of the B.N.A. Act., *viz.*: (1) Section 91, No. 2—"The regulation of trade and commerce," as being one of the matters exclusively assigned to Canada; and (2) section 121, providing that:

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"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."

By the Act to provide for Government Control and Sale of Alcoholic Liquors, Cap. 30 of 1921 (shortly styled the Govern-Liquor Act), the Government of British Columbia was, by section 3, directed to

"establish and maintain, at such places throughout the Province as are considered advisable, stores, to be known as 'Government Liquor Stores,'

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for the sale of liquor in accordance with the provisions of this Act and the regulations; and may from time to time fix the price at which the liquor shall be sold."

And the Act went on to create a "Liquor Control Board," which was charged with the "administration of this Act, including the general control, management and supervision of all Government liquor stores," with provision for "vendors" who, under the direction of the Board, should conduct the sales of "liquor" (defined to mean "all liquids which are intoxicating") at said stores to such members of the general public as might wish to obtain permits for the purchase of liquor, and, briefly and generally, it was declared to be an offence (with certain special and immaterial exceptions, *e.g.*, for medicinal and sacramental purposes) to purchase or sell or have in possession any liquor which was not obtained from a Government store.

There was one considerable exception, under section 114, relating to liquor already lawfully in possession at the commencement of the Act, which might be sealed by a vendor within a limited period, and so brought within the Act, but as this was only of a temporary effect to protect rights acquired under the former British Columbia Prohibition Act, 1916, Cap. 49, it may be dismissed from consideration.

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The effect, therefore, of the Act was, as it obviously intended, to transfer to the Province the entire liquor business within its boundaries and to give it a monopoly thereof, with the one exception that the importation as theretofore of liquor from other Provinces, and elsewhere, was still ostensibly countenanced and recognized by, *e.g.*, sections 53-4, etc. Such right of importation was obviously one which would conflict with sales by the Government stores, both as to price and quality and kind of liquors, and inevitably reduce profits, so in order to forestall and prevent such competition and secure the contemplated monopoly of trade, section 55 was inserted in the Act, which, after certain exceptions (including imported liquor warehoused by a licensee under section 54 for export) provided that:

"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."

This section is clearly intended to stop the present large importation of liquor for private consumption (not sale), because I can find nothing else in the Act to which it can relate (except the said temporary sealing of old lawful stocks under section 114) and it can have no application to illicit liquor manufactured or kept by private persons (not licensed under section 48) or sold surreptitiously because that is not to be sealed or taxed but seized and forfeited under sections 31, 66-8. And that it must inevitably in practice have that desired effect is likewise obvious, because no business firm, wherever situate, or private importer (save perhaps a few rich ones prepared to pay anything for extravagant luxuries) could continue to bear the imposition of such a tax.

Under the provisions of this section the Liquor Control Board by general order of August 27th, 1921, fixed (as applied to the case at bar) the "amount of the profit which would have accrued to the Government . . . . . if it [liquor] had been purchased from a Government store," at "40% on the cost landed price of such liquor, duty or excise paid, as the case may be, at place of possession in British Columbia, plus 10%," etc., and, as aforesaid, taxed the plaintiff, appellant, $11 on a case of Canadian whisky which he imported from Alberta.

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On these facts I shall first consider the second objection based on section 121, which section was recently discussed by some of the judges of the Supreme Court of Canada who sat in *Gold Seal Limited* v. *Dominion Express Co,* 62 S.C.R. 424; (1921), 3 W.W.R. 710, and they took different views thereof, but as their consideration of it was in the light of the particular facts before them and more from the Federal point of view, it must, according to *Quinn* v. *Leathem* (1901), A.C. 495 at p. 506; 70 L.J., P.C. 76, be qualified by those facts, and as the present facts are very different, I feel it my duty to consider the matter upon them and more from the

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aspect of Provincial restriction, and particularly because we were given to understand that in any event this case would go direct from us to the Privy Council.

My view of it is, after a consideration of all the other sections in that wide and divergent group entitled "Revenues; Debts; Assets; Taxation," and embracing sections 102-126, that to restrict the obligation to admit all said articles "free" to those upon which a customs duty could be levied is contrary to the fundamental spirit of said section 121, and this is shewn by a consideration of the following section 122, which provides that:

> "The customs and excise laws of each Province shall, subject to the provisions of this Act, continue in force until altered by the Parliament of Canada."

Now when that section was passed it must evidently have been contemplated that the continuation of discordant Provincial customs tariffs was only a temporary expedient pending the absolutely essential adoption of one Federal tariff for the whole Dominion; and if that be so then section 121 would only have had a brief statutory life limited to the coming into force of that Federal tariff, because thereafter it would become a dead letter for lack of anything to which it could apply. If that were the contemplated brief effect one would expect to find a corresponding clear intention, which would obviously be expressed by inserting some such apt words as "of duty" after "free," but the omission of such words of limitation means, to me at least, that a much wider and more practical trade construction should be placed upon the intention of Parliament, and I have come to the conclusion that "admitted free" means free from any species of tax that is aimed directly, or indirectly (as is undoubtedly the one before us), at the prevention of the importation of said articles.

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There is no magic, be it noted, in the words "articles admitted free," in the section, for they are used in the same practical way as "goods imported into Canada" through a port of entry under section 14 of The Customs Act, R.S.C. 1906, Cap. 48, which as soon as imported (*i.e.*, admitted) must be reported without delay by masters of ships, and also by conductors of trains, and by persons in charge of vehicles, or otherwise, who

must "come to the custom-house nearest to the point at which he crossed the frontier line," or as otherwise provided by, *e.g.*, sections 21-4, and there report and "make entry," and at the time of entry pay the duty (section 27) whereupon the "importer" is entitled to a "permit for the conveyance of such goods further into Canada, if so required by the importer." Under present conditions, a car of wheat, *e.g.*, from Alberta, is hauled into this Province without hindrance from any sort of taxation; in other words, it is "admitted free," but if it became liable to a tax of, say, $1 per bushel, just as soon as it was hauled "across the frontier line" (as section 23 styles it), then, in my opinion, it becomes quite clear that having regard to the ordinary practical course of trade and commerce such a tax, however large or small, would in practice and principle be an unconstitutional fetter upon that free admission which the section is intended to secure in the interest of the whole federation of Provinces. Otherwise, if the Province may impose a discretionary prohibitory tax (as it essentially is in its imposition and practical working) upon liquor, then it may do so to the extent of its unfettered discretion upon Saskatchewan wheat, or Alberta coal or cattle, or Manitoba wheat, or Ontario implements or whisky, or Quebec boots and shoes, or Nova Scotia steel, or any one or more of them, or any other Canadian article, either in general or in discrimination, against any one or more Provinces, with the result that it could, in effect, build up a general or discriminatory tariff wall against some or all the products of other Provinces, which disastrous internal policy is just what I regard section 121 as being designed to prevent, whether done directly or, equally unlawfully, indirectly. *Great West Saddlery Co.* v. *Regem* (1921), 2 A.C. 91; 90 L.J., P.C. 102; (1921), 1 W.W.R. 1034, which indirect attempt the Privy Council therein said, "must be kept closely in view": pp. 1040 and 1057.

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Applying this view to the facts of the case at bar, we find the tax in question attaches to imported liquors just as soon as they "cross the frontier," because then they come into the "possession or under the control" of the importer and must be forthwith "reported" to the Liquor Control Board as required

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by said section 55 (just as they must be reported to the customs if imported from outside Canada) and the exact amount of the tax payable is ascertained and determined as said order of the Board directs, *viz.*, "on the cost landed price of such liquor, duty or excise paid, as the case may be," etc., and this, for the reasons aforesaid, I am of opinion, is not merely an indirect (which is as illegal as if direct) but in practical operation a direct invasion of inter-provincial rights established by section 121, and therefore an illegal fetter upon free admission, and so the appeal should be allowed and the tax declared to be an illegal imposition. With all due respect, I am quite unable to agree with the opinion of the learned judge below that,—

"for the effective working out of the scheme of the Government Liquor Act . . . . . prohibition of importation into the Province would be constitutionally justified."

The decisions he refers to do not support that view, and in the *Gold Seal Limited* case, *supra,* Mr. Justice Anglin said, p. 737:

"It is common ground that the prohibition of importation is beyond the legislative jurisdiction of the Province."

I have not overlooked the extract that the learned judge below invokes from *Attorney-General of Manitoba* v. *Manitoba Licence Holders' Association* (1902), A.C. 73 at p. 79; 71 L.J., P.C. 28, but I can find nothing in it which shews that the Privy Council, *per* Lord Macnaghten, there adopted the view expressed in the unpublished and unproduced report to Her Majesty, of May 9th, 1896, subsequent to the judgment in *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (1896), A.C. 348; 65 L.J., P.C. 26, that:

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"there might be circumstances in which a Provincial Legislature might have jurisdiction to prohibit the manufacture within the Province of intoxicating liquors and the importation of such liquors into the Province."

On the contrary, as I read Lord Macnaghten's observations, he gives no encouragement to follow the report in its speculations upon unknown rights in unknown circumstances but dismisses it briefly by saying that "for the purposes of the present question it is immaterial to inquire what those circumstances may be."

Moreover, the report of the Board, whatever it may include in the way of extra-judicial advice or otherwise, is not referred

to in the judgment by which alone we are bound, and that judgment is clear on the fourth question submitted, *viz.*:

"(4) Has a Provincial Legislature jurisdiction to prohibit the importation of such liquors within the Province?"

And this is the answer thereto, p. 371:

"Their Lordships answer this question in the negative. It appears to them that the exercise by the Provincial Legislature of such jurisdiction in the wide and general terms in which it is expressed would probably trench upon the exclusive authority of the Dominion Parliament."

This affirmed the view of the Supreme Court of Canada (1895), 24 S.C.R. 170, which had unanimously answered the question in the same way.

I need only add that, in my opinion, the decision of the Privy Council in *Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. 575; 56 L.J., P.C. 87, does not apply to this tax, which I have given my reasons for holding not to be direct taxation within section 92 (2) of the B.N.A. Act.

I turn then to the objection that the enactment is in conflict with the exclusive power of the "regulation of trade and commerce" conferred upon the Federal Parliament by section 91, No. 2, of the B.N.A. Act. It cannot be disputed that Provincial legislation under section 92 (No. 16) of that Act (which includes this liquor class legislation) as a "matter of a local or private nature in the Province" (*Attorney-General of Manitoba* v. *Manitoba Licence Holders' Association* (1902), A.C. 73, 78) is not invalid because it, p. 79,

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"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."

Their Lordships were there speaking of a statute (Manitoba) which though declaring its intention of suppressing the liquor traffic within that Province, yet equally declared its intention of not unauthorizedly affecting inter-provincial or foreign transactions in liquor, as likewise does the statute in question by section 55. Hence while it is true that in the exercise of its Provincial rights a Province may trench upon the Federal field, yet it cannot do so to an extent that is more than "necessarily incidental" to the due exercise of its powers, or as Mr. Justice Anglin recently put it in the *Gold Seal* case, *supra* (wherein the meaning of "trade and commerce" was discussed), p. 763,

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if the interference "is merely an incidental consequence of the legislation its validity cannot be successfully impugned on that ground." This limitation was most clearly laid down and illustrated ten years ago by the Privy Council in *City of Montreal* v. *Montreal Street Railway* (1912), A.C. 333; 81 L.J., P.C. 145, and recently re-affirmed in *Great West Saddlery Co.* v. *Regem, supra,* p. 1040 ((1921), 1 W.W.R.), wherein the leading decisions are reviewed. In the *Montreal* case, *supra,* it was objected that the Federal Board of Railway Commissioners had by a certain order invaded the powers of the Province of Quebec over the defendant Company (incorporated by Act of that Province), by seeking to control its traffic, and after saying that the invasion could not be justified under the "peace, order and good government" power in section 91, their Lordships went on to say, p. 344 ((1912), A.C.):

"It follows, therefore, that the Act and Order if justified at all must be justified on the ground that they are necessarily incidental to the exercise by the Dominion Parliament of the powers conferred upon it by the enumerated heads of s. 91. . . . . .

"In other words, it must be shewn that it is necessarily incidental to the exercise of control over the traffic of a Federal railway. . . . . ."

And after considering the position they conclude, p. 346:

"In their Lordships' view this right and power is not necessarily incidental to the exercise by the Parliament of Canada of its undoubted jurisdiction and control over Federal lines, and is therefore, they think, an unauthorized invasion of the rights of the Legislature of the Province of Quebec."

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Applying that test to the case at bar, has it been "shewn that the order of this Board of Liquor Control, based on section 55, can be justified" as it "must be" on the ground that it is no more than "necessarily incidental to the exercise" of this Province's powers under subsection (16)? I have given this matter my careful consideration, bearing in mind what the Privy Council said in the *Great West Saddlery* case, *supra,* p. 1054 ((1921, 1 W.W.R.), *viz.*:

"It is obvious that the question of construction may sometimes prove difficult. The only principle that can be laid down for such cases is that legislation the validity of which has to be tested must be scrutinized in its entirety in order to determine its true character."

And I can only reach the conclusion that what has been done here is far beyond what is legally necessary in the circumstances, and I see no "justification" for the suppression

(almost complete in practice) of Federal inter-provincial trade in legally suppressing purely internal Provincial transactions in liquor, viewing as I do, and as already set out, the enactment of section 55 and the order of the Board thereunder as being aimed to suppress the importation of liquor by that large class of private consumers who import liquor direct from firms outside the Province, not, as above noted, for sale therein, which is prohibited by the Act, but for their own domestic consumption, and hence aimed also at putting the extra-provincial business firms out of that important branch of their business which they carry on direct with their private customers in this Province, except for sacramental purposes under sections 31, 52 and 55 (if that can be properly termed private consumption), thereby in "real effect," as the *Great West Saddlery* case puts it, p. 1057, creating a complete monopoly of the internal Provincial liquor business, because even that business, profitable as it notoriously is, cannot survive the imposition of two profits, therefore the tax in question is, in its practical operation a confiscation of the profits of extra-provincial trade rivals, and a colourable and indirect form of prohibition upon such importation. I am not, of course, now referring to the business of importing for the purposes of exporting, which is permitted (and regulated and licensed at a fee of $3,000 per annum, by sections 49, 54 and 55) obviously because it does not compete with the business carried on by the Government liquor stores. In the *Great West Saddlery* case it is also laid down that the true and single intention of the Provincial Legislature must be to exercise its powers of restriction "merely [as] a means for the attainment of some exclusively Provincial object, such as direct taxation," p. 1042; and again at p. 1058, that its enactments must be "directed solely to the purposes specified in section 92"; in other words, its legislation cannot be saved if it has a dual intention, both legal and illegal.

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The result of my careful scrutiny of every section of the Act in question is, that while there are several provisions in it which may well be said to have a "necessarily incidental" entrenchment upon the Federal field of trade and commerce, yet by means of the one called in question (section 55) the

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Provincial Legislature, in my opinion, is, as the Privy Council said in the *Great West Saddlery* case, p. 1057, "under the guise of imposing direct taxation . . . . . within their power really doing something else," *viz.*, directly and unauthorizedly invading the Federal field of trade and commerce, and therefore the appeal should be allowed on this second ground also.

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

MCPHILLIPS, J.A.: This appeal, in my opinion, fails. The learned trial judge, Mr. Justice CLEMENT, has set forth his reasons for judgment in a very clear and succinct manner. The learned counsel for the appellant, Mr. *Davis,* in his very able argument at this bar first submitted that the challenged section (55) of the Government Liquor Act (Cap. 30, B.C. Stats. 1921) is *ultra vires* as offending against section 121 of the British North America Act, 1867 (30 Vict., c. 3), which reads as follows:

> "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,"

and the learned counsel for the appellant greatly relied upon *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (1896), A.C. 348, and contended that, in its effect, *Gold Seal Ltd.* v. *Dominion Express Co.* (1921), 3 W.W.R. 710 was not an authority in his way. I must admit that, during the argument, this contention weighed with me very considerably upon this line of reasoning, that, although there was no attempt to at the boundary of the Province impose a customs duty which would be palpably beyond the powers of the Province, what was being done was the imposition of what, in effect, was a customs duty in an indirect way. Whilst there was no interference with the entry of the liquor into the Province, the taxation levied was equivalent to the imposition of a customs duty. However, after careful consideration of this point, fortified as well by the reasons for judgment of Mr. Justice Duff (p. 738), Mr. Justice Anglin (p. 738) and Mr. Justice Mignault (p. 740) in the *Gold Seal* case ((1921), 3 W.W.R. 710), I am satisfied that section 121 (B.N.A. Act) is only referable to the levying of customs duties or other similar

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charges and would not extend to any inhibition of taxation as set forth in section 55 (Cap. 30, B.C. Stats. 1921). That is, it is the imposition of a direct tax upon property within the Province and cannot be said to be a customs duty or import tax upon property brought into the Province. Once the liquor, *i.e.*, the property subject to taxation is within the Province, it cannot be said that any magic attaches to it or that it is immune from Provincial taxation, because, as in the first case, it was liquor imported from one of the other Provinces of the Dominion. The liquor being within the Province (property in the Province) it follows that it must be subject to the incidence of taxation, and the taxation imposed is a direct tax. Lord Hobhouse in delivering the judgment of their Lordships of the Privy Council in *Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. 575 at p. 585, said:

"Their Lordships . . . . . hold that, as regards direct taxation within the Province to raise revenue for Provincial purposes, that subject falls wholly within the jurisdiction of the Provincial Legislatures."

In *Workmen's Compensation Board* v. *Canadian Pacific Railway Company* (1919), 3 W.W.R. 167; (1920), A.C. 185, in the judgment as delivered by Viscount Haldane we have it stated:

"In *Bank of Toronto* v. *Lambe* [(1887)], 12 App. Cas. 175, it was decided by the Judicial Committee that a Province could impose direct taxes in aid of its general revenue on a number of banks and insurance companies carrying on business within the Province, and none the less that some of them were, like the respondents, incorporated by Dominion statute. The tax in that case was not a general one, and it was imposed, not on profits nor on particular transactions, but on paid-up capital and places of business. The tax was held to be valid, notwithstanding that the burden might fall in part on persons or property outside the Province."

The method adopted or scale fixed for the imposition of the taxation gave me some anxious thought for a time in that it might be said to trench upon the regulation of trade and commerce (section 91, No. 2, B.N.A. Act) in that plainly in the scale fixed for the taxation imposed (section 55 (2)) this language appears:

"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

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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."

This indicated procedure for the determination of the amount of the tax involves the imposition upon the owner of liquor imported and not bought from a Government liquor store of a double profit plus ten per cent., as, undoubtedly, in buying outside the Province the trade profit is part of the purchase price, but, in the end, can this be said to be other than a scale? It is conceivable, of course, that the effect may well be to discourage purchases of liquor from without the Province and bring about purchases only from the Government liquor stores, but, if the imposition is a direct tax upon property, can it be said that it trenches upon the "regulation of trade and commerce?" That it may affect business conditions and reduce, if not eliminate, purchases of liquor from without the Province, cannot be said to trench upon the exclusive authority of the Parliament of Canada to legislate upon "the regulation of trade and commerce."

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Citizens Insurance Company of Canada v. *Parsons* (1881), 7 App. Cas. 96; 51 L.J., P.C. 11, shews that there may be cases where the statute law relates to property and civil rights in the Province and not amount to a regulation of trade and commerce, and, in my opinion, the challenged legislation in the present case cannot be said to be in its nature a regulation of trade and commerce, and that the legislation is competent and *intra vires* of the Legislative Assembly of British Columbia as being within the meaning of the exclusive powers conferred upon the Provinical Legislature, namely, under section 92, Nos. (2), (13), (16), namely, (a) direct taxation within the Province in order to raise a revenue for Provincial purposes; (b) property or civil rights in the Province; and (c) generally, all matters of a merely local or private nature in the Province (also see *Municipal Corporation of City of Toronto* v. *Virgo* (1896), A.C. 88; *Attorney-General of Manitoba* v. *Manitoba Licence Holders' Association* (1902), A.C. 73; *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (1896), A.C. 348; *City of Montreal* v. *Montreal Street Railway* (1912), A.C. 333; *John Deere Plow Company Limited* v.

Wharton (1915), A.C. 330; *Tennant* v. *Union Bank of Canada* (1894), A.C. 31; *Quong-Wing* v. *Regem* (1914), 49 S.C.R. 440 at pp. 444-5 *per* Fitzpatrick, C.J.; *The Canadian Southern Railway Company* v. *Jackson* (1890), 17 S.C.R. 316; *Smylie* v. *The Queen* (1900), 27 A.R. 172; *City of Montreal* v. *Beauvais* (1909), 42 S.C.R. 211; *Smith* v. *City of London* (1909), 20 O.L.R. 133; *Beardmore* v. *City of Toronto* (1910), 21 O.L.R. 505).

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

EBERTS, J.A.: This is an appeal from the judgment of Mr. Justice CLEMENT, in a case in which the plaintiff claimed for a declaration that he was under no obligation to comply with the demand of the Liquor Control Board made by virtue of resolution 2079 of the Board, passed under the provisions of section 55 of the Government Liquor Act, Cap. 30, B.C. Stats. 1921, for payment of $11 in respect of a case of whisky purchased in the Province of Alberta, and imported by plaintiff into British Columbia.

The above action was dismissed. Mr. *Davis* contended (1) that section 55 of the Government Liquor Act and regulations 79 passed thereunder, were *ultra vires*; (2) that the said Act was contrary to the provisions of section 121 of the British North America Act; (3) that the legislation was a matter of trade and commerce.

The incidence of this tax is equal in all cases of liquor held for consumption within the Province, whether bought from a Government vendor or purchased outside the Province, that is to say, if purchased from a Government vendor, a certain addition is made to the cost price paid by the Government as representing profit upon the transaction. If purchased outside the Province, a similar addition is made to the cost price and imposed upon the purchaser of such liquor, so that whether bought from the Government vendor within or an independent vendor without the Province, the cost is the same to the person holding such liquor for consumption, within the Province; in the latter case the addition is made up by means of this tax in question by virtue of section 92, No. 2, British North America Act, and levied directly upon the person so holding

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such liquor, the impost of ten per cent. being merely, in my opinion, a measure enacted by way of additional security for effectuating the policy of the Act, whereby complete supervision and control of liquor to be consumed within the Province may be exercised.

I would dismiss the appeal.

Appeal dismissed, Martin, J.A. dissenting.

Solicitors for appellant: *Davis & Co.*
Solicitor for respondent: *W. D. Carter.*

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Criminal law—Intoxicating liquors—Keeping for sale—Conviction—Government Liquor Act, 1921—Validity—Trade monopoly—Revenue—R.S.B.C. 1911, Cap. 78, Sec. 29—B.C. Stats. 1921, Cap. 30, Sec. 26—R.S.B.C. 1911, Cap. 1, Sec. 41—B.C. Stats. 1915, Cap. 59, Sec. 101.

The Government Liquor Act, 1921, which vests in the Liquor Control Board (constituted under said Act) the administration of the Act including the general control, management and supervision of all Government liquor stores is *intra vires* of the Provincial Legislature (MARTIN, J.A. dissenting).

Per MACDONALD, C.J.A.: The Province has power to control the liquor traffic and the revenue derived from its operation is only an incident thereto.

Per MCPHILLIPS, J.A.: The policy of the Act was the abatement of a social evil and the fact that a revenue was derived in administering the Act did not invalidate it.

An objection taken on appeal from an order affirming a conviction under the Government Liquor Act, that the efficacy of the proclamation bringing the Act into force was destroyed as it recited the order in council authorizing it, was held to be met by section 41 of the Interpretation Act, also the objection that the proclamation was not proved on the trial was met by section 101 of the Summary Convictions Act, 1915.

Statement

APPEAL by accused from the order of LAMPMAN, Co. J., of the 1st of November, 1921, dismissing an appeal from the con-

viction of the accused by the acting police magistrate at Victoria on a charge of keeping liquor for sale in his premises. The accused's premises in Victoria were raided by police officers on the 13th of August, 1921. They found in one room one bottle of gin, one bottle of whisky and a further bottle partially filled with whisky; also six dozen bottles of beer in a barrel and four dozen in an adjoining room. There was evidence of three men buying three glasses of whisky and three bottles of beer. Evidence of the Liquor Control Board was allowed in to shew that between the 29th of June and the 27th of July following, 70 dozen bottles of beer were purchased by the accused and consumed on the premises. Nine men were on the premises when the raid took place. Doubt was expressed in the Court below as to the evidence of the men who were served with liquor, but the quantity of liquor on the premises pointed to one inference only, *i.e.,* that it was kept for sale. The accused appealed on the grounds that there was no evidence to sustain the conviction, that the Liquor Act is *ultra vires* of the Legislative Assembly, and that the term "liquor" does not include "beer" and that therefore the reason for the decision of the Court below would be eliminated.

Statement

The appeal was argued at Victoria on the 12th of February, 1922, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Lowe, for appellant: Until proclamation the Act is not in force. We are subject to the Evidence Act, section 29 of which provides for mode of proving proclamations. As to distinction between Lieutenant-Governor and Lieutenant-Governor in Council see *Lenoir* v. *Ritchie* (1879), 3 S.C.R. 575. There is no evidence of a proclamation or proof of same. The case was closed without putting it in. As to the issuing of a proclamation see Halsbury's Laws of England, Vol. 7, p. 16, par. 18. The Interpretation Act cannot override a special Act: see *Re Lambert* (1900), 7 B.C. 396; *Richards* v. *Wood* (1906), 12 B.C. 182; *Rex* v. *Garvin* (1909), 14 B.C. 260 at p. 264; *Rex* v. *Sung Chong, ib.* 275 at p. 277. The prisoner should receive the benefit of any doubt: see *Rex* v. *Smith* (1916), 23 B.C. 197 at p. 201; *Morin* v. *Reginam*

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(1890), 18 S.C.R. 407 at p. 426. The learned judge was in error in drawing the inference he did owing to the amount of liquor on the premises. The liquor was obtained regularly: see *Rex* v. *Kozak* (1920), 47 O.L.R. 378; *Rex* v. *Lemaire* (1920), 48 O.L.R. 475. Next there is no offence in keeping beer for sale as it does not come within the term "liquor." "Beer" is dealt with specially, and liquor is dealt with specifically. Section 45 shews this to be the case. The accused is entitled to the benefit of the doubt on the finding of the learned judge as to the liquor alleged to have been sold on one occasion: see *Rex* v. *Nat Bell Liquors Ltd.* (1921), 56 D.L.R. 523; *Rex* v. *Kennedy* (1921), 60 D.L.R. 573; *Rex* v. *McKay* (1919), 46 O.L.R. 125; *Rex* v. *Barb* (1917), 35 D.L.R. 102. There is the distinction between "getting" and "keeping for sale": see *Rex* v. *Walter Moore* (1917), 51 N.S.R. 51; *Rex* v. *Nero* (1914), 26 O.W.R. 703; *Rex* v. *Milkins* (1911), 18 O.W.R. 137.

Argument

Higgins, K.C., on the same side: The Liquor Control Act is unconstitutional: (1) The Province cannot carry on trade for a revenue; (2) granting the Province may regulate or prohibit any trade it cannot do so by going into trade for revenue, it being in contravention of the British North America Act; (3) for the Province to receive a revenue from trade it can only be done by direct taxation or licence. The Act is a commercial venture: see *Attorney-General of Manitoba* v. *Manitoba Licence Holders' Association* (1902), A.C. 73. The Government is carrying on this trade. You can take judicial notice of proceedings in the House of Parliament: see Halsbury's Laws of England, Vol. 13, p. 492, par. 682; *Lake* v. *King* (1668), 1 Wm. Saund. 131; *Attorney-General* v. *Bradlaugh* (1885), 14 Q.B.D. 667. Nothing can be done outside the jurisdiction given: see *Reg.* v. *Burah* (1878), 3 App. Cas. 889 at p. 905; *Attorney-General for the Commonwealth of Australia* v. *Colonial Sugar Refining Company, Limited* (1914), A.C. 237 at p. 254. On the construction of the statute see *Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. 575 at p. 580; *Russell* v. *Reginam* (1882), 7 App. Cas. 829; *Hodge* v. *Regina* (1883), 9 App. Cas. 117; *Attorney-General*

for Ontario v. *Attorney-General for the Dominion* (1896), A.C. 348; *Brewers and Maltsters' Association of Ontario* v. *Attorney-General for Ontario* (1897), A.C. 231; *Royal Bank of Canada* v. *Regem* (1913), A.C. 283 at p. 287; *Dobie* v. *The Temporalities Board* (1882), 7 App. Cas. 136 at p. 152. They cannot confiscate trade any more than revenue. This is not taxation at all: see *Attorney-General for Quebec* v. *Queen Insurance Company* (1878), 3 App. Cas. 1090 at p. 1098. On the interpretation of "tax" see *United States* v. *Railroad Company* (1872), 17 Wall. 322. As to property and civil rights see *City of Montreal* v. *Montreal Street Railway* (1912), A.C. 333 at p. 342; *John Deere Plow Company, Limited* v. *Wharton* (1915), A.C. 330; *Great West Saddlery Co.* v. *Regem* (1921), 2 A.C. 91; 90 L.J., P.C. 102 at p. 115. The Act itself provides for profit: see *Reg.* v. *Burah, supra,* at p. 905. It all comes down to a question of the object and intent of the Act. The Dominion has power to regulate liquor trade and this Act interferes. The right to trade is absorbed by the Province.

Argument

C. L. Harrison, for respondent: The Act is to control and confine the sale of liquor: see *Gold Seal Ltd.* v. *Dominion Express Co.* (1920), 2 W.W.R. 761; *Canadian Pacific Wine Co.* v. *Tuley* (1921), 2 A.C. 417; *Attorney-General of Manitoba* v. *Manitoba Licence Holders' Association* (1902), A.C. 73. On the validity of the Act see *In re Army and Navy Veterans in Canada* (1921), 30 B.C. 164.

Lowe, in reply.

Cur. adv. vult.

10th March, 1922.

MACDONALD, C.J.A.: The proclamation which brought the Act into effect recites an order in council authorizing it, and this it was submitted by counsel for the appellant, destroyed the efficacy of the proclamation. In view of section 41 of the Interpretation Act, Cap. 1, R.S.B.C. 1911, this contention fails.

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The next point urged was that the proclamation was not proved at the trial. This objection is met by section 101 of the Summary Convictions Act, being Cap. 59 of the statutes of 1915.

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The principal objection, however, was that the Liquor Act itself is *ultra vires*. It was contended that it is a revenue Act imposing indirect taxation and therefore beyond the competence of the Provincial Legislature. In my opinion the tax imposed is a direct tax: *Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. 575; *Workmen's Compensation Board* v. *Canadian Pacific Railway Company* (1920), A.C. 424. That revenue is derived from its operation is only an incident. Whether or not the Province would have power to undertake, for profit, the liquor business to the exclusion of all others is a question which I do not find it necessary to decide. If I am right in thinking that the Province has the power to control the liquor traffic and that the Liquor Act effects this control by vesting in a board of control under Provincial authority the exclusive sale of liquor within the Province, then I think that it is in the same category as the Prohibition Act which it replaced. That Act prohibiting the sale of liquor for beverage purposes was declared to be *intra vires* of the Provincial Legislature by the Privy Council. Incidentally a very considerable revenue was made under that Act, but that fact did not render it *ultra vires*. The present Act is wider in its scope than the Prohibition Act was, it permits the sale of liquor for beverage purposes as well as for medicinal purposes, but this sale is for the purpose of controlling the traffic, and is just as much within the competence of the Provincial Legislature as was the Prohibition Act, which exercised a more stringent control, it is true, but nevertheless was passed for the like purpose.

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The case was also argued on the merits, it being contended that there was no evidence to sustain the conviction. The evidence, in my opinion, was ample, and on this ground also the appeal must be dismissed.

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MARTIN, J.A.: This is an appeal from the conviction of the appellant for keeping liquor for sale contrary to section 26 of the statute of this Province entitled An Act to Provide for Government Control and Sale of Alcoholic Liquors, Cap. 30 of 1921.

Three objections to the validity of the conviction are raised, the first being that the said Act is *ultra vires* of the Provincial

Legislature, and as this goes to the root of the whole matter, it requires primary consideration. Two main grounds are advanced in support of this submission of *ultra vires*: the first being that the real and unconstitutional object of the statute is to raise a revenue indirectly for Provincial purposes contrary to section 92, No. 2, of the B.N.A. Act, under the professed intention of restricting, *i.e.*, regulating, the liquor traffic under section 92, No. 13, of said Act; and the second being that the Province is not authorized by said Act to engage in any trade or business, and therefore cannot engage in trade even in the professed exercise of any power to regulate or restrict trade that it may possess.

As to the first: In order to arrive at the real intention it is necessary, as was said by the Privy Council in *Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. 575 at p. 583; 56 L.J., P.C. 87, to "consider the probabilities of the case [and] the frame of the Act," and also to apply those tests mentioned in *Great West Saddlery Co.* v. *Regem* (1921), 2 A.C. 91; 90 L.J., P.C. 102; (1921), 1 W.W.R. 1034, which I cited in my judgment in *Little* v. *Attorney-General for British Columbia* [*ante* p. 84] (wherein judgment was pronounced this day), and I refer to that judgment because it contains a consideration of said Act in certain aspects which are essential to this case. I there came to the conclusion, for reasons given, which I shall not repeat here, that it was the intention of said Act to establish a Government monopoly in the sale of liquor within the Province and, to secure that end, to illegally suppress and prohibit the import trade for internal Provincial consumption by means of a tax imposed to effect that object. That illegality, however, does not extend to the invalidation of the whole Act, because the illegal power could be severed and restricted to importation alone (*Great West Saddlery* case, *supra*, p. 1056), but the objection before us affects the validity of the whole Act and so cannot be severed. To reach a conclusion I have again carefully scrutinized every section of the Act and in particular the sections so much relied upon by Mr. *Higgins*, *viz.*, 107 and 108, as follows:

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"107. From the profits arising under this Act, as certified by the Comptroller-General from time to time, there shall be taken such sums as

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may be determined by the Lieutenant-Governor in Council for the creation of a Reserve Fund to meet any loss that may be incurred by the Government in connection with the administration of this Act, or by reason of its repeal.

"108. (1.) The net profits remaining from time to time after providing the sums required for purposes of the Reserve Fund shall be disposed of as follows:

"(*a.*) One-half of the net amount shall be paid into the Consolidated Revenue Fund for the public service of the Province; and

"(*b.*) One-half of the net amount shall be apportioned and paid to the several municipalities in the Province in proportion to their respective population, and of all moneys so paid to each municipality one-half thereof shall be placed to the credit of a special account in the municipal treasury, and shall be paid thereout only for maintaining or granting aid to hospitals in that municipality, or for such other purposes of municipal expenditure as may be approved by the Lieutenant-Governor in Council."

It is to be observed that by section 105 permit fees are excluded from profits and form part of the general revenue, and that while section 106 also speaks of the "profit and loss" to be shewn in the semi-annual balance sheet and statement directed to be prepared by the Board for the Legislature, yet that can only be in a book-keeping sense, because in the case of a business so notoriously and exceptionally lucrative as the liquor business has been in this Province, even in the face of competition, nothing less than a great profit could possibly be expected when all competitors have been suppressed and a complete monopoly established; only by mismanagement (or worse) of so gross a kind as to be inconceivable could there be a loss in such exceptionally favourable circumstances. As to any loss in the administration of the Act, the loss referred to in section 107 or what may be caused by its repeal, that could not in practice be considerable, because the chief danger of loss would be from fire, which should be covered by insurance, and as to that from repeal, the stock of liquors could always be sold off profitably and the premises purchased or leased for the business would be available for other business purposes if ordinary business judgment has been shewn in their selection. But the question of loss becomes merely academic in view of what has in fact happened, and is to happen (according to the Legislative estimates), because the expected great profits have in part already been and are continuing to be realized, as is proved by the fact that as a result of the first three and a half

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months' business the sum of about $543,000 has (as is a matter of public knowledge) been received as profit out of our small population of 523,369, according to the recent census (despite those heavy initial expenses of establishment which are incidental to every business conducted on a great scale like this), and applied to the reserve fund and distributed among the municipalities as the Act directs. What the profit will be for the next period is a matter of estimation, but it will unquestionably be great, and in the statement of the revenue for the fiscal year ending March 31st, 1922, in the Supply Act of 1921 (1st Sess.), Cap. 61, p. 492, it is estimated at $2,500,000 under the item "Government Liquor Act—Profit on Liquor Sold," etc., and the same estimate of profit is made for the coming fiscal year ending March 31st, 1923, in the Supply Act of December 3rd, 1921, Cap. 46 (2nd Sess.), p. 142, so it is thus seen that if ordinary business advantage be taken of the opportunity afforded by the monopoly, an immense revenue will be realized so long as the system prevails, and it must prevail for at least the considerable period covered by the present estimates.

Under the former British Columbia Prohibition Act of 1916, Cap. 49, the estimated profits for the fiscal year ending March 31st, 1921, on the restricted sale of liquor for special purposes only, and unquestionably "necessarily incidental" to the lawful exercise of the powers duly conferred by that statute, were only $25,000 (Supply Act, 1920, Cap. 88, p. 435), and this great difference illustrates clearly the fiscal result of the practically unrestricted sale of "controlled" Government liquor.

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An examination of said estimates for 1923 shews that this item of $2,500,000 profit on sales only, is the largest in the receipts of the Province with the exception of the income tax ($3,000,000) and being all profit as the result of the operations of a distinct statutory Board, *viz.*, the Liquor Control Board (sections 4 and 92 *et seq.*), there is no countervailing charge against it for departmental administration such as the other items of revenue are subject to, with immaterial exceptions.

The real intention of an enactment is often manifested by its results and, to my mind, there is no escape from the infer-

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ence obviously to be drawn from the amount of revenue already derived and the very conservative estimates for the future up to March 31st, 1923, *viz.*, that the Act was passed to obtain a revenue and is being maintained with the settled intention of retaining that great net revenue of $2,500,000 from this liquor business out of a total estimated Provincial revenue of $19,000,000 from all sources. It is, of course, largely a question of degree, because it would be said in answer to the present challenge, that if no revenue were being derived there could be no indirect unlawful intention to raise it, but here what has already happened and what is practically assured for the future, bear so great, not to say startling, proportion to the general revenue, that I am driven to the conclusion that the Act is intended to do just what it has done and will continue to do while it remains in force, *viz.*, indirectly raise a great revenue, and indeed the Legislature expressly declares its intention to do so in the most solemn manner by making the said statement of its expected profits in its estimates, and it cannot be heard to impeach its own declaration respecting the raising of public revenue upon which the credit of the Province is based.

It must be borne in mind that the present Government Liquor Act is of an essentially different nature from the said preceding British Columbia Prohibition Act of 1916, which this Court held was *intra vires* in *Rex* v. *Western Canada Liquor Co.* (1921), [29 B.C. 449]; 2 W.W.R. 774, and it was upheld by the Privy Council in *Canadian Pacific Wine Co.* v. *Tuley* (1921), 2 A.C. 417; 90 L.J., P.C. 223; (1921), 3 W.W.R. 49. That Act was undoubtedly passed with the sole intention to prohibit, in the exercise of powers conferred by section 92, No. 16, of the B.N.A. Act (as a "matter of local and private interest within the Province"), all sales and consumption of liquor (except in the few cases specified in section 4 (*a*), *viz.*, "for medicinal, mechanical, scientific and sacramental purposes") other than such inter-provincial transactions and importations thereunder as were unavoidably permissible under Federal powers. But the object of the present Act is exactly the contrary, being to allow once more the sale of liquor to the

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public generally, and unlimited in quantity if so desired, but only after the Government had obtained sole control of it by suppressing private persons or companies from engaging in it as formerly, and to more effectually secure that object the competition of rival extra-provincial firms by means of importation for private consumption was got rid of by means of the illegal (in my opinion) tax already considered.

I emphasize this point because, with all due respect, it seems to have been overlooked in certain quarters that while certain things may be lawfully done as being "necessarily incidental" to the lawful prohibition of the liquor traffic, those same things may not be incidental to carrying on the business of selling liquor by the Government (assuming it can lawfully be done), which is fundamentally antagonistic to prohibition and restriction.

The cumulative expression "control and sale," in the title of the Act, is clearly not used in the sense of restricting the supply of liquor to those who wish to buy it, because by means of an unlimited permit, obtainable under section 11 as of right for a fee of $5 by all adult persons of both sexes who are residents of one month's standing (excepting, of course, Indians, who are wards of the Crown Federal, section 36), such persons are entitled to buy as much liquor as they please and consume it privately (and give it to their children) but not in a public place, section 33, or other places prohibited by sections 29 and 43. And to meet the various wishes of various classes of the public, various kinds of limited permits are granted for lesser quantities and periods at corresponding prices so that everyone, including temporary residents and sojourners, can, as of right, get as much or as little liquor as he or she wants. Hence "control" means here, first, the appropriation, and second, the commital of the entire trade to a sole authority which alone shall have the power to carry on the business of selling it and solely reap the profit. The only essential distinction in principle between the old Liquor Licence Act, Cap. 142, R.S.B.C. 1911, and the present one, is that, speaking generally, under the former the private vendors were licensed to sell liquor in their licensed premises to the general public to an unlimited extent,

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while under the latter permits (which are a form of licence) are granted to the public to buy liquor to an unlimited extent from the Government stores, *i.e.*, in the one case the vendor is licensed under a heavy fee, in the other the consumer under a light one. Of course in each Act there are found similar provisions appropriate to the varying circumstances (some of which are noted in *Rex* v. *Western Canada Liquor Co., supra,* at p. 777) for regulating sales, as to time, place, etc., and the interdiction of certain persons, and penalties of varying severity are imposed for breaches, the most severe, and usually disastrous one, being the cancellation under the old Act of the licence for the hotel premises, which practically meant their ruin. The other feature now meriting notice is that more regulations of a certain kind were required under the old Act because the many licensed vendors were subjected to more supervision than is now necessary when the Government as vendor is carrying out its own laws, but, on the other hand, there are many more regulations under the new Act relating to the very much larger number of licensees of a new kind, *i.e.*, the customers of the Government.

In his argument the counsel for the respondent did not take the ground that the regulation of the trade was being attempted but submitted that it was being restricted and the revenue derived was only incidental to that restriction, and that if the

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Province could prohibit the sale by others it could sell itself, which however does not at all follow under the scheme of the B.N.A. Act, which will be considered later. I do not think that where the Government extinguishes a certain trade by prohibiting those engaged in it from carrying it on, and then converts the sale of the commodity in question into a Government monopoly, that then it could properly be said that the trade, which in the ordinary sense of private business enterprise and open competition free to all the lieges had ceased to exist, was being "regulated," because there was no longer any trade (which is composed of buying and selling by the general public) to regulate, the Government having extinguished it and become sole master of the situation—that proceeding is not regulation, but extinction followed by monopoly. See the

principle laid down in *Municipal Corporation of City of Toronto* v. *Virgo* (1895), 65 L.J., P.C. 4; (1896), A.C. 88, followed in *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (1896), A.C. 348; 65 L.J., P.C. 26. But of course it may be that the Government has power by "controlling and selling" to create a monopoly, and if so, such a power would properly be exercised independent of regulation, and that aspect of the matter will be considered later.

The power of a Province to prohibit dealing in liquor is based upon the principle set out in *Attorney-General for Ontario* v. *Attorney-General for the Dominion, supra,* to cure a local evil, upon which their Lordships said, pp. 354-5:

"A law which prohibits retail transactions and restricts the consumption of liquor within the ambit of the Province, and does not affect transactions in liquor between persons in the Province and persons in other Provinces or in foreign countries, concerns property in the Province which would be the subject-matter of the transactions if they were not prohibited, and also the civil rights of persons in the Province. It is not impossible that the vice of intemperance may prevail in particular localities within a Province to such an extent as to constitute its cure by restricting or prohibiting the sale of liquor a matter of a merely local or private nature, and therefore falling *prima facie* within No. 16. In that state of matters, it is conceded that the Parliament of Canada could not imperatively enact a prohibitory law adapted and confined to the requirements of localities within the Province where prohibition was urgently needed."

By "prohibition" their Lordships meant, of course, practical "abolition," which is the expression, "restriction or abolition," they use later on, p. 365, and the appellant's counsel submits that a genuine intention to cure the "vice of intemperance" cannot be extracted from a statute which admittedly does not prohibit, but, on the contrary, affords facilities for unlimited supply by unlimited individual licences (called permits); in other words, a return in principle to the old licensing system but with the additional and illegal object of obtaining, apart from legal licence fees, an additional indirect revenue from the profits of the monopoly it has established to attain that end. This aspect of the matter merits weighty consideration, and it is open to grave question whether the evil is not "cured" but really intensified because of the fact that the liquor business is put on a more attractive plane to the people owing to the encouragement held out to increased consumption by a forced

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profit-sharing plan with the public at large, as well as consumers, through their municipalities and their Government's revenue, and the further fact that the deterring stigma formerly attached to the traffic when in private hands is now removed since it is invested with the prestige of Government sanction and supply. In this connection it was suggested during the argument that the effect of the present Act has been to decrease the drunkenness caused by illicit transactions that, as a matter of common knowledge, recently existed despite the penalties of the late British Columbia Prohibition Act, but in the total absence of statistics it is impossible to speak with any comparative certainty on this point, particularly because, unhappily, it is a matter of equally common knowledge that the same regrettable state of affairs exists today, as might indeed have been expected in the light of economic history, because the establishment of any state monopoly of trade, be it of salt, sugar, tobacco, or otherwise, is, with its attendant high prices, inevitably followed by those illicit transactions which the monopoly itself invites. While it cannot be gainsaid that the present Act continues the suppression (introduced by the former British Columbia Prohibition Act) of some of the worst evils of the old licensing system, such as the abolition of the bar, yet that is no legal justification for selecting a way for so doing which involves a breach of the B.N.A. Act respecting revenue by insisting upon obtaining profits as well as licence fees out of its control of the traffic.

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It must, however, be clearly understood that if the Province has the power to create this trade monopoly, then the way it chooses to exercise it is not open to review or even comment by this Court, however much many people who are not prohibitionists may conscientiously strongly object to becoming forced participants in such a traffic; but where the power is challenged by one who is suffering from its exercise, upon the ground that what is really being attempted is unauthorized, then, as has been noted, to ascertain the real intention "the probabilities of the case" must be carefully considered and weighed in all their aspects in the light of the facts in proof, and also those which appear in the statutes, and those which are matters of common

knowledge of which judicial notice must be taken; *Cf. e.g., Welch* v. *Kracovsky,* 27 B.C. 170; (1919), 3 W.W.R. 361; *Rex* v. *Lachance,* 30 Man. L.R. 432; (1920), 2 W.W.R. 624; 33 Can. Cr. Cas. 170; and *In re Price Bros. and Company and the Board of Commerce of Canada,* 60 S.C.R. 265 at p. 279; (1920), 2 W.W.R. 721. A leading example of the real intention of the Legislature, and not the professed, being extracted from its legislation is to be found in the well-known case from this Province of *Union Colliery Co. of British Columbia* v. *Bryden* (1899), A.C. 580; 68 L.J., P.C. 118; 1 M.M.C. 337, as explained in *Cunningham* v. *Tomey Homma* (1902), 72 L.J., P.C. 23; (1903), A.C. 151 at p. 157, wherein the Privy Council

"came to the conclusion that the regulations there impeached were not really aimed at the regulation of coal mines at all, but were in truth devised to deprive the Chinese, naturalized or not, of the ordinary rights of the inhabitants of British Columbia," etc.

The authorities cited in the *Little* case, *supra,* shew that the intention to exercise powers must be lawful and single, and, if so, effects which are "necessarily incidental" to that exercise are not *ultra vires,* but the power is not saved where there is a dual intention, one being legal and the other illegal. In the present case I have reached the conclusion after prolonged, indeed I may say, anxious, consideration of it, in view of its exceptional public importance, that there is, even in its most favourable aspect, at least a dual intention embodied in the statute, the illegal and very important one being that which aims at indirectly raising a great revenue from the "control and sale" of liquor and therefore as it is not severable in this respect, the Act is *ultra vires* as a whole and the conviction thereunder should be quashed and the appeal allowed.

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Then as to the second point, that the Province is not authorized by the B.N.A. Act to engage in trade or business and therefore the Act in question which professes to give it that power is *ultra vires.* Now, when such a question arises, it was said by the Privy Council in *Citizens Insurance Company of Canada* v. *Parsons* (1881), 7 App. Cas. 96 at p. 109; 51 L.J., P.C. 11, that:

"The first question to be decided is, whether the Act impeached . . . . falls within any of the classes of subjects enumerated in sect. 92, and

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assigned exclusively to the Legislatures of the Provinces; for if it does not, it can be of no validity, and no other question would then arise. It is only when an Act of the Provincial Legislature *prima facie* falls within one of these classes of subjects that the further questions arise, *viz.*, whether, notwithstanding this is so, the subject of the Act does not also fall within one of the enumerated classes of subjects in sect. 91, and whether the power of the Provincial Legislature is or is not thereby overborne."

I therefore proceed to inquire if such a power is so enumerated in section 92. The only subsection of it which directly authorizes the sale of property and, inferentially, the carrying on of business in its disposal is No. 5, *viz.*:

"The management and sale of the public lands belonging to the Province and of the timber and wood thereon."

That undoubtedly authorized the Province to go into land and timber business, but to the extent only of its own possessions, and derive a profit therefrom.

Then No. 7 confers powers for

"The establishment, maintenance, and management of hospitals, asylums, charities, and eleemosynary institutions in and for the Province, other than marine hospitals."

Seeing that, *e.g.*, many private hospitals are conducted as business ventures and are undoubtedly profitable, I can see no legal reason why a profit should not be derived from Government hospitals, if possible, since the Province is authorized to establish and manage them; and I suppose it is possible that some of the other public institutions mentioned might, in specially favourable circumstances, become more than self-sustaining and hence a source of revenue from which the public exchequer could clearly benefit under this subsection.

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Then No. 10 authorizes

"Local works and undertakings other than such as are of the following classes:

"(*a.*) Lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the Province with any other or others of the Provinces, or extending beyond the limits of the Province;

"(*b.*) Lines of steamships between the Province and any British or foreign country;

"(*c.*) Such works as, although wholly situate within the Province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the Provinces."

This expression "works and undertakings" clearly, I think, relates to works of construction in the way of transportation,

communication, and public utilities, *e.g.*, highways, railways, canals, telegraphs, telephones, power conservation and transmission, bridges, wharves, local ferries (*Cf.* No. 13 of section 91), etc., etc., but I do not understand it as being directed to those ordinary trades which it is the inherent and personal right of every subject to engage in, which view is borne out by *City of Montreal* v. *Montreal Street Railway* (1912), A.C. 333 at p. 342; 81 L.J., P.C. 145, wherein the Privy Council said of this subsection: "These works are physical things, not service." The "incorporation of companies with Provincial objects" is empowered by the next, No. 11. No case has been cited to assist us, because the matter has never before arisen for adjudication.

It is to be noted that even where power is given to the Province to engage in what may be called trade and business (as above noted) or in "works and undertakings," there is no hint of anything that would justify the establishment of a monopoly and the exclusion of the business community from any branch of trade or commerce, which subject is reserved for the Federal Parliament. And if the Province may take over and monopolize the whole trade in the drink of the people, it may do the same with their "food and raiment" and everything else, because no line of demarcation can be drawn, and if it did, the result would be complete Provincial communism, *i.e.*, in brief, the abolition of private rights and their absorption into state (Provincial) control. I can discover nothing in the B.N.A. Act contemplating any such far-reaching result, which is totally at variance with the scheme of Confederation, which aims at a strong and united federation of Provinces built up upon the interlacing distribution of Federal and Provincial powers under sections 91-2, and the reserved and special powers of raising "duties and revenues" conferred by sections 102 and 126 of that Act. Moreover, the removal by any one of, and therefore all of (if they see fit) the Provinces of its or their entire or partial "property" from "liability of taxation" under section 125 would, if adopted to any considerable extent, financially disrupt Confederation, and it is no answer to say that it is very improbable that such an extreme result might

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come to pass, because no one can say what may not happen if the opportunity is created, and once the door is even partially opened to illegal courses of a certain nature, it is impossible to close it, and here, it must be remembered, the door has in fact been opened and one of the largest and most lucrative branches of trade appropriated by the Province; if this can be done, I repeat, in this business, it can be done in all businesses and it is just as illegal in the case of one as in all, and if it is illegal in its extreme end it is just as illegal in its smaller beginning. It is, moreover, a fair deduction that the B.N.A. Act not only never contemplated, but intended to guard against the particular or general engagement of a Province in mercantile pursuits, from the fact that it considered it necessary to confer the power in the special cases already enumerated, and even in the case of lands and timber, limited the power to its own Provincial property.

It is to be observed, as was, I think, in the main, correctly stated (subject to exceptions) in the argument of Sir R. Finlay in *Royal Bank of Canada* v. *Regem* (1913), A.C. 283 at p. 286; 82 L.J., P.C. 33; 23 W.L.R. 315; 3 W.W.R. 994, that the powers of a Province to raise money are expressly limited by the B.N.A. Act to four specified classes under section 92, *viz.*: direct taxation, under No. 2; borrowing on its sole credit, under No. 3; management and sale of lands and timber, under No. 5; and licences, under No. 9; to which I would add as exceptions any revenue that might result from business or "works and undertakings" authorized to be carried on under No. 7 and No. 10 as aforesaid, and also any revenue that might be necessarily incidentally derived by way of fees, fines, or otherwise from the other classes of subjects enumerated. But these receipts, directly authorized or incidental, as the case may be, are quite distinct from the revenue that would result from the Province itself engaging in business, to justify which grave departure from constitutional precedent I, for one, shall require some clear authority, and I cannot find it in No. 16 relating to "matters of a merely local or private nature in the Province." It has never been suggested before that this confers a power upon the Province to go into trade and business and create a

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monopoly thereof, and to my mind, and with all due respect, it is a complete fallacy to say that because the Province has the power to prohibit the liquor traffic, it has the further power to engage in it after prohibition. The authorized object of No. 16 may, in my opinion, be completely attained as regards the restraint or regulation of the liquor traffic without the Province entering into that business, but if they cannot, then they must be attained so far as possible for the Province to do so up to that constitutional limitation. I do not enter into the immaterial inquiry as to whether or no the Federal Parliament, with its much wider field of legislation than the Provinces, can engage in business ventures, except to observe that though it has under section 91 the power to "make laws for the peace, order and good government of Canada in relation to all matters" not assigned exclusively to the Provinces, yet by Part VI. of the B.N.A. Act, Parliament, like the Provincial Legislatures, has only those prescribed powers which it derives from the "Distribution of Legislative Powers" conferred by that Act, because, despite the grandoise and misleading statements to the contrary, Canada is still constitutionally and internationally only a dependency of the United Kingdom, *viz.*, a "Dominion under the Crown of the United Kingdom of Great Britain and Ireland," as the preamble of that Act recites, and while it is true that within its limits the Federal Parliament is supreme, yet it is equally true that its area is restricted, as the Privy Council said in *Powell* v. *Apollo Candle Company* (1885), 10 App. Cas. 282 at p. 290; 54 L.J., P.C. 7 (after considering *Reg.* v. *Burah* (1878), 3 App. Cas. 889, and *Hodge* v. *Reginam* (1883), 9 App. Cas. 117; 53 L.J., P.C. 1), *viz.*:

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> "These two cases have put an end to a doctrine which appears at one time to have had some currency, that a Colonial Legislature is a delegate of the Imperial Legislature. It is a Legislature restricted in the area of its powers, but within that area unrestricted, and not acting as an agent or a delegate."

One of the most striking illustrations of the "restricted area" of Federal powers is afforded by the subject of copyright, as to which it is pointed out in Lefroy's Canada's Federal System (1913), 52-3, that though this is a subject-matter over which Parliament is given exclusive jurisdiction by section 91 (23),

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yet that jurisdiction was over-ridden by the Imperial Copyright Act of 1842, as was held in *Smiles* v. *Belford* (1877), 1 A.R. 436; 1 Cartw. 576, and *Routledge* v. *Low* (1868), L.R. 3 H.L. 100 at p. 113; 37 L.J., Ch. 454, and the Imperial Parliament again asserted its right to deal with it by the Copyright Act of 1911, the effect of which is considered in Clement's Canadian Constitution, 3rd Ed., 251 *et seq.*, and in the last-cited authority, at p. 4 *et seq.*, it is said, *sub-tit.* "Imperial Acts extending to Canada":

> "Apart then from the British North America Act, it will be shewn that with reference to various matters of great moment the law in force in Canada is to be found in Imperial statutes."

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And he proceeds to consider a number of them, but it is unnecessary to pursue the subject further, and I have only noticed it because of the way legislation is affected by the misleading idea which prevails in many quarters that this dependent Dominion has the powers of a Sovereign State.

From all the foregoing it follows that, in my opinion, the Act in question is *ultra vires,* and so on this second ground also the appeal should be allowed. Such being the case it is unnecessary for me to express any opinion upon the other grounds that were advanced against the conviction.

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

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MCPHILLIPS, J.A.: I am of the opinion that LAMPMAN, Co. J. had before him ample evidence to find as he did that there had been an infraction of the Government Liquor Act (Cap. 30, B.C. Stats. 1921), and that he rightly affirmed the conviction made by Mr. Alexis Martin, acting police magistrate for the City of Victoria, wherein he found the appellant John Ferguson guilty of unlawfully keeping liquor for sale contrary to the provisions of the Act. With deference to the argument advanced by learned counsel for the appellant, it is clear to demonstration that the Act was duly proclaimed, the requisite proclamation of His Honour the Lieutenant-Governor took place, and at the time the offence was committed the Government Liquor Act was in full force and effect. I do not find it necessary to in detail set forth the reasons for this conclusion, as I cannot, after full consideration, say that any

of the exceptions taken as to the manner and form of the proclamation have merit, the usual and customary procedure was had and taken, founded upon custom, usage and precedent extending over many years during the time of responsible Government in this Province. Then there remains only the point taken by Mr. *Higgins,* the learned counsel for the appellant, that the Act is in its entirety *ultra vires* of the Legislative Assembly of the Province of British Columbia.

The first contention advanced is that the Act is one authorizing the Government to embark in trade for the purpose of raising a revenue. Were it such an enactment, I am far from saying that that would not be admissible. What the subject may do, Parliament may authorize a corporation to do, or, as in the present case, constitute a Liquor Control Board, acting under the Government, to exclusively to all others, carry on, namely, the vending of liquors. The admitted policy of the Act is that of control and the abatement of a local evil; further, it is a matter of merely local or private nature in the Province and within the exclusive power of the Parliament of the Province (Sec. 92, No. 16, B.N.A. Act, 30 Vict., 3). That it interferes with property and civil rights in the Province (Sec. 92, No. 13, B.N.A. Act) is an exception without force, as it is an exclusive power of the Parliament of the Province, and property may be taken and civil rights abrogated or circumscribed if it be done by the utilization of apt words in the statute law, and we find the apt words in the enactment we have before us. If it be that the liquor traffic may be suppressed, it may equally be restricted, and the control may be that of the Government of the Province, if there be the statutory mandate from Parliament, and that we have here. It was held in *Attorney-General of Manitoba* v. *Manitoba Licence Holders' Association* (1902), A.C. 73, that the suppression of the liquor traffic was *intra vires* (Sec. 92, No. 16, B.N.A. Act) notwithstanding that in its practical working it would interfere with Dominion revenue and, indirectly at least, with business operations in the Province, so that there is no force in the contention that the Government Liquor Act drives others out of the trade. To the extent of its provisions, it is undoubtedly

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an interference with and exploitation of the subject out of engaging in a particular business, and to this extent is restrictive of a civil right, but then it is in respect of a matter in which Parliament is paramount. It may be that in the carrying out of the provisions of the Government Liquor Act some revenue may be obtained by the Province, but on the other hand such may not be the case. The subject in business oftentimes fails, so may the Crown, and unquestionably the cost of vending the liquor, with the attendant system of control to abate the existent local evil, will necessitate large outlays. However, even admitting that there will be a large surplus going into the Consolidated Fund of the Province, as do all other moneys collected by the Province, by means of taxation and other imposts derivable from the sale of the natural and other resources of the Province, the revenue derivable is analogous to that derivable from the operation of Provincial railways, hydro-electric power plants (so extensive in the Province of Ontario), and the many other undertakings in the public interest carried on by the Governments of the Provinces, being undertakings of a "merely local or private nature" in the Province (Sec. 92, No. 16), and can it be said that these must be carried on without profit to the Province? I feel constrained to say that the answer must be in the negative. It is a matter, as I have said before, in which the Parliament of the Province is paramount. Lord Macnaghten in the *Manitoba Licence Holders'* case, *supra,* at pp. 77-8, said:

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> "On the other hand, according to the decision in *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (1896), A.C. 348, it is not incompetent for a Provincial Legislature to pass a measure for the repression, or even for the total abolition, of the liquor traffic within the Province, provided the subject is dealt with as a matter 'of a merely local nature' in the Province, and the Act itself is not repugnant to any Act of the Parliament of Canada."

The Provinces have embarked in many undertakings, and as I view the constitutional powers of the Provinces, may do so with impunity so long as they are "of a merely local nature." Let us consider what Lord Hobhouse said in delivering the judgment of their Lordships of the Privy Council in *Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. 575 at p. 588:

> "And they [the Judicial Committee] 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."

This irresistibly establishes that if the Province cannot embark upon the liquor vending business the Dominion must be enabled to do so. In my opinion, this consideration impels me to say, that as the undertaking is "of a merely local nature," that the power to embark in it is vested in the Province. It is instructive generally upon the question of the validity of the Government Liquor Act, and in particular in that the Act is an attempt to cope with a "local evil," to note what Mr. Justice Duff said when considering a statute with analogous moral purpose, namely, in *Quong-Wing* v. *Regem* (1914), 49 S.C.R. 440 at pp. 461-2:

"I shall assume further that (although the legislation does unquestionably deal with civil rights) the real purpose of it is to abate or prevent a 'local evil' and that considerations similar to those which influenced the minds of the Judicial Committee in *Attorney-General of Manitoba* v. *Manitoba Licence Holders' Association* (1902), A.C. 73, lead to the conclusion that the Act ought to be regarded as enacted under section 92 (16), 'matters merely local or private within the Province,' rather than under section 92 (13), 'property and civil rights within the Province.' There can be no doubt that, *prima facie*, legislation prohibiting the employment of specified classes of persons in particular occupations on grounds which touch the public health, the public morality or the public order from the 'local or provincial point of view' may fall within the domain of the authority conferred upon the Provinces by section 92 (16). Such legislation stands upon precisely the same footing in relation to the respective powers of the Provinces and of the Dominion as the legislation providing for the local prohibition of the sale of liquor, the validity of which legislation has been sustained by several well-known decisions of the Judicial Committee, including that already referred to.

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"The enactment is not necessarily brought within the category of 'criminal law,' as that phrase is used in section 91 of the British North America Act, 1867, by the fact merely that it consists simply of a prohibition and of clauses prescribing penalties for the non-observance of the substantive provisions. The decisions in *Hodge* v. *Reginam* (1883), 9 App. Cas. 117, and in the *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (1896), A.C. 348, as well as in the *Attorney-General of Manitoba* v. *Manitoba Licence Holders' Association* (1902), A.C. 73, already mentioned, established that the Provinces may, under section 92 (16) of the British North America Act, 1867, suppress a Provincial evil by prohibiting *simpliciter* the doing of the acts which constitute the evil or the maintaining of conditions affording a favourable *milieu* for it, under the sanction of penalties authorized by section 92 (15)."

The Government Liquor Act is in many of its provisions

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similar to the British Columbia Prohibition Act (Cap. 49, B.C. Stats. 1916), and puts an absolute bar upon all sales of liquor within the Province and other very drastic provisions, notably, there is similarity in the Government Liquor Act to sections 10, 11, 19, 30, 48, 49, 50 and 28, as contained in the British Columbia Prohibition Act. The Government Liquor Act provides for sale within the Province, but the sale may only be made by the Liquor Control Board. The British Columbia Prohibition Act was held to be within the powers of the Provincial Legislature in *Canadian Pacific Wine Co.* v. *Tuley* (1921), [A.C. 417]; 3 W.W.R. 49. The Lord Chancellor (Lord Birkenhead) at p. 51, said:

"Their Lordships are of opinion that it was within the power of the Legislature of British Columbia to enact it. The case is in their opinion governed by the principles enunciated when their decision was given in favour of the Province of Manitoba on the interpretation of sections 91 and 92 of the British North America Act, 1867, in *Attorney-General of Manitoba* v. *Manitoba Licence Holders' Association* (1902), A.C. 73."

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In my opinion the Government Liquor Act is also within the powers of the Provincial Legislature and within the *ratio decidendi* of the *Manitoba Licence Holders'* case. I will not further enlarge upon the considerations that weigh with me in coming to the conclusion that the impeached Act is *intra vires* of the Legislature of the Province of British Columbia, save to say, that my reasons for judgment already given in *Little* v. *Attorney-General for British Columbia* [*ante* p. 84] are applicable to this case as well.

In my opinion the appeal should be dismissed.

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

Appeal dismissed, Martin, J.A. dissenting.

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LEE HOY

Criminal law—Certiorari—Criminal Code, Secs. 226, 227, 228 and 986.

The sale of Chinese lottery tickets in a room used for that purpose constitutes the offence of keeping a common gaming-house within the meaning of section 226 of the Code, although the purchase and marking of a lottery ticket could be described as making a bet within the meaning of section 227 of the Code.

MOTION for writs of *certiorari*. The defendants Ha Joe and Joe Keep were proved to have sold Chinese lottery tickets to detectives of the Victoria police force, the evidence being that on two occasions on visiting the places where the accused were, they were handed Chinese lottery tickets, which they marked by cancelling a certain number of Chinese characters thereon, handing the same back to the defendants Ha Joe and Joe Keep with 10 cents for each ticket. Subsequently a ticket was brought in from outside with a number of the Chinese characters thereon cancelled, this being announced to be the "draw." There was no evidence as to how the draw was made, or who made it, but if a given number of the cancelled characters on the player's ticket coincided with those on the ticket shewing the result of the "draw," a sum of money would be obtained, the amount received increasing with the number of coinciding cancellations. The defendants Ha Joe and Joe Keep sent all marked tickets and money received by them to what they described as "The Company." There was no evidence of anyone winning any money. Both premises were raided by the police and the defendants arrested, the defendant Lee Hoy being alleged to be the doorkeeper, and so liable under section 228, subsection 2, of the Code. The main point argued in all three cases, however, was that the facts disclosed shewed the keeping of a betting-house, as defined by section 227, and that therefore the accused could not be found guilty on the charge of keeping a common gaming-house under section 226. Heard by MURPHY, J., at Victoria on the 17th of February, 1922.

Statement

H. W. R. Moore, for the accused: Section 226 of the Code

Argument

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makes it an offence to keep a common gaming-house, which is defined as a place kept for gain to which persons resort for the purpose of playing any game of chance. Section 227 makes it an offence to keep a common betting-house, defined as a place kept for the purpose, *inter alia,* of receiving money bet upon the results of any game or sport. In *Rex* v. *Mah Sam* (1910), 19 Can. Cr. Cas. 1, the Court, *en banc,* of Saskatchewan, held that keeping a common gaming-house under section 226 and keeping a common betting-house under section 227 are distinct offences. Therefore if the defendants are charged under section 226 and the facts proved indicate an offence under section 227, the defendants are not guilty as charged and the conviction should be quashed. The essence of keeping a common gaming-house as defined by section 226 is that a game of chance must be played therein, and Murray's Dictionary defines game as being "A diversion of the nature of a contest, played according to rules, and displaying in the result the superiority either in skill, strength, or good fortune of the winner or winners." The evidence shews that there were no rules, but the Crown produced a card found on the premises shewing the amounts paid providing a given number of characters were correctly cancelled. What the Crown witnesses did was to bet 10 cents each that the markings on their tickets would coincide with the ticket marked with the result of the draw, the odds paid being greater the more correctly the ticket was marked. This is no doubt a diversion, but it is not a contest, but a bet on the result of a contingency or event, namely, the draw, occurring elsewhere. The exact point has been decided in the State of Victoria, Australia, in the case of *Gleeson* v. *Yee Kee* (1892), 18 V.L.R. 698. Lee Hoy having satisfactorily explained how he happened to open the door, should be released in any event.

Argument

C. L. Harrison, for the Crown: It may well be that the accused could have been charged under section 227, but it does not follow that they cannot also be charged under section 226. Both sections are general in their language, and not infrequently cases like this are found which could be brought within either section. Chinese lottery is unquestionably a game of chance, the term "lottery" being merely a popular term used to desig-

nate the game. This was sworn to by the witnesses. In any event there is a contest between the purchaser of the ticket and the company paying the bets, and the draw is part of the contest. Subsection 2 of section 226 makes it immaterial that that part of the game was not played on the premises raided. Under section 986 it is *prima facie* evidence to find implements of a game of chance: see *Rex* v. *Ah Sing* (1920), 3 W.W.R. 629.

1st March, 1922.

MURPHY, J.: In my opinion the writs of *certiorari* should be refused. Dealing first with the contention that there is no evidence against Lee Hoy I cannot agree. There is direct evidence that he acted as doorkeeper in one instance and there is further evidence that he was seen letting several people in previously. In view of the provisions of sections 296 and 228, subsection 2, of the Code, I think it was open to the magistrate to convict on this evidence. As to the main point, I think the magistrate had evidence before him on which he could hold that a game of chance was going on. *Gleeson* v. *Yee Kee* (1892), 18 V.L.R. 698 does, I think, decide on evidence not distinguishable from the evidence herein that the offence of betting is thereby proven. It does not follow that the same evidence may not prove that a game of chance was being played. Mr. *Moore* cites Murray's Dictionary as shewing that "game" necessarily involves the idea of contest and argues there is here no evidence of a contest. A reference to this work shews "game" defined, *inter alia,* as "a diversion by way of contest," etc. The primary idea therefore under this definition, which I agree is the one applicable to this case if any dictionary is to govern, is that of "diversion," and a reference to the definition of "diversion" in the same work will, I think, shew that the magistrate could well hold that the evidence discloses a "diversion." He might also on the evidence hold that such diversion was "by way of contest." The evidence discloses what I think the magistrate could hold was a guessing match between the person betting and the person who received his money, the guess to be decided by chance. The writs are refused.

Judgment

Motion dismissed.

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Criminal law—Prohibition—Sale of liquor—Bargain—Costs—Crown Costs Act—R.S.B.C. 1911, Cap. 61, Sec. 2—B.C. Stats. 1915, Cap. 59, Sec. 36; 1916, Cap. 49, Sec. 10.

An accused was charged with the sale of liquor under section 10 of the British Columbia Prohibition Act. On the hearing before the magistrate the accused stated he had not sold the liquor but had given it in exchange for services in repairing an automobile. The magistrate then pointed out that on his own statement he came within the section. Accused then changed his plea to one of "guilty" and was fined $400.

Held, on appeal, that on the accused's own statement his action was in contravention of the statute and the conviction was rightly made.

On an application for costs of the appeal by counsel for the magistrate:—

Held, per MACDONALD, C.J.A. and GALLIHER, J.A., that without deciding on the applicability of the Crown Costs Act the difficulty had arisen from the magistrate's interference with the course of trial and there should be no costs.

Per MARTIN and MCPHILLIPS, JJ.A.: That the Crown Costs Act is a bar to any costs being allowed.

Statement

APPEAL by accused from an order of MACDONALD, J. of the 25th of November, 1921, refusing the order absolute for a writ of *certiorari*. On the evening of the 5th of November, 1920, the Provincial constable at Campbell River, on seeing the accused leave his automobile with one Anderson, searched Anderson and found a bottle of whisky on him. Anderson said he got it from Liden. Both men were arrested and Liden was charged with selling liquor under section 10 of the British Columbia Prohibition Act. On the hearing before the magistrate, after the constable and Anderson had given their evidence, Liden said that he had not sold the liquor to Anderson but that he gave him a bottle of whisky in appreciation of Anderson's services in assisting him with repairs to his automobile. The magistrate then pointed out that his statement was damaging to himself under section 10 of the British Columbia Prohibition Act. Liden then changed his plea to one of "guilty." The magistrate then fined him $400. An order *nisi* was granted by MACDONALD, J. on the

8th of December, 1920. At the conclusion of the appeal the question of whether the Crown Costs Act applied to this case was raised by counsel for the magistrate.

The appeal was argued at Vancouver on the 8th of March, 1922, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Gordon M. Grant, for appellant: The allegation was that Liden sold a bottle of whisky. He admits he gave it for services in fixing an automobile, but there was no evidence that there was a previous arrangement or that there was a bargain. Neither does the evidence on the records shew that the offence was committed within the jurisdiction. Judicial notice cannot be taken of this. As to accused's plea of guilty see *Rex* v. *Barlow* (1918), 1 W.W.R. 499; *Rex* v. *Richmond* (1917), 2 W.W.R. 1200. The procedure is laid down in section 36 of the Summary Convictions Act, 1915, and when so laid down must be followed. There was no clear consideration here so as to constitute a sale.

Argument

Wood, for respondent: This is not a case for *certiorari* and the learned judge below was right in so holding.

MACDONALD, C.J.A.: I must say that I have some doubt about this case. The magistrate appears to have departed from the ordinary course of taking the plea of the prisoner and the evidence and then basing his conviction upon the evidence. In the middle of the trial, whether at his suggestion or at the suggestion of the prisoner is a matter of doubt, one saying one thing and the other another, the magistrate and accused got into a discussion as to whether the accused ought to not withdraw his plea and plead guilty. According to the magistrate's story the accused told him that he had not sold the liquor, but had given it in exchange (to use the words of the magistrate in his affidavit) for services. Of course *prima facie* that imports a bargain. He had not sold it as he understood the word "sold," but he had given it in consideration for services, whereupon the magistrate read to him, or pointed out to him section 10 of the Act, stating that what he had done was within section 10, and the accused said, "Well, if that is so I

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might as well plead guilty," which he did. If it were an exchange in the true sense of the word, that is a bargain or exchange of the one thing for the other, then the magistrate may have been quite right in his construction of the section that it was a bargain, it was selling under section 10. I do not say he was, since the point was not taken that an exchange is not a sale. On the other hand, if it were not an exchange but a mere gift without consideration or out of gratitude for something the man had done before, then we should have had to consider whether that was contrary to the Act, whether it was contrary to the Act to make a pure gift of a bottle of liquor; but it is hardly necessary for me to consider that phase of it, because I am basing my judgment entirely upon the evidence of the magistrate. *Prima facie* the evidence of the magistrate means that there was a bargain. It would be, as I have pointed out, an exceedingly dangerous thing to set aside a conviction upon the suggestion that a mistake had been made in the plea, even if we could deal with the question at all. It is a question of whether a mistake has been made. Now *prima facie* there has been no mistake. The appeal must be dismissed.

MACDONALD, C.J.A.

MARTIN, J.A.: I have so clearly indicated my views during the argument that it is unnecessary to repeat them except to say just simply this, that there was no misleading or misstatement here by the magistrate who correctly stated the law to the accused on the evidence as given to him by the accused, and the law was clearly stated to him (accused), and upon that and the facts that he himself had stated (and probably also what he knew in his own mind) the accused elected to plead guilty. In such case there is nothing more to be said.

MARTIN, J.A.

GALLIHER, J.A.: Shortly, I think what the accused did plead guilty to is what we must construe as barter. If so, he was within the Act and was rightly convicted.

I would just like to add a word which has a bearing on what occurred in this case, and that would be that I do not think it is advisable practice for magistrates to follow when they are trying a charge to do other than continue to try that charge. If the man is not convicted on that charge well and good, he

GALLIHER, J.A.

may be convicted on some other charge; but it has given rise to a good deal of misunderstanding here.

McPHILLIPS, J.A.: I am of opinion the appeal must be dismissed. I cannot, in giving judgment, fail to remark upon the somewhat irregular happenings. However, when magistrates throughout the country are so often, as in this case, not legal practitioners they sometimes make mistakes. It is not unreasonable that some errors or mistakes should be made, and therefore that consideration has to weigh with us; but nevertheless the records of the Court are records quite independent of the capacity of those who certify to them, and in this particular case there is the record that the accused was fully apprised of the information and pleaded guilty thereto. Now, if it had been *simpliciter,* whether a sale or a barter took place and the defendant took the advice of the magistrate, it might have become a serious question; but such is not the case. The information was read, and "he [the defendant] then stated that he wished to speak to me outside of the Court-room, which I refused to do and told him that he was not speaking to me personally but to me as stipendiary magistrate. He then asked whether he could change his plea to one of guilty. I told him that he could and he then pleaded guilty, and I imposed the fine." Now, what was it that he wished to say to the magistrate outside? It is not being unduly vivid in imagination to conjure up the idea that statements might have been made to the magistrate more clearly, if it is necessary to say more clearly, to make it apparent that there was an infraction of the statute, and when he could not have that conversation with the magistrate he then exercised his own judgment and decided that he would plead guilty. Upon what facts he decided to plead guilty we cannot say, that is inscrutable; at any rate it is not developed before us. He may have known that there was a possibility of its being developed, and it might have been the establishment of a clear infraction of the statute. I might say though, in passing, that the evidence shews a clear infraction of the statute, upon the defendant's own statement. It cannot be for a consideration, and it does not appear to me that the consideration must be by prior arrangement; it may be by

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subsequent arrangement just as well as prior arrangement; it can be well seen how dangerous it would be that it should be otherwise, especially as we know how elusive transactions are in respect of dealings in liquor. But in any case the main point upon which I proceed is this, he pleaded guilty, and having pleaded guilty, if *certiorari* does lie, there are only two points open, one of jurisdiction and one of fraud in obtaining the conviction.

Now, I do not think there can be any question of want of jurisdiction when you have the plea of guilty, so that is answered; there was jurisdiction.

MCPHILLIPS, J.A.

Then proceeding to the next question which is open, that is fraud. As to this I do not think it is possible to contend that any fraud was perpetrated upon the accused in this case. That is, to my mind, impossible upon the evidence here, and then further a matter to be remembered is that it would be very dangerous indeed if convictions, even of inferior Courts, should be capable of being set aside upon such meagre and scant material. I would, therefore, think that the appeal should be denied. I wish to say that I viewed with satisfaction the carefulness and thoroughness with which counsel for the appellant presented this appeal.

Argument

Wood, on the question of costs: The magistrate is entitled to costs. He is a party and does not come within the Crown Costs Act. The case is distinguishable from the Workmen's Compensation Board who are Crown officers.

Grant, contra: He is a judicial officer appointed by the Crown. The Act was passed largely for the purpose of protecting magistrates in such cases.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I do not decide whether these are Crown costs or not. There is some question of doubt—a very considerable doubt as to whether the Act was meant to apply to the costs of a magistrate or only to costs as to which the Crown was either entitled to receive or even liable to pay the costs. Now in the circumstances of this case, assuming without deciding the applicability of the Crown Costs Act, I would not give costs to this magistrate. I think the difficulty has

arisen from his own interference with the course of the trial and with the prisoner's course, therefore he is not entitled to costs.

MARTIN, J.A.: I think that costs should not be given for the reason that, apart from all others (I am expressing no opinion as to whether or no I should or should not give them apart from the statute), but as I say, basing it on the statute, I think we have no power to give these costs, because the Crown Costs Act prevents it. Here we have an officer, now, in his territory within the statute, acting for the Crown, and also the fact that he is trying this case and is keeping these records in His Majesty's Court—for whom else is he acting? He is not doing it for his own private benefit; he is acting for the Crown in keeping the Crown records. And we find here the Crown coming forward and appearing in the name of His Majesty and justifying and adopting the course of the magistrate. If that is so, for whom else are they all acting? It is true that by compulsion of a higher Court he may be directed to remove his records, and if so, of course he will comply with the order of the Court. That would be his duty. Nevertheless in so complying with the order of the Court he is just as much an officer acting for the Crown as he was in trying the case and in keeping these records, among others, in his possession with the records of his Court. And as I say, the Crown comes here and justifies his proceeding. And as my brother MCPHILLIPS says, there is only one person can represent the Crown here, and that is the counsel for the Crown.

MARTIN, J.A.

GALLIHER, J.A.: No costs. I was perhaps almost too brief in what I said, and lest there might be any misunderstanding of my conclusion there, I am not deciding whether it comes within the provisions of the Crown Costs Act.

GALLIHER, J.A.

MCPHILLIPS, J.A.: I quite agree in saying that in this case no costs can be allowed. The statute itself (the Crown Costs Act) is a complete bar. This statute has been applied so far as to protect the Workmen's Compensation Board, which is constituted a corporation by statute, and they have been held

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to be immune, so that if you wished an illustration of how far the statute has been projected, you have it projected to absolve a corporation, not the Crown. Here we have the King supporting the conviction and the counsel for the King only can be heard here in support of the conviction, as stated by my brother MARTIN, with which I agree; the Crown is sheltered under a parliamentary enactment of protection from paying costs and is also deprived of receiving costs. There is often not much in way of protection to the subject, but the Crown not paying costs cannot receive costs—such is the statutory enactment and the Crown cannot complain when that is the state of the statute law. The reason of the thing is not for the Court, all that the Court can say is that the statute is a complete bar to the giving of any costs, and in this case I cannot say that I have any regrets.

Appeal dismissed without costs.

Solicitors for appellant: *Grant & Grant.*
Solicitor for respondent: *H. S. Wood.*

NORTH AMERICAN LOAN COMPANY, LIMITED v. MAH TEN: WHALEN PULP AND PAPER MILLS, LIMITED, GARNISHEE.

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NORTH AMERICAN LOAN CO. v. MAH TEN

Garnishee—Order by registrar—Affidavit in support—Information and belief—Sufficiency—R.S.B.C. 1911, Cap. 14, Sec. 3.

A garnishee order was made by a registrar under section 3 of the Attachment for Debts Act, the applicant in his affidavit in support swearing merely as to his belief. An application to set aside the order was dismissed.

Held, on appeal, reversing the order of HUNTER, C.J.B.C. (MCPHILLIPS, J.A. dissenting), that under the statute the applicant must swear upon information and belief. There was not a sufficient compliance with the statute, and the order should be set aside.

Per MACDONALD, C.J.A.: Where a form of affidavit is supplied by the statute and the form is followed it is sufficient even where the form varies from the substance of the Act.

APPEAL by defendant from an order of HUNTER, C.J.B.C., of the 30th of January, 1922, dismissing an application to set aside a garnishee order made by the registrar on the 29th of December, 1921. The plaintiff obtained judgment against Mah Ten on the 18th of June, 1917, the total amount due under said judgment when the garnishee order was made being $1,133.67. It appeared by the affidavit filed in support of the motion for garnishee that Mah Ten was usually known as Charlie Sing Chong. On the 12th of December, 1921, Charlie Sing Chong obtained judgment against the Whalen Pulp and Paper Mills, Limited, for $1,547, and this sum was paid into Court under the garnishee order. The affidavit in support of the garnishee order was as follows: Statement

"1. That I am a member of the firm of Ellis & Brown, Solicitors for the plaintiff (judgment creditor) herein and as such have knowledge of the matters and facts hereinafter deposed to.

"2. That on the 18th of June, 1917, the North American Loan Company, Limited, plaintiff in this action, did obtain judgment against Mah Ten, the defendant in this action, for the sum of $910 and costs, which were taxed and allowed at $34.75.

"3. That the judgment together with the taxed costs and together

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with interest on the total sum from the 18th of June, 1917, to this date amounts to $1,133.67.

"4. That the said Mah Ten in his examination as a judgment debtor held on the 26th of September, 1918, did therein swear that he was usually known by the name of Charlie Sing Chong.

"5. I have heard Mah Ten, the defendant in this action, called and referred to as 'Charlie Sing Chong' and I verily believe that the said Mah Ten and Charlie Sing Chong are one and the same person.

"6. That I verily believe that the Whalen Pulp and Paper Mills, Limited, are justly and truly indebted to Mah Ten otherwise known as Charlie Sing Chong in the sum of $1,547.

"7. That I believe that on Monday, the 12th of December, 1921, the said Charlie Sing Chong, whom I verily believe is known in this action as the defendant Mah Ten, did obtain a judgment against the said Whalen Pulp and Paper Mills, Limited, in the sum of $1,547, which said judgment is not for wages or salary.

"8. That the said Whalen Pulp and Paper Mills, Limited, the garnishee herein, is within the jurisdiction of this Court.

"9. I am a director of the plaintiff Company and say that no part of the sum of $1,133.67, being the amount of the judgment and costs and interest at this date obtained by the North American Loan Company, Limited, plaintiff in this action against Mah Ten, the defendant herein has been satisfied, and the whole sum of $1,133.67 now remains due and owing and unpaid."

The appeal was argued at Vancouver on the 24th of March, 1922, before MACDONALD, C.J.A., MARTIN, MCPHILLIPS and EBERTS, JJ.A.

Argument

Martin, K.C., for appellant: The first point is that the style of cause in the garnishing order is not the style of cause in this action under which Mah Ten owed money. There must be strict compliance: see *Joe* v. *Maddox* (1920), 27 B.C. 541; *Hogue* v. *Leitch* (1915), 22 B.C. 10. As to the registrar being *persona designata* see *Richards* v. *Wood* (1906), 12 B.C. 182. If the registrar did not act under the statute the order is a nullity. To be ahead he must comply with the statute; he cannot get a *nunc pro tunc* order now. The affidavit is insufficient in that it does not give the grounds or source of information and belief.

Brown, K.C., for respondent: On the sufficiency of the affidavit see *Gandara* v. *Davison* (1919), 3 W.W.R. 915; *Adams* v. *Adams, Janett & Adams* (1921), 3 W.W.R. 540 and on appeal (1922), 1 W.W.R. 47.

Martin, in reply.

MACDONALD, C.J.A.: I would allow the appeal on the ground that the affidavit does not comply with the statute.

As to the effect of the insertion of the words following the name of the defendant in the style of cause I express no opinion.

But on the other question of what the applicant for the summons must swear to, I find, as the statute says, that he must swear upon information and belief. In this case he has sworn merely as to his belief, but that is not a compliance with the statute. The proceedings before the registrar, if not a nullity, are irregular, and the Court ought to interfere for the purpose of setting them aside. Where a statute requires certain things to be done, I think the Court having supervision over the doing of these things should be somewhat strict in seeing they are done. In other words, we must assume that the Legislature intends what it says; intends that the parties shall do what it says they shall do in order to get relief. The Legislature has said that in order to get the relief which the plaintiff sought for in this case he must make an affidavit of a certain character. I do not think the Court has a right to fritter away what the Legislature says shall be done. It is easy enough for practitioners to follow the form. The Legislature has been emphatic enough to supply a form, and if that form is complied with, that is sufficient; and this the Court has upheld even where the form has varied from the substance of the Act. If you follow the form which is said to be sufficient, that is enough. Now in this case the form was not followed. The usual statement as to information was left out of it; the very statement which the Legislature may have thought was necessary to safeguard the interests of the opposite party. In the case of an examination upon that affidavit the deponent might be asked, "From whom did you receive the information upon which you have made this affidavit?" And he would have to give a satisfactory answer to that question. If that requirement were not in the statute he would simply say, "Well I have sworn to my belief, and I do believe it," and there would be no way of checking him up, as it were, on cross-examination.

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For this reason, and for this reason alone, I would set aside the order.

The appeal is therefore allowed.

MARTIN, J.A.: I am of the same opinion and I do not see that I can add anything to what my learned brother the Chief Justice has said. The only remark I have to make is, I keep an open mind on the addition, the *alias* addition to the name of the defendant. I simply put it this way, it is a dangerous thing to do, an unwarranted thing to do to attempt to interfere with the record by making any addition to it. I should not attempt it myself and I do not think it ought to be done. It is not necessary to go any further than to sound that note of warning.

MCPHILLIPS, J.A.: I would dismiss the appeal; firstly, on the ground that the district registrar, in making the order, was *persona designata* under the statute. That being so, the learned Chief Justice in the Court below was without jurisdiction to set aside the order on any ground; that is, the order for the attachment of the debt. I would support what I have said on the question of *persona designata* by *Richards* v. *Wood* (1906), 12 B.C. 182. The point there was that an assistant or deputy district registrar made the order and made an order which was a nullity. The Full Court held that the district registrar was *persona designata*. However, should I be in error and it is not a case of *persona designata,* I then say that the affidavit is in form sufficient. If we turn to section 3 of the Attachment of Debts Act we will see exactly what has been sworn to. It reads: "A judge or district registrar may, upon the *ex parte* application of any plaintiff or judgment creditor or person entitled to enforce a judgment or order for the payment of money, upon affidavit by himself or his solicitor . . . . [now it is made by the solicitor here] stating, in case a judgment has been recovered or an order made, that it has been recovered or made, and that it is still unsatisfied, and to what amount, or, in case a judgment has not been recovered . . . ." Then going on to where you come to the question of garnishment, "that any other person is indebted or liable to the defend-

ant." It does not say "on information and belief." "That any other person is indebted or liable to the defendant or judgment debtor."

Now, first see whether it satisfied that requirement. When the solicitor makes the affidavit, which he does, and in paragraph 1 says that he has "knowledge of the matters and facts hereinafter deposed to," that paragraph is applicable to every paragraph that follows in the affidavit; and you must read it as preceding every one of the sworn statements of the affidavit. Therefore we have to understand that he has sworn that he has knowledge of the matters and the facts and verily believes that the Whalen Pulp and Paper Mills, Limited, are justly and truly indebted.

Now, as a matter of language, could there be any doubt about the verification of the essential facts? I cannot see any. Section 6 reads:

"The affidavit referred to in section 3 may, as to the indebtedness, obligation, or liability of the third person, be made on the information and belief of the deponent."

That is, it may be made. It is not a matter of obligation that it should be so made, and there is no need for it to be made if the allegation is sufficiently made of the indebtedness.

Now, I cannot see how it can be said with any force that it is not sufficiently made. I often say that the law is in the main common sense, and I certainly, in the discharge of my judicial duty, always feel pleased when I am able to give judgment in accordance with common sense.

MCPHILLIPS, J.A.

I am glad to have before me this case of *Adams* v. *Adams, Janett & Adams* (1922), 1 W.W.R. 47, referred to by Mr. *Brown,* and the judgment of Mr. Justice Beck of the Appellate Court of Alberta, and it seems to me that learned judge has put in very apt words what the meaning of "information and belief" is. He says (p. 51):

"Taking this as the object of the part of the rule under consideration and taking what may be called the popular use of 'information and belief' as equivalent to 'belief' simply, I would hold that the affidavit sufficiently complies with the rule in that respect."

Here we have the words "verily believe" assuredly equivalent to "information and belief."

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In my opinion the learned Chief Justice in the Court below arrived at the right conclusion.

EBERTS, J.A.: I have nothing to add to the remarks of the Chief Justice. I would allow the appeal.

Appeal allowed, McPhillips, J.A. dissenting.

Solicitors for appellants: *McGeer, McGeer & Wilson.*
Solicitors for respondents: *Ellis & Brown.*

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HOOPER v. NORTH VANCOUVER

HOOPER v. NORTH VANCOUVER.

Appeal — Special leave to appeal to Supreme Court — Jurisdiction — Injunction until trial—Set aside on appeal—Substantive right— Can. Stats. 1920, Cap. 32, Sec. 2.

An application for special leave under section 41 of the Supreme Court Act, R.S.C. 1906, Cap. 139, as re-enacted by Can. Stats. 1920, Cap. 32, Sec. 2, to appeal from an order of the Court of Appeal setting aside an order for an injunction until the trial was refused because there had been no disposition of the action. The allowing of an appeal at this stage might be followed by a second appeal, and it is desirable that the action be tried before an appeal be taken to the Supreme Court of Canada (EBERTS, J.A. dissenting).

Statement

MOTION to the Court of Appeal for leave to appeal to the Supreme Court of Canada from the decision of the Court of Appeal of the 10th of March, 1922, allowing the appeal of the defendant and setting aside two orders of MURPHY, J., one of the 17th of November, 1921, granting an injunction restraining the defendant until trial from issuing, honouring, or accepting any passes provided for by a resolution of the Municipal Council of North Vancouver, and the other of the 29th of November following dismissing a motion to dissolve the injunction. The application was made under sections 39 and 41 of the Supreme Court Act, as re-enacted by Can. Stats. 1920, Cap. 32, Sec. 2. A full statement of the case will be found in 30 B.C. 336.

The appeal was argued at Vancouver on the 31st of March, 1922, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Davis, K.C., for the motion: The order of the Court below was for an injunction until the trial. There is no fixed amount involved. We are entitled to special leave under sections 39 and 41 of the Supreme Court Act as re-enacted by Can. Stats. 1920, Cap. 32, Sec. 2.

Mayers, contra: The grounds given favour the case going to trial before an appeal be taken. An appeal is not properly authorized: see *Harbin* v. *Masterman* (1896), 1 Ch. 351 at p. 364; *Standard Construction Co.* v. *Crabb* (1914), 7 W.W.R. 719 at p. 722; Halsbury's Laws of England, Vol. 26, p. 742, par. 1228. The judgment appealed from did not dispose of any substantive right in controversy in the action. It is not a final judgment and there is no appeal: see *The St. John Lumber Company* v. *Roy* (1916), 53 S.C.R. 310; *Lachance* v. *Cauchon* (1915), 52 S.C.R. 223. Under section 36 leave is only given in case of final judgment when the amount involved is less than $2,000. An interlocutory judgment will not be considered. This is not a case in which it should be granted: see *Girard* v. *Corporation of Roberval* (1921), 62 S.C.R. 234.

Argument

Davis, in reply: As to authority the proper steps should be taken as in *Standard Construction Co.* v. *Crabb* (1914), 7 W.W.R. 719 at p. 722. If you have an interlocutory judgment which settles a substantive right it is a final judgment for the purposes of appeal. The 1913 Act (Can. Stats. Cap. 51) changed the definition of "final judgment." Obtaining proper authority is only a question of adjournment. A substantive right is at issue and it is a question of public interest.

MACDONALD, C.J.A.: I think the application should be dismissed. I may say I do not decide the question as to whether this is a final judgment or not since it is not necessary, in my view of the case, to decide that question. The ground upon which I decide is this, that there has been no disposition of the action and, if we therefore were to give leave to appeal now, a

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second appeal later on might be taken. We ought not to encourage multiplicity of appeals. It is desirable that the whole action should be tried before the appeal to the Supreme Court of Canada is taken.

MARTIN, J.A.: That is my view.

GALLIHER, J.A.: I think I must come to the same conclusion, although I am not clear as to which course would involve the most expense, allowing this to go now or dismissing the application. But the chief matter that influences me at the moment is this: that it is an application to us in the exercise of our discretion, and Mr. *Mayers* has submitted that the question as to whether this is a benefit or detriment to the City has never been really tried out. That being the case, it seems to me that the question should be tried out or at all events, it would cause in the end less litigation to have the matter tried out now than to take the other course. I am not so sure but for that feature of the case I might not consider this judgment as a final judgment for purposes of appeal. However, I am not expressing myself definitely on that, and for the reasons I have just stated, I am inclined to agree with what has been said.

GALLIHER, J.A.

MCPHILLIPS, J.A.: I would not accede to the application. I cannot see how it can be contended that this is a final judgment. The case has still to go to trial. In interlocutory matters the decision of the Court of Appeal should in most cases be final, and that has been the expressed view of the Supreme Court of Canada. When there is a final determination of the action, then the whole case goes to the Supreme Court of Canada, but not matters of procedure. In reported decisions the Supreme Court of Canada has withheld from passing upon questions of practice and questions of pleadings. The Supreme Court of Canada cannot well advise itself upon what is the settled practice in the nine Provinces of Canada. In the abstract I do not think that we should grant leave to appeal to the Supreme Court of Canada, because I think we should be granting leave in a case in which that Court would not grant leave if the application were made to it.

MCPHILLIPS, J.A.

EBERTS, J.A.: I would grant the application on the ground that the action itself was for a declaration that the resolution of the City Council of North Vancouver was *ultra vires*. The learned judge finds that the resolution was *ultra vires* and the plaintiffs had the right to bring the action. In the circumstances I think that, although interlocutory in form, it was a final judgment for purposes of appeal, and as I have the right to exercise a discretion, I think that question, being one of public interest, should go to the Supreme Court of Canada if the plaintiff so desires.

Application dismissed, Eberts, J.A. dissenting.

Solicitors for appellants: *Burns & Walkem.*
Solicitor for respondents: *A. C. Sutton.*

MORTON v. THE VANCOUVER GENERAL HOSPITAL.

Negligence — Damages — Treatment in hospital — Jury — Sealed verdict— Consent of counsel—Appeal books—Material required.

Consent of counsel must be obtained for the delivery of a sealed verdict by a jury.

The registrar with the assistance of the parties should keep appeal books within proper limits and have included in them only such material as is relevant to the appeal.

APPEAL by plaintiff from the decision of MORRISON, J. of the 7th of February, 1922, and the verdict of a jury. The action was for damages for negligence and improper treatment as a patient at the defendant hospital, and was tried at Vancouver on the 20th of June, 1921. The jury retired to consider their verdict at 5.50 in the afternoon, and at about 7 o'clock in the evening the learned judge, without having submitted the matter to counsel and without having obtained their consent,

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told the clerk of the Court to direct the jury to hand in a sealed verdict and the learned judge then left the Court. Shortly after 9 o'clock in the evening the foreman of the jury left in the hands of the clerk a sealed envelope and the jury dispersed. On the following morning the verdict was opened in Court and read as follows: "We find no case against The Vancouver General Hospital."

The appeal was argued at Vancouver on the 30th and 31st of March, 1922, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Argument

McPhillips, K.C. (*Rubinowitz,* with him), for appellant: There was misdirection, improper reception of evidence, and rejection of evidence to such an extent as to bring the case within *Lucas* v. *Ministerial Union* (1916), 23 B.C. 257. On the question of a sealed verdict see Halsbury's Laws of England, Vol. 18, p. 258; Blackstone's Commentaries, Book 3, Lewis's Ed., 377; *Doe dem Lewis* v. *Baster* (1836), 5 A. & E. 129; *Bentley* v. *Fleming* (1845), 1 C.B. 479; *Fanshaw* v. *Knowles* (1916), 2 K.B. 538; 85 L.J., K.B. 1735 at p. 1741.

Reid, K.C. (*Gibson,* with him), for respondent: There must be a substantial wrong done before a new trial will be granted: see judgment of Scrutton, J. in *Fanshaw* v. *Knowles* (1916), 85 L.J., K.B. 1735 at p. 1743; *Gavin* v. *The Kettle Valley Rway. Co.* (1919), 58 S.C.R. 501; *Allcock* v. *Hall* (1891), 1 Q.B. 444; *Banbury* v. *Bank of Montreal* (1918), A.C. 626. As to sealed verdict see *Campbell* v. *Linton* (1868), 27 U.C.Q.B. 563.

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MACDONALD, C.J.A.: There will be a new trial. It is a *sine qua non* that counsel shall consent to the delivery of a sealed verdict and this one was without consent. It is usual to order that the costs below abide the event. The costs of this Court will follow the event.

I wish to speak about this appeal book. We have spoken before about the costs of appeals and the unnecessary material which has been put into appeal books. I notice, on looking through this book, that all the rules and regulations of the hospital are included in it. Now, it may be that a few sent-

ences or paragraphs of these rules might have been the subject of comment by counsel here, but I cannot see why those rules which have to do with the internal economy of the hospital and matters that have nothing in the remotest degree to do with the question raised in this appeal, are put in. There are, as I make out, 47 pages of material which ought not to have been inserted at all. We have a notice of appeal which covers 18 pages, setting forth objections to the charge of the learned judge to the jury, which charge itself covers only 12 pages. The notice of appeal dealing with that covers 18 pages, and there may be other matters I did not notice. The appeal book has been grossly padded, and while it is a matter for the taxing officer, I think it as well that the Court should call attention to the fact. There must be a reform in the matter of appeal books in the direction of cutting down their expense. Both sides are responsible for this to some extent. The practice is to settle the appeal book, and the respondent, if he takes objection, if he thinks that material is inserted in the book which is unnecessary, ought to take the objection and have it ruled out. While you are perhaps less culpable than your learned friends, Mr. *Reid,* you are culpable as well as they. It is the business of the registrar, with the assistance of the parties to keep the appeal book within proper limits, and have included in it only such material as is relevant to the appeal. On the taxation it is the duty of the registrar to scrutinize and see that irrelevant materials are not allowed. Junior counsel are supposed to know their case, and if they do not know it they ought to secure advice. Not only in the printing of evidence and documents in the appeal book, but on matters of pleadings there is a great deal of unnecessary expense. We have had pleadings before us, many of them covering 10 to 15 or 20 pages of the book, the allegation in which could with much greater clearness have been stated in two pages at the outside. Then I have known cases of application to amend pleadings before the trial judge, and discussion goes on between judge and counsel, the notes covering 20 pages. The amendment is granted; no appeal is taken from amendment and all that is put into the appeal book. Notice to produce and notice to admit are put in and

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no reference ever made to them in the argument. It may be done through oversight or from a desire to pad out the appeal book.

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MARTIN, J.A.

MARTIN, J.A.: I heartily associate myself with what my brother has said, and I hope the registrar will understand distinctly it is his duty to scrutinize. I do not understand why this appeal book is printed in the way it is. It is a very expensive thing. We generally understand there are three folios on a page. By actual count I see on examination only about two-thirds of each page is utilized. We have thus an appeal book of 309 pages and on an average I do not think there would be found to be a folio and a half to each page. These matters ought to be investigated, because the cost of appeal books is getting to be a public scandal. This notice of appeal is really an abuse of the process of the Court. These 18 pages are absolutely unjustified. It could all be condensed into less than that—18 pages, you have only to state that to shew how preposterous it is.

GALLIHER, J.A.

GALLIHER, J.A.: I quite agree with what has been expressed in this matter. It is not the first time the Court has expressed the opinion that all expenses should be kept within reasonable limits, and by that we mean necessary and only necessary matter that counsel can reasonably say is necessary should be put into the appeal book. If that were done, I am sure in the end it would be more satisfactory, not only to clients, but counsel themselves, as when costs run to 500 or 600 or $1,000, clients maybe are more inclined to let their rights of appeal go than incur these costs. Therefore, I say that in the interests of counsel themselves, they should put into the appeal book only relevant matter.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: The chances are that the rules of The Vancouver General Hospital are in print, and by agreement with counsel I am sure it would be always satisfactory to the Court that we be referred to the original exhibit when it is in print, and we oftentimes do that, to save costs to the litigant.

EBERTS, J.A.: I agree.

New trial ordered.

Solicitor for appellant: *I. I. Rubinowitz.*

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

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IN RE IMMIGRATION ACT AND WONG SHEE.

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Statute, construction of—Habeas corpus—Accused discharged from custody—Right of appeal to Court of Appeal—Immigration—Deportation—Right of review—Can. Stats. 1910, Cap. 27, Sec. 23—B.C. Stats. 1920, Cap. 21, Sec. 2.

Under the Court of Appeal Act as amended in 1920, there is the right of appeal to the Court of Appeal in *habeas corpus* proceedings in matters over which the Legislature of British Columbia has jurisdiction whether the person detained be remanded to custody or discharged from custody.

The Court has no jurisdiction to review or otherwise interfere with the decision or order of the Board of Inquiry in relation to the admission or deportation of a rejected immigrant unless such person is a Canadian citizen or has Canadian domicil.

APPEAL by the Crown from the decision of HUNTER, C.J.B.C. (reported in 30 B.C. 70) upon *habeas corpus* proceedings, discharging the respondent from the custody of the Comptroller of Chinese Immigration at Vancouver. The husband of Wong Shee had lived in Vancouver for eleven years prior to going back to China in 1920. He owned a hotel which he sold for $3,300 prior to sailing for China. He married Wong Shee in China and returned with her in 1921. On their arrival in Vancouver she was refused admission on the ground that she came within the labouring class. The husband had previously been married, but his first wife died before his return to China.

Statement

The appeal was argued at Victoria on the 10th of January,

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1922, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Reid, K.C., for appellant.

Henderson, K.C. (*Maitland,* with him), for respondent, raised the preliminary objection that there was no appeal when the prisoner is discharged on *habeas corpus* on a charge under the Immigration Act: see *In re Tiderington* (1912), 17 B.C. 81; *Cox* v. *Hakes* (1890), 15 App. Cas. 506. The only objection is that she belonged to the labouring class. Her husband sold a hotel, went to China and was readmitted without inquiry: see also *In re Rahim* (1912), 17 B.C. 276.

Reid, contra: This is not a criminal proceeding: see *Rex* v. *Alamazoff* (1919), 3 W.W.R. 281. As to the right of appeal see *Rex* v. *Jeu Jang How* (1919), 59 S.C.R. 175; Clement's Canadian Constitution, 3rd Ed., 538-9; *Ikezoya* v. *C.P.R.* (1907), 12 B.C. 454. The Act of 1920 (Cap. 21) was passed to give jurisdiction to hear appeals from the discharge of a person under a writ of *habeas corpus*.

Reid, on the merits: Respondent was 20 years old and her father was a labourer in Hong Kong. As to not accepting the husband's evidence of the death of his first wife see *Re Munshi Singh* (1914), 20 B.C. 243; *In re Wong Sit Kit* (1921), 3 W.W.R. 116. As to interfering with the finding of the Court below see *Re Munshi Singh* (1914), 20 B.C. 243 at p. 258; *Rex* v. *Schoppelrei* (1919), 3 W.W.R. 322 at p. 323. Under section 23 of the Immigration Act the finding of the Board of Inquiry cannot be interfered with. The Court below deciding that the husband's evidence should be accepted is not in accordance with the judgment in *Re Munshi Singh, supra;* see also *Dugdale* v. *Reginam* (1853), 2 El. & Bl. 129.

Argument

Maitland: The Court already decided there was no appeal prior to the statute of 1920, but the statute does not go far enough to include *Cox* v. *Hakes* (1890), 15 App. Cas. 506. The Chief Justice below concluded they must have some evidence to come to the conclusion they did. There is not a line to say the husband was a labourer or that the woman was not married. He owned a hotel and sold it at a substantial figure. As to reasonable inference from the evidence see *Rex* v. *Covert*

(1916), 10 Alta. L.R. 349 at p. 364. Section 23 of the Immigration Act does not apply to a Canadian citizen or to Canadian domicil: see *In re Margaret Murphy* (1910), 15 B.C. 401. This woman has acquired a Canadian domicil at common law. There was jurisdiction to release her.

Reid, in reply: The Board concluded on the evidence that she was not married.

Cur. adv. vult.

11th April, 1922.

MACDONALD, C.J.A.: The respondent Wong Shee was ordered by a Board of Inquiry to be deported on the ground that her entry into Canada was contrary to P.C. 1202. She was released upon *habeas corpus* proceedings and that appeal is taken by the Immigration authorities against that order.

Preliminary objection was taken by respondent's counsel that no appeal lies to this Court from an order of *habeas corpus* releasing the person detained. This was the law prior to the amendment made by the Provincial Legislature by the statutes of 1920, Cap. 21, Sec. 2, which so far as the Province had power to enact, gave an appeal in cases like the present one. The law prior to this enactment is referred to in two cases in this Court, *In re Tiderington* (1912), 17 B.C. 81, and *In re Rahim, ib.* 276. These cases follow the decision of *Cox* v. *Hakes* (1890), 15 App. Cas. 506. It was held in *Barnardo* v. *Ford* (1892), A.C. 326, that where the order was one refusing a writ of *certiorari* an appeal would lie. Both *Cox* v. *Hakes* and *Barnardo* v. *Ford* depended for their decision upon the construction of section 19 of the English Judicature Act, which has to do with the right of appeal in civil cases. By the Act of 1920 the Court of Appeal Act, which gave a similar right of appeal in civil causes was amended so as to give an appeal where the person detained was discharged, so that at the present time in this Province in civil matters, or rather in matters over which the Legislature of British Columbia has jurisdiction, an appeal lies to this Court whether the person detained be remanded to custody or be discharged from custody.

The question in this case is as to whether the legislation of the Province is applicable where the inquiry is under a

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Federal Act, namely, the Immigration Act. That the proceedings are not criminal proceedings is quite clear: *Cox* v. *Hakes, supra; Rex* v. *Jeu Jang How* (1919), 59 S.C.R. 175. They must therefore be civil proceedings.

The power to legislate in relation to civil rights was assigned to the Province, the right to liberty where a person is detained not for a crime or supposed crime, but as in this case, to test whether or not the person has fulfilled the conditions necessary to her admission into Canada, is a civil right. The right to the writ of *habeas corpus* is not given by Dominion statute but is part of the common and statutory law of England introduced into and made part of the law of this Province. The right of appeal is a substantive right and not a mere matter of practice and procedure, but even if it were a matter of procedure in a civil case, it would fall within the jurisdiction of the Province. The recent amendment of the Act, giving an appeal in a case like the present, is an amendment to the civil laws of this Province. It has nothing to do with criminal law or criminal procedure, and hence the preliminary objection must be overruled.

MACDONALD, C.J.A.

On the merits it seems to me it is impossible to sustain the order appealed from. The Immigration Act has constituted the Board of Inquiry the tribunal to hear and determine upon the facts relating to the right of an immigrant to enter Canada. It has put the burden of proof upon the immigrant, and it has provided by section 23 that no Court shall have jurisdiction to review or otherwise interfere with the decision or order of the Minister or of the Board of Inquiry in relation to the admission or deportation of any rejected immigrant, unless such person be a Canadian citizen or have Canadian domicil. The Board of Inquiry unquestionably had jurisdiction to enter upon the inquiry; they were entitled to disbelieve the evidence of the respondent if, in their opinion, circumstances tended to throw doubt upon it. It is true that the evidence is practically all one way, but it is not of that character which entitles me to say that as a matter of law the Board of Inquiry were not entitled to disbelieve it. The Board may have come to the conclusion that the story of the death of the former wife and

marriage of the respondent to Soo Gar, was not entitled to belief. They may not have been satisfied, and the respondent was bound to satisfy them, that she was not one of a prohibited class.

The appeal should be allowed.

MARTIN, J.A.: With respect to our jurisdiction to entertain this appeal from the order discharging the respondent from custody, made on the application for a writ of *habeas corpus*, I am of opinion that it should be overruled because these proceedings under the Federal Immigration Act, 1910, Cap. 27, have been finally decided not to be of a criminal nature—*Rex* v. *Jeu Jang How*, 59 S.C.R. 175; (1919), 3 W.W.R. 1115; 32 Can. Cr. Cas. 103—and so the amendment introduced by the Court of Appeal Act Amendment Act, 1920, Cap. 21, applies.

Then as to the validity of the order of deportation made by the Board of Inquiry under section 33, which was, in effect, set aside by the learned judge below, but for no reason given: I have read all the evidence before the Board, in the light of section 16, and am of opinion that this is a case where we cannot interfere because of section 23, which prohibits it unless the person concerned "is a Canadian citizen or has Canadian domicil," and here the applicant cannot, in view of the change in section 2 (*d*) (*i*), since *In re Margaret Murphy* (1910), 15 B.C. 401, invoke that exception. In the case of persons who have not Canadian citizenship or domicil we cannot interfere with proceedings, decisions or orders of the Minister, Board, or officers, so long as they have been "had, made, or given, under the authority and in accordance with the provisions of this Act." That was the view this Court took in *Re Munshi Singh* (1914), 20 B.C. 243; 6 W.W.R. 1347; 29 W.L.R. 45, wherein the section was expounded at pp. 258, 263, and in particular at pp. 268-71, wherein I considered it at some length, and have nothing now to add to that opinion.

MARTIN, J.A.

At one time during the argument I was not satisfied that the "reason" required by Form B (Order for Deportation) was sufficiently given in the order in question, wherein it is

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stated to be that the applicant "belongs to the labouring classes," without stating whether the class was of skilled or unskilled labour as set out in the order in council of June 9th, 1919, defining prohibited "classes or occupations." But upon further consideration I find myself unable to say that it is not, on the facts, a practical and sufficient, although not the most precise, definition of the applicant's disqualifications.

MARTIN, J.A.

It follows that the appeal should be allowed and the order discharging the applicant from custody set aside, and she will be restored to the custody of the controller of immigration.

GALLIHER, J.A.: In this matter the immigration authorities made an order for the deportation of Wong Shee, on the ground that she was a labourer and this order was confirmed at Ottawa. The matter then came before HUNTER, C.J.B.C. on *habeas corpus,* who ordered her discharge and this order is appealed against. Mr. *Henderson,* for the respondent, took the preliminary objection that there was no appeal to us from an order discharging a person from custody on *habeas corpus* proceedings. This Court dealt with that point in *Re Tiderington* (1912), 17 B.C. 81, and later in the same volume in *In re Rahim,* 276, and it was also dealt with by Duff and Anglin, JJ., in the Supreme Court of Canada in *Rex* v. *Jeu Jang How* (1919), 59 S.C.R. 175.

GALLIHER, J.A.

In the cases before us and *per* Duff and Anglin, JJ., in the *Jeu Jang How* case, it was decided on the authority of *Cox* v. *Hakes* (1890), 15 App. Cas. 506, that no appeal lies from an order discharging an accused person on a writ of *habeas corpus.* Subsequent to the decisions in these cases the Legislature of the Province of British Columbia passed an Act, B.C. Stats. 1920, Cap. 21, amending section 6 of the Court of Appeal Act, R.S.B.C. 1911, Cap. 51, in express words, conferring jurisdiction on the Court of Appeal to hear appeals in *habeas corpus* and providing the machinery for the rearrest of accused persons discharged upon *habeas corpus* proceedings. Here the accused is detained under a Dominion statute (the Immigration Act) and such proceedings have been held not to be criminal proceedings *per* Duff and Anglin, JJ. in *Rex* v. *Jeu Jang How,*

supra, and *per* Mathers, C.J.K.B. in *Rex* v. *Alamazoff* (1919), 3 W.W.R. 281.

If this were a matter where the applicant for *habeas corpus* was in custody on a criminal charge, it may be that the Legislature could not give the Court jurisdiction to hear the appeal, but where, as here, it is an offence not of a criminal nature that is being enquired into and civil rights only are involved, it is within the purview of the Legislation to pass the Act. This gives us jurisdiction to entertain an appeal in matters not of a criminal nature, at all events, where a party has been discharged upon *habeas corpus.*

GALLIHER, J.A.

I think, for the reasons given by the Chief Justice, that the order of HUNTER, C.J.B.C. should be set aside and the party again taken into custody for deportation.

MCPHILLIPS, J.A.: I am in entire agreement with the judgment of my brother MARTIN. I merely wish to add that during the argument I was in some doubt as to whether, if the marriage could be deemed to have been valid, the effect would not be to give the wife the *status* of the husband, and that the result would be that she would not be of the "labouring classes." However, after fuller consideration and owing to the fact that although the wife's domicil is the domicil of the husband in ordinary cases, in this case the statute stands in the way—the wife has not acquired Canadian domicil. I am satisfied that the Court has not the power of review in the present case, in fact there is inhibition in the most positive terms upon the reading of section 23. I dealt with this point and the subject generally in a somewhat exhaustive way in *Re Munshi Singh* (1914), 20 B.C. 243 at pp. 278 to 292, and would refer to my reasons for judgment there given, which obviates the necessity of repeating them here, and those reasons are equally applicable to the present case, *i.e.,* there is an absolute inhibition upon the Court in the present case from interfering with the decision of the Board of Inquiry.

MCPHILLIPS, J.A.

It follows therefore that, in my opinion, and with great respect to the learned Chief Justice of British Columbia, there was no power to grant a writ of *habeas corpus* discharging Wong

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Shee from custody, and she should be restored to the custody of the controller of immigration, the appeal to be allowed.

EBERTS, J.A. would allow the appeal.

Appeal allowed.

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

Solicitors for respondent: *Henderson & Smith.*

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PREMIER LUMBER CO. *v.* GRAND TRUNK PACIFIC RY. CO.

PREMIER LUMBER COMPANY, LIMITED v. GRAND TRUNK PACIFIC RAILWAY COMPANY.

Contract—Carriers—Delivery to wrong person—Bill of lading—Failure to give notice of loss—Liability of carrier.

Five cars of lumber were shipped under contract with the defendant Company from Prince Rupert to the State of Minnesota. They were carried over the defendant Company's line to Winnipeg and from there proceeded over another Company's line to their destination where they arrived without delay but were wrongly delivered. An action by the assignee of the bills of lading for the loss sustained was dismissed on the ground that the plaintiff failed to give notice of loss which by the bills of lading was made a condition of the defendant Company's liability.

Held, on appeal, affirming the decision of MACDONALD, J. (MCPHILLIPS, J.A. dissenting), that the failure to give notice of loss was fatal to the plaintiff's claim and the appeal should be dismissed.

Statement

APPEAL by plaintiff from the decision of MACDONALD, J., of the 29th of November, 1921, in an action to recover the amount of loss sustained by the defendant's breach of duty in and about the carriage and delivery of certain lumber. The lumber was shipped from Prince Rupert in July, 1920, on the railway of the defendant Company the consignors being G. W. Nickerson Company, Limited, who assigned the bills of lading covering the shipments to the plaintiff Company. There were

five bills of lading, four of which were to carry the lumber to Minnesota transfer in the State of Minnesota and the fifth to Minneapolis in the same State. The lumber was carried as far as Winnipeg on the line of the defendant Company where it was delivered into the care of the Canadian Pacific Railway Company and carried to its destination where it arrived in August. Instead of being held at the disposal of the plaintiff Company, it was delivered over to the U.S. Lumber & Box Co. through the fault of the Canadian Pacific Railway. The defendant claimed they were not notified of the loss of the goods within the time specified in one of the terms of the contracts.

Statement

The appeal was argued at Victoria on the 12th of January, 1922, before MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Mayers, for appellant: The lumber was sold prior to shipment by the plaintiff to the United States Lumber & Box Co. The Railway Company delivered the goods to the United States Lumber & Box Co. without receiving the bills of lading. The goods could only be properly given on receipt of the bills of lading. This is a conversion of goods: see Bullen & Leake's Precedents of Pleadings, 3rd Ed., p. 279, note (*a*). On the question of liability under the contract see *Wilson* v. *Canadian Development Co.* (1903), 33 S.C.R. 432 at p. 441; *Price & Co.* v. *Union Lighterage Company* (1904), 1 K.B. 412 at p. 416; *The Cap Palos* (1921), P. 458 at p. 471; *Mallet* v. *Great Eastern Railway* (1899), 1 Q.B. 309. As to want of notice the carrier must shew the facts that bring him within the protection of that clause: see *Maunsell* v. *Campbell Security Fireproof Storage, &c., Co.* (1921), 29 B.C. 424.

Argument

A. Alexander, for respondent: There was a wrongful delivery, but after the goods were out of our hands, and by persons for whom we were not responsible. Secondly, the notice of loss provided by contract was not given and this relieves us from responsibility. If we are to be found liable for the negligence of others we should receive notice of it and under the contract it must be given within four months: see *Knight-Watson Ranching Co. Ltd.* v. *C.P.R.* (1921), 3 W.W.R.

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788; *Martin* v. *Northern Pacific Express Co.* (1895), 10 Man. L.R. 595 at p. 613; (1896), 26 S.C.R. 135; *Newman* v. *Grand Trunk R.W. Co.* (1910), 21 O.L.R. 72 at p. 73. The notice clause applies in case of negligence of others.

Mayers, in reply, referred to *The Grand Trunk Railway Company* v. *McMillan* (1889), 16 S.C.R. 543; *Crawford and Law* v. *Allan Line Steamship Co.* (1911), 81 L.J., P.C. 113 at p. 122.

Cur. adv. vult.

12th April, 1922.

MARTIN, J.A.: This is an action for the value of five cars of lumber which the statement of claim, 3, alleges were lost in transit and so never delivered under the contract for carriage set up.

It is admitted that the said five cars did reach their destination but upon arrival were delivered to the wrong person, and it is not alleged that in the course of the carriage (which was found to be without delay) there was any deviation from the route specified in the bills of lading. This constitutes misdelivery (*Neilson* v. *London and North Western Ry. Co.* (1922), 1 K.B. 192, 198, 202), and whatever the wrongful possessors did with the cars after such arrival, either by disposing of them there or forwarding them to customers at other places, is immaterial, as I view the matter. One of the conditions of the bills of lading was the following:

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"Notice of loss, damage, or delay must be made in writing to the carrier at the point of delivery, or to the carrier at the point of origin, within four months after delivery of the goods, or in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Unless notice is so given the carrier shall not be liable."

No notice was given of the loss, and the action was dismissed on that ground. It was urged before us that this condition or exception relates only to things done under the contract in its due performance and not in violation thereof, and so it cannot be invoked to assist the defendant. The question is a nice one and it has occasioned me much consideration, but fortunately the recent decision in *Neilson's* case, *supra*, has elucidated it. That was a case of certain packages of theatrical properties which were bulked in a van "through to Bolton," but had in

the course of the journey been by mistake diverted at Manchester to other points and consequently were delayed for two days in arriving at Bolton, thereby causing damage to the plaintiff. At p. 197 Bankes, L.J. says:

"The defendants contracted to convey these goods from Llandudno to Bolton by a specified route, and they endeavoured to protect themselves in certain events. I think the law is quite plain that if a carrier desires to exempt himself from his common law liability he must do so in clear language, and that in my opinion the defendants did not do here. And secondly as the contract had reference to the conveyance by the prescribed route and by that route alone, when once the goods were diverted by the defendants from the prescribed route and taken on another journey, even though that diversion was the result of a pure mistake on the part of their inspector, they ceased to be covered by the contract and by the exceptions which it contained."

And he goes on to say that such an act was not misdelivery, nor "any delivery at all."

Scrutton, L.J. at p. 202 says:

"Misdelivery means a delivery to a wrong person, and if you keep the goods yourself you do not deliver them at all."

But in the case at bar the goods did, "by the prescribed route," reach their destination, and there were misdelivered. I can only regard this as something, however unfortunate, that "happened in the course of carrying out the contract," as Scrutton, L.J. puts it at p. 201, and as the language of the "exception" is quite clear it must be given effect to, because what happened is, I think, covered by the expression, "failure to make delivery," *i.e.*, to the proper party under the contract. I am unable to take the view that the exception is displaced by the references to negligence in the other clauses cited: this notice of loss clause is comprehensive and appropriate to the misdelivery which occurred, the failure to make a proper delivery causing the "loss" of the goods to the plaintiff. In coming to this conclusion I have assumed all the other questions in favour of the plaintiff. I need only add that the case of *Wilson* v. *Canadian Development Co.* (1903), 33 S.C.R. 432, was one where the carrier "wrongfully sold or converted the goods" to its own use, p. 442. It follows that the appeal should be dismissed.

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GALLIHER, J.A.: I agree with the learned trial judge, that the failure to give notice within the time prescribed disentitles the plaintiff to recover, and would dismiss the appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: This is an action for the loss of five cars of lumber not forthcoming to answer to the issued bills of lading therefor, the appellant being the indorser of the bills of lading. The lumber, it would appear, was shipped away from the point of destination by the Railway Company quite unauthorizedly, and it has failed to account for the lumber—in effect, the Railway Company has been guilty of conversion of the lumber. The contract was one for through carriage, and the Railway Company was liable throughout for the due carriage and delivery of the lumber to the holders of the bills of lading. Further, the shipment was under (as it was necessarily required to be) the joint tariff regulation, *viz.*: Order of the Board of Railway Commissioners, No. 7562, 15th July, 1909, and no provision in the bills of lading will admit of the Railway Company excusing itself from liability upon the ground that the loss or damage arose from the action of any intervening carrier, that is, the carrier issuing the bills of lading is liable to the holder of the bills of lading Unquestionably, there was a contractual obligation to carry and deliver the lumber to the holders of the bills of lading, but that was not done. In *Crawford and Law* v. *Allan Line Steamship Co.* (1911), 81 L.J., P.C. 113 at p. 122, Lord Shaw quoted from an opinion of Lord Salvesen, these words:

"'If there has been a bill of lading signed on behalf of the ship . . . . this would have been a contractual obligation which it would lie upon the ship to excuse itself from discharging.' (1911), S.C. at p. 805."

And Lord Shaw then said:

"I entirely agree in that view. As, accordingly, I am, along with your Lordships, of opinion that there was such a bill of lading on behalf of the ship in this case, I think the contractual obligation referred to rests upon the respondents."

Here it rests upon the Railway Company (the respondent) and the evidence is wanting in the present case to establish any excuse. There has been in this case a complete frustration of the contract of carriage, and no provision excusing liability, such as we have in the present case, can avail or absolve the

Railway Company from liability upon the special facts of this case (*Wilson* v. *Canadian Development Co.* (1903), 33 S.C.R. 432 at pp. 441-2, Davies, J.). The condition relied upon in the present case for excusing liability does not, in its terms nor by reasonable implication, cover the negligence of the carrier. The *ratio* of the judgment of Lord Alverstone, C.J., in *Price & Co.* v. *Union Lighterage Company* (1904), 1 K.B. 412 at p. 416, is applicable to the present case. He there said:

"It is of course quite possible to construe the words, 'any loss of or damage to goods which can be covered by insurance' as including everything, because practically everything can be so covered, and, as pointed out by Walton, J., a great many policies of insurance would include such a loss as that which arose in this case. The question, however, is not whether these words could be made to cover such a loss, but whether in a contract for carriage they include, on a reasonable construction, an exemption from negligence on the part of the carrier. We have only to look at the case to which I have referred, and in particular to *Sutton* v. *Ciceri* [(1890)], 15 App. Cas. 144, to see that the words of this contract can receive a contractual and businesslike construction and have effect without including in the exemption the consequences of the negligence of the carrier. That being so, the principle that to exempt the carrier from liability for the consequences of his negligence there must be words that make it clear that the parties intended that there should be such an exemption is applicable to this case, and the learned judge was right in holding that the contract does not exempt the defendants from liability of their own negligence. I think, therefore, that the appeal should be dismissed."

MCPHILLIPS, J.A.

We have here the palpable case of the non-performance of the contract of carriage and the production of the lumber to answer to the holders of the bills of lading, and in this connection what Atkin, L.J. said at pp. 470-72 in *The Cap Palos* (1921), P. 458 is much in point in the present case.

It would appear to me that the conditions for exemption from liability amount to this: that they are of no avail save where the carrier has proved (which he has not in the present case) that he has not been guilty of negligence. Now, the carrier in the present case admits at this bar that there was conversion of the lumber but attempts to escape liability by saying that the conversion was not their act but the acts of persons for whom they are not liable, and further, the conversion was after the contract was performed. Upon the facts I cannot accede to the contention that there was performance

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of the contract, as I have already said, it is the case of complete frustration of contract—the lumber was accepted for carriage subject to bills of lading, and the lumber has never been produced in answer to the bills of lading. Could there be any state of circumstances more complete to evidence non-performance of contract? It is a clear case of failure of performance of carriage and negligence throughout. The onus in any case was on the Railway Company, having issued the bills of lading, to excuse itself from discharging its contractual obligation and that was not done. The appellant was entitled, being the holder of the bills of lading, to have delivered to it the lumber covered by the bills of lading, but that contract was never performed by the Railway Company. In such a case it is idle to cite conditions of exemption. The language of Lord Alverstone, C.J., in the *Price* case, *supra,* meets the point:

> "To exempt the carrier from liability for the consequences of his negligence, there must be words that make it clear that the parties intended that there should be such an exemption,"

and I fail to see that in the present case the conditions of exemption at all excuse the Railway Company in its frustration of the contract of carriage and failure to produce the lumber. Admittedly, the present case is one of conversion and the Railway Company has not discharged the onus which rested upon it; it is futile to say that the conversion was by others; it is to the appellant that the respondent must account, its contractual obligation is not capable of being transferred to others. The Railway Company as a common carrier was under the obligation to produce the lumber to the holders of the bills of lading. In *The Prinz Adalbert* (1917), 33 T.L.R. 490, Lord Sumner, at p. 491, said:

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> "The bill of lading was the symbol of the goods. . . . . Possession of the indorsed bill of lading enabled the acceptor to get possession of the goods on the ship's arrival."

The appellant was entitled to have the lumber delivered in accordance with the terms of the bills of lading held by it, but the Railway Company did not do this, nor has it legally excused itself from the contractual obligation.

In *Neilson* v. *London & North Western Ry. Co.* (1922), 1 K.B. 192, Scrutton, L.J. at pp. 201-2, said:

"If a carrier wishes to protect himself from liability for the negligence of his servants he must do it in clear and unambiguous language."

In so far as there is evidence in the present case, the Railway Company re-routed the cars carrying the lumber and made deliveries to other than the holders of the bills of lading, a complete frustration of the contract, and it is to be noted that the Railway Company is only able to account for one car out of the five as to its final disposition, but that disposition was not on the order of the appellant, and as to the other four cars, no account whatever.

Upon this view of the matter the language of Greer, J. ((1921), 3 K.B. 213 at pp. 224-5), quoted by Bankes, L.J., in the *Neilson* case, *supra,* at pp. 197-8, seems much in point in the present case: that the goods arrived at their destination but were re-routed again unauthorizedly (and before any notice to the holders of the bills of lading) does not seem to me to be at all helpful to the Railway Company. It was a negligent act. Greer, J., said:

" 'For myself, where goods have been intentionally sent upon a journey not covered by the contract I have a difficulty in seeing it can make any difference as regards the liability of the railway company whether they were started on a wrong journey immediately after they were delivered to the company or were diverted on to a wrong route after they had arrived at an intermediate station. It seems to me that in both cases the company have equally failed to perform the service in respect of which the limitation of liability was agreed to by the consignor.' "

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Bankes, L.J., at p. 198, said immediately following what is above quoted:

"With every word of that statement, I entirely agree."

In the *Neilson* case, *supra,* the Court of Appeal affirmed the Divisional Court, which held that as the defendants' servant intentionally sent the goods to places which were in fact not upon the contract route, the defendants were not relieved from liability by the terms of the contract. In the present case there must follow liability as there is no compliance with the contractual obligation to merely bring the lumber to the point of destination, then re-route it and make deliveries to other than the holders of the bills of lading. Such conduct amounts to

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wrongful conversion of the lumber and frustration of the contract of carriage, and it is impossible, upon such a state of facts, to admit of exemption provisions from liability being invoked, and it must follow that the Railway Company cannot be relieved from liability by the terms of the contract. I would allow the appeal, and a new trial must be had to assess the damages unless the amount of damages can be agreed upon.

EBERTS, J.A. would dismiss the appeal.

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitors for appellant: *Mayers, Stockton & Smith.*
Solicitor for respondent: *R. W. Hannington.*

REX v. LEE SOW.

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REX v. LEE SOW

Criminal law—Charge under The Opium and Narcotic Drug Act—Right of accused before electing to adjournment to obtain advice—Fair trial—Criminal Code, Sec. 777—Can. Stats. 1911, Cap. 17, Sec. 3.

On the accused being brought before the magistrate and after the information had been read to him by an interpreter, the magistrate told him he had the right to choose whether he would be tried by him or in a higher Court. The interpreter then said accused wanted an adjournment until he could obtain advice. This was refused and he was called upon to elect at once. He decided to be tried by the magistrate, was convicted, and sentenced to the penitentiary for five years.

Held, on *certiorari*, that the refusal of an adjournment in the circumstances rendered the trial unfair and the conviction should be quashed.

APPEAL by way of *certiorari* from the conviction of Lee Sow, on a charge of selling cocaine and morphine in contravention of section 3 of The Opium and Narcotic Drug Act. The facts are set out fully in the reasons for judgment. Heard by MACDONALD, J. at Vancouver on the 28th of April, 1922.

Statement

Mellish, for appellant.
Orr, for the Crown.

6th May, 1922.

MACDONALD, J.: On the 31st of January, 1922, Lee Sow was tried by C. J. Smith, deputy police magistrate of the City of Vancouver, under The Opium and Narcotic Drug Act, Can. Stats. 1911, Cap. 17, on a charge of selling cocaine and morphine. By an amendment to this Act, Can. Stats. 1921, Cap. 42, it was provided, that any person found guilty of such offence became liable, upon indictment, to imprisonment for any term, not exceeding seven years. The magistrate utilized the provisions of section 777 of the Criminal Code and, with the consent of the accused, held the trial, as if he had been indicted. He was convicted and sentenced to the penitentiary for five years.

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By *certiorari* proceedings, Lee Sow now seeks to quash the

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conviction, and thus set aside the warrant of commitment, issued thereunder.

Objection was taken to the jurisdiction of the magistrate. It was contended that there was no power vested in Mr. South, as deputy police magistrate of the City of Vancouver, to try indictable offences under said section 777 of the Code. Subsection 1 of this section provides that, in Ontario, any person charged, before a police magistrate, or stipendiary magistrate, for any offence for which he might be tried "at a Court of General Sessions of the Peace . . . . may, with his consent, be tried before such magistrate." This mode of trial by subsection 2 of such section was declared to

"apply also to district magistrates and judges of the sessions in the Province of Quebec, and to police and stipendiary magistrates of cities and incorporated towns, having a population of not less than 2500."

It was decided in *Rex* v. *Rahamat Ali* (1910), 15 B.C. 175; 16 Can. Cr. Cas. 195, that section 777 applied to British Columbia, and conferred jurisdiction upon the police magistrate of the City of Vancouver.

Another point raised, requiring consideration, was, that aside from any question of jurisdiction, the trial was so conducted that it could not support a valid conviction. The accused was entitled, upon being brought before the magistrate for trial, to a full and complete defence. MARTIN, J., in *Re Sing Kee* (1901), 8 B.C. 20 referred to a defect in the procedure being fatal to a conviction, even though the course taken by the magistrate was pursued with the best of intention. Here, the accused, after the information had been read to him by the interpreter, was informed by the magistrate that the charge might be tried forthwith before him without the intervention of a jury, or to remain in custody, or under bail, and be tried in the ordinary way by a Court having competent jurisdiction. That he had the right to choose whether he would be tried in the police Court or in a higher Court. The interpreter then stated to the Court that the accused wished an adjournment until he could see his cousin. This request, for an adjournment, for the purpose of obtaining counsel or advice, was refused, and the accused was called upon to elect, through an interpreter, and plead to the charge. I think that, before an

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accused person is compelled to make such an election, through an interpreter, presumably employed by the Court, he should, if he so desires, be entitled to an adjournment for the purpose of obtaining counsel or advice from any source that might be deemed reasonable. Under the circumstances, Lee Sow was required to make his "election," if it can be so termed, without advice, and his trial proceeded in the same manner. Counsel for the Crown could not cite any authority in support of any proposition that this was a fair trial. It was not along the lines intended by section 786 of the Code, which provides that:

"In every case of summary proceedings under this Part the person accused shall be allowed to make his full answer and defence, and to have all witnesses examined and cross-examined by counsel or solicitor."

In the *King* v. *Lorenzo* (1909), 14 O.W.R. 1038; 16 Can. Cr. Cas. 19, Britton, J. was of the opinion that because the request for the adjournment of the trial for summary conviction, for selling liquor without a licence, was not granted, for the purpose of obtaining witnesses, that the defendant did not get a fair trial, as "he was not allowed a fair and reasonable opportunity to make his defence." He considered the decision in *Rex* v. *Farrell* (1907), 15 O.L.R. 100; 12 Can. Cr. Cas. 524 as binding upon him. This position, and the necessity for a fair trial, was referred to by HUNTER, C.J.B.C. in the case of *Rex* v. *Chow Chin* (1921), 29 B.C. 445. There witnesses, who it was alleged could probably give material evidence, were sought to be secured and, while there was overwhelming evidence given to convict the Chinaman, still, the opportunity was not afforded to the defence of obtaining the evidence of such absent witnesses. An accused person "must be convicted according to law." In the *Farrell* case, a party, accused of selling liquor, was refused an adjournment by the magistrate on account of the absence of his solicitor. The facts there outlined are quite similar to those here present, and Mr. Justice Anglin, after reciting them, and referring to the fact that the accused person was not even granted an adjournment of a few hours, and was compelled to proceed with his trial without witnesses, adds (p. 107):

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"The defendant was, in the circumstances of this case, entitled to a reasonable adjournment, not as of grace, but as of right—not upon terms, but unconditionally."

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Of course, these remarks would not always be entitled to weight, but I think, in my opinion, are applicable to the present application.

I draw a distinction between the right of a person to have an adjournment, for consultation at least, before giving his consent to a certain Court exercising criminal jurisdiction, and where such Court has an absolute right to try an offence summarily and refuses a request for adjournment, to enable an accused person to secure counsel, it might generally speaking, appear unfair and unreasonable not to grant an adjournment for such a purpose, but there might be occasions in which a magistrate, having this ample power, would feel justified in exercising his discretion and refusing such an adjournment and the consequent delay. There is authority, deciding that a magistrate has such right: see *Rex* v. *Irwing* (1908), 14 Can. Cr. Cas. 489; *Reg.* v. *Thomas Biggins* (1862), 5 L.T. 605; *Reg.* v. *Thomas Griffiths and Thomas Williams* (1886), 54 L.T. 280.

I fully appreciate the difficulties that the authorities encounter, in dealing with the drug traffic and in endeavouring to destroy its pernicious effect in the community. At the same time, it is most necessary that every person charged with an offence should receive a fair trial. There has been a departure from this fundamental principle. It follows that the jurisdiction of the magistrate was affected and the conviction should be quashed. There will be protection to the magistrate and no costs.

Conviction quashed.

WOOD GUNDY & COMPANY INC. v. CITY OF VANCOUVER.

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WOOD GUNDY & CO. v. CITY OF VANCOUVER

Debtor and creditor—Guarantor of debentures—Payable at certain branches of Bank of Montreal including New York — Right of payment in American funds—Intention of parties.

The Vancouver General Hospital issued debentures that became due and payable June 1st, 1921, and they were guaranteed by the City of Vancouver. Each debenture stipulated that "the principal moneys and interest secured by this debenture shall be payable at the Bank of Montreal" and that the debtor would pay interest to the bearer of every interest coupon "upon the same being presented at the Bank of Montreal, Vancouver, or any branch of the Bank of Montreal in Toronto, Montreal, New York, or London, England." At maturity the plaintiff presented 37 $1,000 debentures for payment at the branch of the Bank of Montreal in New York, and sought payment in American funds. He was paid in Canadian funds and he then brought action for the difference in exchange.

Held, that it was the evident intention of the parties that the principal should be payable at Vancouver in Canadian currency and that upon default of the principal debtor, the defendant would, on proper demand, make payment at the same place, that the principle that the debtor seeks the creditor was inapplicable in the circumstances and as against the defendant under the terms of its guarantee.

ACTION by debenture holders against a guarantor to recover the balance alleged to be due after payment of the amount of the debentures in Canadian currency. The facts appear in the head-note and judgment. Tried by MACDONALD, J., at Vancouver on the 14th of March, 1922. Statement

Housser, for plaintiff.
McCrossan, for defendant.

12th May, 1922.

MACDONALD, J.: Plaintiff seeks to recover $4,400, alleging that this amount is still due by the defendant under its guarantee, given with respect to 37 debentures of the Vancouver General Hospital, amounting to $37,000. It appears that the Vancouver General Hospital, in 1906, issued 60 debentures of $1,000 each, bearing interest at 4½ per cent. per annum, and repayable, as to principal, on the 1st of June, Judgment

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1921. The power to borrow was only exercisable by the Hospital, upon an issue of debentures being guaranteed by the City of Vancouver, under the provisions of the Vancouver Incorporation Act and amending Act. The defendant Corporation, by by-law, sanctioned such issue and became surety for the due payment of the debentures and interest to the holders thereof. The Hospital covenanted, in each debenture, to pay the principal at maturity and, in the meantime, to pay interest, on the principal sum, to the bearer of every coupon for interest "upon the same being 'presented' at the Bank of Montreal, Vancouver, or any branch of the Bank of Montreal in Toronto, Montreal, New York, or London, England." The obligation, created by the debentures, was stated to be subject to conditions endorsed thereon. Conditions were not so endorsed but appeared above the execution of each debenture by the Hospital and included an averment that "the principal moneys and interest secured by this debenture shall be payable at the Bank of Montreal." The interest was duly paid from time to time, and when the debentures matured, on the 1st of June, 1921, the plaintiff presented the 37 debentures, of which it was the holder, for payment, at the branch, or agency, of the Bank of Montreal in the City of New York. It sought payment of the principal of such debentures in American funds, which was refused. Then plaintiff requested payment from the defendant, as guarantor, of the debentures, with a like result. It was then arranged that, except as to the difference of exchange between Canadian and American funds, the plaintiff should accept payment in Canadian currency of the amount of such debentures. It now claims to be entitled to such difference amounting, on the 1st of June, 1921, to $4,400. This involves consideration and construction of the document by which the defendant guaranteed the debentures. The terms of the document should not only be considered from the standpoint of a surety, but be governed by the intention of the parties, at the time when the debentures were issued and guaranteed. It is clearly apparent that either for convenience, or, perchance, to assist in their negotiation, the annual interest should be payable, not only in Canada, but also in England and in the United States.

A similar provision was not inserted, as to payment of the principal, but it is contended that the plaintiff, and presumably all persons holding these debentures, had a right of election and could demand payment at the branch, or agency, of the Bank of Montreal in New York. In other words, the Vancouver General Hospital, or the defendant, as its guarantor, would be expected to have funds available for payment at that place, not in the currency of the country, where the debentures were issued, but in American currency.

If the debenture distinctly stated, that the payment of principal was to be made in New York, then it might be successfully contended that such payment should be in money amounting to the requisite sum in the legal tender of the United States.

I might discuss, at length, the position taken by the plaintiff and the able arguments submitted by counsel, but I do not deem it necessary. I do not think the contention of plaintiff is tenable, that liability exists against the defendant as to the $4,400, either in the terms of the guarantee or based on the intention of the parties. If it had been in the contemplation of those interested in the issuance and sale of such debentures that, not only the interest, but the principal should be payable in New York, and in gold or American currency as distinct from Canadian currency, then the instrument, intended to create the liability, should have so stated.

Judgment

While there is a principle that the debtor seeks the creditor, still this would be inapplicable under the circumstances and as against the defendant under its guarantee. It provided for payment only in the event of default by the Vancouver General Hospital for 40 days, and it was only on demand being made in writing for payment within 30 days after such default, that the defendant became liable under its obligation.

It is unreasonable to contend that the undertaking of the defendant, as surety, amounted to an agreement on its part, that the Hospital would make banking arrangements, by which the principal of the debentures would, at maturity, be redeemed at the different named branches of the Bank of Montreal. As the document, as to principal, provides for payment at "the

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Bank of Montreal," it might just as reasonably be contended that funds should be available at all its numerous branches for such redemption.

Aside from any contention, that the defendant is a favoured debtor, I think it was the evident intention of the parties that the principal of the debentures should be payable at the Bank of Montreal at Vancouver and that, upon default, on the part of the principal debtor, the defendant should, upon proper demand, make payment at the same place.

The action is dismissed with costs.

Action dismissed.

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

SMITH v. SOUTH VANCOUVER AND CORPORATION OF RICHMOND

Municipal law—Action for negligence—Families Compensation Act—Limitation—Action by widow—Benefit of children—R.S.B.C. 1911, Cap 82, Sec. 5—B.C. Stats. 1914, Cap. 52, Secs. 484, 485.

A widow brought action eleven months after her husband's death for compensation therefor owing to the negligence of the defendant Municipalities in failing to properly safeguard the open span of a bridge. The jury found that there was negligence but the defendants contended that section 484 of the Municipal Act limiting the time within which actions could be brought against a municipality to six months, applied.

Held, that the section did not apply to an action of this nature but pertains to the unlawful performance by a municipality of anything purporting to have been done under authority conferred by legislation. Claims for compensation under the Families Compensation Act may be properly instituted if commenced within twelve months from the death of the husband.

The action was commenced in the name of the widow without any reference to the children. More than a year after the death of the father, but prior to the delivery of a statement of claim, the children were added as parties (there being no executor or administrator).

Held, that the action enured to the benefit of the children as well as the widow.

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Both Municipalities contributed to the maintenance of the bridge but by agreement between them the Municipality of Richmond appointed and controlled the bridge tender. It appeared by the evidence that if the boundaries of South Vancouver were legally extended that the span in question was within them and the bridge formed a portion of the highway connecting the two Municipalities.

Held, that both Municipalities were jointly liable.

ACTION by the widow and children of a deceased person for compensation for the death of the husband and father owing to the negligence of the servants of the defendant Corporations. On the finding of the jury the defendants were held liable on the ground of negligence, but two questions were reserved for further consideration; first, that as the accident took place on the 11th of November, 1916, and the widow commenced her action on the 5th of October, 1917, it was contended by the defendants that the action was barred by section 484 of the Municipal Act; and secondly, it was contended by South Vancouver that although it contributed to the maintenance and repair of the bridge the Municipality of Richmond appointed the officers and had immediate control of the bridge and that this relieved South Vancouver from liability. Tried by MACDONALD, J., with a jury, at Vancouver on the 20th of March, 1922.

Statement

A. D. Taylor, K.C., and *F. A. Jackson*, for plaintiff.

Cowan, K.C., for defendant Municipality of Richmond.

D. Donaghy, and *Wismer*, for defendant Municipality of South Vancouver.

13th May, 1922.

MACDONALD, J.: Upon the motion for judgment herein, after I had, upon the findings of the jury, decided generally in favour of the plaintiffs and held the defendants liable on the ground of negligence, there were still two questions reserved for further consideration.

Judgment

In the first place, it was contended that, as the accident and death of George C. Smith occurred on the 11th of November, 1916, and the action was not commenced by Charlotte E. Smith, his widow, until the 15th of October, 1917, that such action, against the defendant Municipalities, was barred by section

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484 of the Municipal Act (B.C. Stats. 1914, Cap. 52). I do not think this section applies to an action of this nature. Speaking generally, the limitation of action to six months, in my opinion, pertains to the unlawful performance by a municipality of anything purporting to have been done under authority conferred by legislation. It might be contended that it would not govern an action for misfeasance, where the municipality did not "purport" to act under any Act, but was simply guilty of neglect or default rendering it liable. Further, aside from the question, as to whether section 484 is applicable to such an action of misfeasance for personal injuries, through misfeasance on the part of a municipality, it would appear that claims for compensation under the Families Compensation Act, may be properly instituted if commenced within the limit of twelve months therein stipulated: see *British Columbia Electric Railway* v. *Gentile* (1914), 83 L.J., P.C. 353 and cases there cited, particularly *Seward* v. *"Vera Cruz"* (1884), 10 App. Cas. 59, where Lord Selborne at pp. 67 and 70 refers to the Act, giving a new cause of action to the widow and children of a deceased person, who might, if he had lived, maintained an action. Lord Blackburn, to the same effect, says that a totally new action is given against the person, who would have been responsible to the deceased, if he had lived, and adds:

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"An action which, as pointed out in *Pym* v. *Great Northern Railway* [(1863)], 4 B. & S. 396 [at p. 406], is new in its species, new in its quality, new in its principle, in every way new."

It was then submitted that, in any event, as far as the children of the deceased were concerned, their right of action was barred by section 485 of the Municipal Act, as well as by the provisions of the Families Compensation Act, R.S.B.C. 1911, Cap. 82.

It was argued that, as the action was commenced in the name of Charlotte Smith, as widow, without any reference to the children, they thus lost the benefit of the Families Compensation Act, as they were only added as parties in October, 1921. The ground seems tenable, that, if the action, brought by the widow, did not enure to the benefit of the children, and really amounted to an action brought on their behalf, then they cannot recover. No authority was cited directly on the point.

but it was contended that the wording of subsection (2) of section 4 of the Families Compensation Act sufficed, to support the claim of the children. It provides that, where there has been no executor or administrator of the person deceased, who would have a right of action, if death had not ensued, then, the right of action conferred by the Act,

"may be brought by and in the name or names of all or any of the persons (if more than one) for whose benefit such action would have been if it had been brought by and in the name of such executor or administrator; and every action so to be brought shall be for the benefit of the same person or persons as if it were brought in the name of such executor or administrator."

Subsection (3) of said section 4 provides for payment into Court by the defendant, and if the amount paid in be not accepted, for an issue as to its sufficiency. The defendant, so paying in, does not need to specify how the amount is to be divided amongst the parties entitled under the Act. It may be inferred from section 6 of the Act that the names of the parties, for which benefit the action is brought, need not be stated in the writ of summons, as the "plaintiff on the record" is required in the statement of claim, to furnish the names of such persons, together with their addresses and occupations. This stipulation and procedure, under the Act, was observed, as the children were added as parties before the statement of claim was delivered, and when delivered, it complied with said section 6. The Families Compensation Act was remedial in its nature and intended to benefit the class of persons referred to in such enactment. I think it is a fair construction to place upon the Act, that the action so brought by the widow, was for her benefit, as well as her children. The tendency of the Courts, to afford compensation, under this Act, is indicated by authority, particularly in the case of *Sanderson* v. *Sanderson* (1877), 36 L.T. 847, where the defendant had paid into Court a sum of money, which was accepted by the widow in satisfaction, but as there was no provision in the section, under which such payment was made, for ascertaining the shares to which the parties were entitled, it necessitated a special case being presented to the Court. Malins, V.C., in default of such provision, decided that the best he could do, would be to treat the money as the personal estate of the deceased, and divided it

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according to the Statute of Distributions, giving one-third to the widow and the remainder to the children. Then the fact that the children need not necessarily be named at the trial, in order to obtain the benefit of the Act, is emphasized by the case of *The George and Richard* (1871), L.R. 3 A. & E. 466, where the proctor for an unborn child was held entitled to assert a claim under the Act on its behalf. There will be judgment accordingly for the plaintiffs, for the respective amounts allowed by the jury.

It was then contended, on behalf of the Municipality of South Vancouver, that the liability, if any, only existed as against the Municipality of Richmond. It appears that the bridge in question was constructed by the Provincial Government in 1909 and both Municipalities contributed towards the cost of construction. By an agreement between them, which was not proved and made evidence in the previous trial of *Evans* v. *South Vancouver and Township of Richmond* (1918), 26 B.C. 60, both Municipalities contributed towards the maintenance and repair of the bridge. While the Municipality of Richmond appointed and had immediate control of the bridge tender, the Municipality of South Vancouver contributed towards his wages. Then it was submitted that, even with these facts proven, they would not create a liability against South Vancouver, because the span of the bridge, where the accident occurred, was not within the Municipality of South Vancouver and did not form a portion of its highway. The question is, whether the boundaries of South Vancouver as originally defined, were properly extended by order in council pursuant to section 4 of B.C. Stats. 1910, Cap. 78. If this section is not properly applicable, then the only other power, permitting for such extension of boundaries of a Municipality, is contained in section 13, R.S.B.C. 1911, Cap. 172, but this section can only be operative upon the consent of the ratepayers and so has no application in this instance. It was proved, that the $7,000, required to be paid by South Vancouver to Richmond, pursuant to said section 4 of Cap. 78, was not paid within the stipulated period. It was submitted, that this provision was a condition precedent, and that such

Judgment

failure, having occurred, the power of the Lieutenant-Governor in Council under the section absolutely ceased. I think that the payment of this amount was a matter of adjustment between the Municipalities and was not a controlling factor, as far as the Executive of the Province was concerned. It might, and probably would, decline to act until the payment was made, and the proviso in that respect was simply inserted to effect such result. I think the power to act still remained and was properly exercised by an order in council to that effect, which was produced at the trial. Assuming then, that the extension was legally consummated, I find that the span of the bridge was, according to the evidence of Col. Tracey, C.E., physically within the boundaries of South Vancouver so extended, and that the bridge formed a portion of the highway connecting both Municipalities. The Municipality of South Vancouver was aware of the nature and extent of the safeguards or warnings, in use for some time, upon this intermunicipal bridge, when the span was open. The jury has found that they were such as to constitute negligence. Accepting such finding, I think that both Municipalities are jointly liable, and there should be judgment accordingly.

Judgment for plaintiffs.

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CLAUSEN *v.* CANADA TIMBER & LANDS LTD.

CLAUSEN *ET AL.* v. CANADA TIMBER & LANDS LIMITED AND NORTON.

Contract—Sale of timber—Condition prohibiting sale without consent—Purchasers' interest vested in receiver—Notice of intention to cancel by sellers—Right of cancellation.

A contract for the sale of timber included a clause prohibiting the purchasers from assigning their interest without the consent of the vendor and providing for cancellation by the vendor in case of a sale. After logging for a season the partnership of the purchasers was dissolved and a receiver was appointed to take over the assets. The vendors then gave notice of intention to cancel at the expiration of 20 days from the date of notice by reason of default consisting of dissolution of the partnership and transfer to a receiver of the purchasers' interest under the contract. The purchasers denied a partnership in the purchase of the timber and taking the notice as repudiation of the contract brought action for damages for breach. The defendants counterclaimed for a declaration that they were not at the time of giving notice bound by the contract.

Held, that the defendants' notice was unauthorized and amounted to a wrongful repudiation of the contract. The plaintiffs were therefore entitled to the damages that follow.

ACTION for damages for breach of contract for the purchase of timber, tried by MURPHY, J. at Vancouver on the 22nd of May, 1922. On the 15th of June, 1921, the plaintiffs and one Norton entered into a contract in writing with the Canada Timber & Lands Limited to purchase all the timber and logs on the Company's leases and logging plant and equipment situate at Toba River, B.C., and on the same day they entered into a further contract for the purchase of the water rights, road rights, and booming rights of said Company at Toba River. The purchasers went into possession and carried on logging operations until December, 1921, when work ceased, disputes having arisen between the co-purchasers, and in January, 1922, the plaintiffs brought action for a dissolution of partnership and appointment of a receiver. On the 13th of March, 1922, the defendants' solicitor gave written notice to the plaintiffs that as the agreement had been assigned without the consent of the defendants that the defendants intended to

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cancel the agreement at the expiration of 20 days from the date of notice. On the 18th of March, the plaintiffs, in writing, accepted the notice as a repudiation of the contract and brought this action.

Mayers (*Cosgrove,* with him), for plaintiff.
Hutcheson, for defendant Company.
W. S. Deacon, for defendant Norton.

29th May, 1922.

MURPHY, J.: In my opinion, the contracts in question are not contracts with a partnership whereof plaintiffs and defendant Norton were members, but are contracts with these parties as co-adventurers. I do not think evidence can be admitted to controvert this view, but, even if it can be, I hold, on the record, that there is no evidence proving that the contracts were in fact made with a partnership. Nor do the contracts involve any element of personal service. So long as plaintiffs and Norton or any of them fulfilled the terms binding on them, it was no concern of the defendant Company by what arrangement *inter se* plaintiffs and Norton complied with these obligations unless such arrangement constituted a breach of some specific term of the contracts. The dissolution of their partnership and the appointment of a receiver of the assets thereof would not, if my view of the nature of the contracts is correct, be such a breach. *Non constat* but what they might all or some or one of them proceed to carry out the contracts without utilizing any partnership assets held by the receiver, for it must be remembered each of them is personally bound to see the whole contracts carried out. In my view, therefore, the notice, Exhibit 4, was unauthorized by the terms of the contracts and amounts to a wrongful repudiation of them by the defendant Company. It is strongly urged that as the contract, Exhibit 2, provides that the default specified in a notice as a ground for cancellation must continue for 20 days after the giving of such notice in order to effect cancellation, and that as the writ herein was issued within the 20-day period, this action is premature. This would be a weighty objection, if the ground specified were one covered by the contracts, but, as stated, I hold it is not. If this view is correct, plaintiffs were

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entitled to regard the notice as a repudiation, as they did. There being no default, there was nothing on which the 20-day clause, as to continuance, could operate.

It is also argued that plaintiffs abandoned the contracts because they incorporated a company and opened negotiations with defendant Company to obtain new contracts for the company so incorporated, covering the same subject-matter as do Exhibits 2 and 3. But Exhibit 13, which makes the offer, on behalf of plaintiffs, clearly recognizes the contracts as in existence, since it speaks of purchasing from the receiver, *inter alia*, "whatever rights the partnership may have under the old contract."

It follows, I think, that plaintiffs are entitled to succeed against the defendant Company.

As to damages, it is urged that these should be mitigated because the notice was disclaimed in the statement of defence. But there was no offer to reinstate plaintiffs. On the contrary, the action was fought out by the defendant Company on the basis that plaintiffs had lost their rights under the contracts.

Judgment

There will be a reference to the registrar to assess the damages.

As to defendant Norton, I find the charge, that he colluded with defendant Company to deprive plaintiffs of their rights under the contract, not proven. In view of this finding, I desire to hear counsel further, as to what judgment should be given affecting him, as the matter was not discussed on the argument.

Plaintiffs are entitled to costs against defendant Company.

Judgment for plaintiffs.

REX *EX REL.* MILLER v. GOLD SEAL LIMITED.

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REX v. GOLD SEAL LIMITED

Constitutional law — Intoxicating liquors — Inter-provincial trade — "Sale within the Province"—Delivery—B.C. Stats. 1921, Cap. 30, Sec. 26.

The Gold Seal Limited carrying on business as exporter and importer of liquors had its head office at Vancouver with a branch office at Calgary, Alberta. A warehouse company had offices in the same premises in Vancouver and the Gold Seal Limited stored its liquor there. G. entered the premises in Vancouver and signed an order addressed to the defendant in Calgary for a case of rye and a case of Scotch whisky and paid the cash therefor. An employee of the warehouse company then sent the order and money to the Gold Seal office at Calgary, which office then instructed the warehouse company at Vancouver to deliver the two cases to the purchaser out of its stock in the warehouse at Vancouver, and the instructions were carried out. On a charge of selling liquor in contravention of section 26 of the Government Liquor Act the Gold Seal Limited was convicted and on a case stated by the magistrate the conviction was quashed.

Held, on appeal, reversing the decision of HUNTER, C.J.B.C., that the defendant was guilty of unlawfully selling liquor within the Province of British Columbia within the meaning of section 26 of the Government Liquor Act.

APPEAL by the Crown from the decision of HUNTER, C.J.B.C., on an appeal heard by him at Vancouver on the 4th of January, 1922, by way of case stated by the police magistrate for Vancouver after conviction of the Gold Seal Limited for unlawfully selling liquor in contravention of section 26 of the Government Liquor Act (B.C. Stats. 1921, Cap. 30). The magistrate found on the evidence that the Gold Seal Limited was incorporated under the Great Seal of the Dominion of Canada with head office at Vancouver and branch office at Calgary, Alberta, and carries on the business of importers and exporters of liquor. The Western Canada Liquor Company Limited was incorporated in British Columbia with head office at Vancouver in the same premises as that of the Gold Seal Limited. It is licensed to maintain a liquor warehouse and is engaged in the business of warehousing and forwarding. One James Gillies, a special constable acting under instructions of the Liquor Control Board, entered said offices in Vancouver on the 4th of July, 1921, and gave an order for a case of Walker's Imperial Rye

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whisky and one case of Henderson's House of Lords Scotch whisky. He then signed an order and receipt form, which with $74.60 (cost of liquor) he handed an employee of the Western Canada Liquor Company. The order and receipt form set out that the purchaser was from Britannia Beach, and contained a memo that:

"This order with funds to be forwarded by Western Canada Liquor Company Ltd. in accordance with provisions of B.C. Government Liquor Act to Gold Seal Limited, Calgary, Alberta, with no responsibility whatever to the said forwarders except as to transmission of funds. This transaction is not to be completed until accepted by the Gold Seal Limited, in Calgary, Alberta."

The order and receipt form with the money were sent by the Western Canada Liquor Company Limited to the Gold Seal Limited, at Calgary. On receipt of the order and money in Calgary the Gold Seal Limited telegraphed the Western Canada Liquor Company at Vancouver acknowledging receipt of order and money and accepting same, which was followed by a letter acknowledging receipt of the order and directing that "out of our stock of merchandise in warehouse, ship to the consignee named below, the goods herein described." On receipt of the telegram the Western Canada Liquor Company selected one case of Walker's Imperial Rye whisky and one case of Henderson's House of Lords Scotch whisky from a stock belonging to the Gold Seal Limited, and warehoused for the said Gold Seal Limited by the Western Canada Liquor Company at its warehouse in Vancouver, and shipped the said two cases of whisky *via* the Union Steamship Company addressed to the said James Gillies at Britannia Beach, by whom it was received. The questions submitted to the Court were:

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"1. Whether upon the facts set out the said Gold Seal Limited did unlawfully sell liquor within the Province of British Columbia within the meaning of section 26 of the Government Liquor Act, being chapter 30 of the Statutes of British Columbia, 1921?

"2. Is the said Government Liquor Act *intra vires* of the Legislature of the Province of British Columbia?"

Davis, K.C., for accused.
Tobin, for the Crown.

17th January, 1922.

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HUNTER, C.J.B.C.: In view of an intended appeal, Mr.

Tobin has asked me for my reasons in writing, there being no stenographer present.

In this case the purchaser applied at the office of the Western Canada Liquor Company, which had in its warehouse at Vancouver liquor belonging to the defendant Company, for an order on the defendant Company at Calgary, Alberta, for certain liquor, which order, together with the amount of the price named, was forwarded to the defendant Company at Calgary. The order was accepted by the Company at Calgary and a telegram, subsequently confirmed by letter, was sent to the Western Canada Liquor Company at Vancouver to forward the liquor to Britannia Beach, British Columbia, the place named by the consignee.

The contract for sale was thus entered into without the jurisdiction, and if the liquor had been sent to the consignee direct from Calgary, I do not see how there could be any doubt that the transaction did not constitute a sale in British Columbia. Nor am I able to see any difference in principle, because the liquor was directed by the Company without the jurisdiction to be supplied out of liquor already in storage in British Columbia. It was argued that this was an evasion of the Act, but the Privy Council has more than once pointed out that Acts may be successfully evaded. Where, as here, the essential acts necessary to set up a contract for sale take place without the jurisdiction, it is impossible to say that delivery *per se* within the jurisdiction constitutes a sale. If a man in Vancouver gives an order for grain which is accepted in Calgary, the grain to be delivered in Liverpool, one would say that the sale was in Calgary even if the grain was in storage in Winnipeg at the time of acceptance. Had the statute prohibited delivery in pursuance of a contract entered into without the jurisdiction, the question as to its being *ultra vires* might have arisen, with which I am not now concerned, nor am I called on to deal with the wide question raised in the case stated as to whether the whole Act is *ultra vires,* as it was not argued.

HUNTER, C.J.B.C.

From this decision the Crown appealed. The appeal was argued at Vancouver on the 29th of March, 1922, before MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

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Argument

Tobin, for appellant: This was a charge under section 26 of the Government Liquor Act. The Calgary office directed the Gold Seal Limited at Vancouver to deliver the order from the stock in Vancouver. Labels were put on boxes when expressed. This was an attempt to mislead: see *Rex* v. *Western Canada Liquor Co.* (1921), 29 B.C. 499. We say the sale took place here: see *Rex* v. *Bigelow* (1904), 9 Can. Cr. Cas. 322; *Bigelow* v. *Craigellachie-Glenlivet Distillery Co.* (1905), 37 S.C.R. 55; *Rex* v. *Shaw* (1920), 3 W.W.R. 611 at p. 614. The liquor stock in the Province must be held for export purposes only.

Davis, K.C., for respondent: The agreement for sale was made in Calgary. Where there was an agreement for sale made in one Province and a completion of delivery in another it cannot be said the sale was made where the delivery was completed. The word "sell" in section 26 should be construed in its popular meaning, and if so construed it was a sale in Calgary and not here. There is no sale in the Province in which the agreement was not made. It is not necessary to notify the purchaser if he waives notification: see *Carlill* v. *Carbolic Smoke Ball Company* (1892), 62 L.J., Q.B. 257 at p. 263. He may dispense with notice: see *Byrne* v. *Van Tienhoven* (1880), 49 L.J., C.P. 316 at p. 319; *Henthorn* v. *Fraser* (1892), 61 L.J., Ch. 373 at p. 375; *Magann* v. *Auger* (1901), 31 S.C.R. 186. As to what is a "sale" see Benjamin on Sale, 6th Ed., 1; Chalmers's Bills of Exchange, 7th Ed., 9. In *Rex* v. *Bigelow* (1904), 9 Can. Cr. Cas. 322 it was held the whole sale was bogus and it does not apply here. The word "sale" should be construed in the popular way: see *Lambert* v. *Rowe* (1914), 1 K.B. 38; *Stretch* v. *White* (1861), 25 J.P. 485; *Grainger & Son* v. *Gough* (1896), A.C. 325; *Gracey* v. *Banbridge U.D.C.* (1905), 2 I.R. 209; *Stephenson* v. *W. J. Rogers (Limited)* (1899), 15 T.L.R. 148.

Tobin, in reply.

Cur. adv. vult.

6th June, 1922.

MARTIN, J.A.

MARTIN, J.A. [after stating the nature of the appeal]: The facts are set out in the case stated by the magistrate, and briefly,

it appears that the Company has its head office at Vancouver in this Province and a branch at Calgary in Alberta, and carries on business as an importer and exporter of liquor; that it has liquor stored with a licensed warehouse company (the Western Canada Liquor Company) in Vancouver, which has its head office and warehouse in the same premises (137 Water Street) as the respondent Company has; that one Gillies went to the said joint offices of the two companies and gave a written order (set out in the case) accompanied by the cash, for two cases of liquor, which order and cash were taken by an employee of the warehouse company, and sent to the respondent's head office in Calgary, which office, upon receipt thereof, telegraphed to the warehouse company to deliver the liquor to the purchaser out of the respondent's stock in its warehouse, and the delivery was so made. The question reserved by the magistrate is:

"Whether upon the facts set out the said Gold Seal Limited did unlawfully sell liquor within the Province of British Columbia within the meaning of section 26 . . . . ?"

In my opinion the question should be answered in the affirmative: it was quite open to the magistrate to draw the inference from such a state of facts that what was being done was a sham proceeding, and though it might, upon the writings, assume more or less the aspects of an extra-provincial sale, yet, in substance, which is what the Court will look at, it was obviously a mere circumlocutory, and therefore ineffectual, attempt to evade the statute by selling its own liquor then within the Province and under the control of its head office there.

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The market tolls cases cited by the respondent's counsel in support of his submission that "sale" should be construed in a popular sense, do not even then go so far as this case, because in all of them the goods were at the time of sale without the limits of the local authority in question. Here, the respondent Company had the liquor as its own property all the time under its control in Vancouver, and the fact that it had warehoused it (subject to its order) with an entirely independent and *bona fide* warehousing company (assuming that to be the case) does not inwardly change the principle though it may outwardly complicate the transaction.

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The appeal, therefore, should be allowed and the conviction restored.

GALLIHER, J.A.: I would allow the appeal. The goods in question here, two cases of liquor, were the property of the Gold Seal Limited and were stored in the premises of the Western Canada Liquor Company in the City of Vancouver, British Columbia. The head office of the Gold Seal Limited was in Vancouver, and they also had a branch office in Calgary, Alberta. It appears that the Gold Seal Limited and the Western Canada Liquor Company occupied premises jointly in Vancouver, the Gold Seal Limited as importers and exporters, and the Western Canada Liquor Company as warehousemen and forwarders. On July 4th, 1921, one, James Gillies, of Vancouver, entered the offices of the Western Canada Liquor Company and ordered two cases of whisky, paying therefor the sum of $74.60. This order, together with the money, was forwarded to the office of the Gold Seal Limited at Calgary, and is in the following words and figures: [after setting out the order the learned judge continued].

In reply to this the following letter of instruction was sent by the Gold Seal Limited at Calgary to the Western Canada Liquor Company, Vancouver: [the learned judge after setting out the letter continued].

GALLIHER, J.A.

The liquor was then supplied from the stock of the Gold Seal Limited in storage with the Western Canada Liquor Company in Vancouver, and was by them forwarded to the customer, Gillies.

Information was laid for infraction of section 26 of Cap. 30, B.C. Stats. 1921, and the Gold Seal Limited was convicted. The matter then came up before HUNTER, C.J.B.C., who quashed the conviction. This is now before us on appeal. With every respect, I am unable to agree with the learned Chief Justice. Mr. *Davis* for the respondent cited a number of authorities, which I have read, and however sound those decisions may be on the facts of the respective cases, I find myself unable to regard them as authorities applicable to the facts here. Had Gillies, on the day he ordered the goods, been supplied with them from the stock then in the storehouse of

the Western Canada Liquor Company in Vancouver (and from which he was some four days later supplied), there could be no question an offence would have been committed against the Act.

I agree that Acts may be successfully evaded, and I also agree with the learned Chief Justice that had Gillies ordered direct from the Gold Seal Limited, Calgary, and been supplied direct from there, that no offence would have been committed, but the liquor here the subject-matter of the transaction was at all times during the negotiations in the City of Vancouver, and was supplied from there, nor can, in my opinion, the circuitous method of sending a paper order with the money to Calgary and the acceptance of that by the branch firm there, with notification to the head office of the firm at Vancouver to supply from the stock of the firm there, rob the transaction of its true character of a sale within British Columbia. The sale, in my opinion, was in British Columbia. The respondents were rightly convicted and the conviction should be restored.

McPHILLIPS, J.A.: I am entirely of the same opinion as my brother MARTIN. In an interesting and learned article in the Solicitors' Journal, Vol. 61, p. 742, entitled "The Evasion of Taxes," this language is used at p. 743 relative to the evasion of statute law, and I think it is a trite statement of the law:

"The question of law thus raised is not easy to state in clear and simple language. Perhaps the best way of putting it is to say that one is entitled to adopt straightforwardly any permissible legal means of *avoiding* liability to a public burden, but not entitled to adopt a mere colourable trick for the purpose of *evading* the burden. But the borderline between permissible *avoidance* and forbidden *evasion* is obviously hard to draw. The best and ablest discussion of the difficulty is to be found in the leading case of *Attorney-General* v. *Duke of Richmond and Gordon* (1909), A.C. 466."

It was stated at this bar that the present case is a test case by agreement with the Crown. Mr. *Davis* in his able argument submitted that the sole question was confined to where the sale was made, and strenuously contended that the sale was made in Calgary, in the Province of Alberta. The appropriation of the goods was made in the City of Vancouver, in a

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warehouse there, and delivery made of the goods in British Columbia.

Section 26 of the Government Liquor Act reads as follows:

"Except as provided by this Act, no person shall, within the Province, by himself, his clerk, servant, or agent, expose or keep for sale, or directly or indirectly or upon any pretence, or upon any device, sell or offer to sell, or in consideration of the purchase or transfer of any property, or for any other consideration, or at the time of the transfer of any property, give to any other person any liquor."

The question for determination is whether upon the case stated the facts warrant it being stated that there has been an infraction of the law. The question is, where did the sale take place? The goods were in British Columbia and were appropriated to the buyer in British Columbia, and delivery was made in British Columbia, all elements to constitute a completed sale. When the appropriation of the goods took place in British Columbia and the delivery of the goods was made to the carrier, from that moment the goods vested in the buyer. "The essence of sale is the transfer of the property in a thing from one person to another for a price" (Chalmers's Sale of Goods, 8th Ed., p. 3). It is the transaction of selling or offering to sell liquor that is aimed at in the enactment, and the transfer of the property in the liquor from the seller to the buyer. Then we have it said in Chalmers at pp. 3-4:

MCPHILLIPS, J.A.

"The purport of the contract is that the seller divests himself of all proprietary right in the thing sold in favour of the buyer (*Cf. Walker* v. *Mellor* (1848), 11 Q.B. 478)."

In the present case the question for determination is whether there was a sale within the Province? In my opinion there was as the elements to constitute a sale within the purview of the enactment had their place in British Columbia. It was essential that there should be an appropriation of the goods by the seller with the assent of the buyer, or by the buyer with the assent of the seller; then and then only, the property in the goods passed to the buyer and, of course, we have here delivery made as well (see Chalmers at p. 56; *Heilbutt* v. *Hickson* (1872), L.R. 7 C.P. 438 at p. 449; *Boswell* v. *Kilborn* (1862), 15 Moore, P.C. 309; *Campbell* v. *Mersey Docks* (1863), 14 C.B. (N.S.) 412 at p. 415, *per* Willes, J.; *Wait* v. *Baker* (1848), 2 Ex. 1 at p. 7, *per* Parke, B.; *Greaves* v.

Hepke (1818), 2 B. & Ald. 131; *Ogle* v. *Atkinson* (1814), 5 Taunt. 759).

Here to constitute an effective sale there had to be the appropriation of the goods and the approval of the buyer, all of which took place in British Columbia (*Head* v. *Tattersall* (1871), L.R. 7 Ex. 7; Blackburn on Sale, 3rd Ed., 128; *Sir Rowland Heyward's Case* (1595), 1 Co. Rep. 524; *Rankin* v. *Potter* (1873), L.R. 6 H.L. 83 at p. 119; *Wait* v. *Baker* (1848), 2 Ex. 1 at p. 8, *per* Parke, B.).

I would refer to what Maclennan, J. said in *Bigelow* v. *Craigellachie-Glenlivet Distillery Co.* (1905), 37 S.C.R. 55 at p. 73. The language of Mr. Justice Maclennan is conclusive upon the point:

"The sale would not be complete until goods of the kind sought to be purchased had been appropriated to the contract."

The facts upon which the case stated is to be decided evidence "a mere colourable trick" and cannot be held to constitute a sale made without the Province of British Columbia. The essential ingredient to bring about a sale within the purview of the statute (section 26, Government Liquor Act) was the appropriation of the goods to the contract, and that took place in British Columbia, followed by a delivery of the goods in British Columbia.

MCPHILLIPS, J.A.

I therefore answer question one in the affirmative.

Question two has been determined already by this Court, it being held that the Government Liquor Act is *intra vires* of the Legislature of British Columbia (see *Little* v. *Attorney-General for British Columbia* (1922), [*ante* p. 84]; 2 W.W.R. 359, and *Rex* v. *Ferguson* [*ante* p. 100], *ib.* 473).

It follows that, in my opinion, the appeal should be allowed and the conviction restored.

EBERTS, J.A. would allow the appeal.

EBERTS, J.A.

Appeal allowed.

Solicitors for appellant: *Pattullo & Tobin.*

Solicitors for respondent: *Davis, Marshall, Macneill & Pugh.*

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WINCH v. BOWELL

WINCH v. BOWELL.

Negligence — Collision — Automobiles — Speed — Contributory negligence— Ultimate negligence—Rule of the road—By-law—Owner and driver.

W.'s car was driven by his brother south on Bute Street (left side), Vancouver, on the 1st of June, 1921, about 2 a.m. B. at the same time was driving west on Robson Street, both cars being driven at an excessive rate of speed. At the intersection of the two streets the cars collided, both being badly damaged. W. succeeded on the trial in an action for damages and B.'s counterclaim was dismissed.

Held, on appeal, reversing the decision of MURPHY, J., that the inference to be drawn from the whole evidence, oral and physical, is that both parties were negligent, one being as much to blame as the other, and that that negligence continued until it was too late to avoid the accident. Both action and counterclaim should therefore be dismissed.

APPEAL by defendant from the decision of MURPHY, J. of the 20th of December, 1921, in an action for damages to plaintiff's Rolls-Royce automobile owing to a collision with his Oldsmobile car. The facts are that at about 2 a.m. on the morning of the 1st of June, 1921, the plaintiff's car, driven by his brother, was going south on Bute Street (left side) and the defendant was driving his car west on Robson Street. At the intersection of the two streets the cars collided and considerable damage was done to both cars. It was not a dark night and there was a cluster of lights at the intersection of the streets. On the evidence it appeared that both cars were going at a high rate of speed. The plaintiff claimed $1,190 for the damage done to his car, the defendant counterclaimed for $700 for the damage done his car. The learned trial judge gave judgment for the plaintiff.

Statement

The appeal was argued at Vancouver on the 17th of March, 1922, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Craig, K.C., for appellant: Winch was going up Bute Street and he admits he was putting on speed in order to get up. Under the by-law we had the right of way, the rule being at that time that at a crossing a car coming from the left of the driver had the right of way. This was a breach of a statutory

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condition: see *Wilson* v. *City of Coquitlam* (1922), [30 B.C. 449]; 1 W.W.R. 640 at p. 645; Cyc., Vol. 25, p. 546. There was in any case contributory negligence: see Beven on Negligence, 3rd Ed., 546; *Forrester* v. *Canadian National Railways* (1921), 1 W.W.R. 316 at p. 320. A breach of a by-law is of itself evidence of negligence: *Myall* v. *Quick* (1922), 1 W.W.R. 1. As to the position when the car is driven by owner's brother see *The "Bernina"* (1888), 13 App. Cas. 1; Beven on Negligence, 3rd Ed., 178. The principle is whether the owner was in control at the time of the accident. A view gives more information than the evidence.

Hossie, for respondent: The conduct of the defendant amounted to recklessness: see *Johnson* v. *Giffen* (1921), 3 W.W.R. 596 at p. 598; *Ramsay* v. *Toronto R.W. Co.* (1913), 30 O.L.R. 127 at p. 139. Cars should be driven moderately and prudently and in accordance with the provisions of the by-laws: see *Wallace* v. *Viergutz* (1920), 2 W.W.R. 333 at p. 335; *British Columbia Electric Railway Company, Limited* v. *Loach* (1916), 1 A.C. 719 at p. 726. On the question of ultimate negligence see *City of Calgary* v. *Harnovis* (1913), 48 S.C.R. 494; *Radley* v. *London & North Western Rail. Co.* (1876), 46 L.J., Q.B. 573 at p. 575; *The Sanspareil* (1900), 69 L.J., P. 127 at pp. 133-4; *Banbury* v. *City of Regina* (1917), 3 W.W.R. 159. On the position of the owner when his brother was driving the car see *Boyer* v. *Moillet* (1921), 30 B.C. 216; *The "Bernina"* (1888), 57 L.J., P. 65 at p. 68; *Beard* v. *London General Omnibus Co.* (1900), 69 L.J., Q.B. 895; *The Seacombe* (1911), 81 L.J., P. 36; *S.S. Devonshire (Owners)* v. *Barge Leslie (Owners)* (1912), A.C. 634; *King* v. *Spurr* (1881), 51 L.J., Q.B. 105; *Sault Ste. Marie Pulp and Paper Co.* v. *Myers* (1902), 33 S.C.R. 23; *B. & R. Co.* v. *McLeod* (1914), 6 W.W.R. 1299 at p. 1301; *Forrester* v. *Canadian National Railways* (1921), 1 W.W.R. 316.

Argument

Craig, in reply.

Cur. adv. vult.

6th June, 1922.

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

MACDONALD, C.J.A.

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Both parties were to blame for the collision. Each admits a speed of from 15 to 20 miles an hour at the intersection of the streets, which is a speed prohibited by traffic by-laws of Vancouver. Each admits that he had no head-lights, but only side-lights. The hour was about one o'clock in the morning, and the defendant and the driver of plaintiff's car, each admits that he was sober.

The defendant was proceeding along Robson Street, a well-lighted thoroughfare, 66 feet in width, keeping upon the proper side, the left, it being before the change in the rule of the road; the driver of the plaintiff's car was also on his proper side of Bute Street, a street running at right angles to Robson Street, but being a badly lighted side street. To reach the place of collision this driver had to cross about two-thirds of Robson Street. The defendant, according to usage, if not of the law, was keeping, he says, a look out for vehicles coming from his left out of Bute Street. The plaintiff's driver was coming out of Bute Street from the right and was bound, according to the usage of traffic, to watch for danger from the direction from which the defendant was coming. The plaintiff's car was driven by his brother and there were in the driver's seat beside him two other young men. All three gave evidence. Clarke, one of them, says that he saw the defendant's car when the plaintiff's car was coming out of Bute Street, but thought it was too far away to be dangerous, and did not warn the driver, who if he had been paying attention, would have himself seen it. This witness paid no further heed to the defendant and the next thing he knew the cars were in collision. Marshall, the second man in the car with the driver, did not see defendant's car till they were within a length or a length and a half of it, and the driver himself saw a flash and the cars came together. The defendant did not know of the proximity of the plaintiff's car until the collision occurred. The defendant is a man getting on in years and was on his way home, and says that he looked at his speedometer shortly before the encounter; it indicated a speed of 15 miles an hour. According to the by-law governing traffic, the defendant had the right of way. When the collision occurred, he was thrown from his car and, being unconscious, knew nothing of the circumstances of the

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collision thereafter. The photograph shews that the plaintiff's car was struck on the rear door and over the rear wheel. The result of the collision is important. The defendant's car without a driver and with no brakes applied, though the clutch seems to have been out, ran a distance of from 60 to 75 feet when it brought up against a guy wire near the sidewalk. The impact did not upset either car; they appear to have run for a few feet practically parallel when defendant's car swerved from the sidewalk, crossed the travelled part of Bute Street at an angle and brought up against the guy wire near the opposite sidewalk. The plaintiff's car ran over the sidewalk and up a two-and-a-half foot embankment, into a neighbouring lot, crossed the lot, carried away a fence at the back and brought up against another embankment with a jerk which lifted the occupants from their seats. The distance travelled over these impediments was greater than the distance travelled by defendant's car practically unimpeded and without brakes. The driver of plaintiff's car attempts to explain this occurrence, first, by saying that he was struck from behind by defendant's car, which accelerated his speed; secondly, that he increased his speed for the purpose of getting out of the way; and, thirdly, that owing to an injury to his arm, although he was not struck by anything, he was unable to apply the emergency brake, although he does not deny that he applied the foot brake. The suggestion that he was hit from behind and had his speed thus accelerated, is disproved by the photograph and by the evidence of one of the young men who was in the car with him, who says that the blow appeared to lift the plaintiff's car bodily sideways. The other excuses may be taken for what they are worth. The inference I would draw is that the car was going at even a greater speed than 20 miles an hour to have accomplished this plunge into a neighbouring lot, over the sidewalk, embankment, lawn and back fence with the foot brake on. The plan shews that between the point of the collision and the first embankment is only a few feet, and I think the evidence indicates that he was trying to stop the car instead of increasing its speed when it was crossing the lot.

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The learned trial judge took a view of the *locus in quo*, but it is apparent that he was not assisted by it. He bases his

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judgment on this, that he was bound to find that the defendant's car ran into the plaintiff's car, and that the defendant's car was going at an excessive rate of speed, and also that defendant had failed to prove contributory negligence on the part of plaintiff's driver, but it is conclusively shewn that both cars were going at an excessive rate of speed, and it does not appear to me to make any difference which ran into the other in the circumstances in evidence. He also says that he attaches particular importance to the evidence of one Beveridge, who crossed Robson Street just before the collision. Beveridge looked in the direction from which the defendant came and says he did not see him, and that after crossing Robson Street he walked 22 yards up Bute Street when he heard the crash of the collision. The inference which the learned judge draws from this evidence is that the defendant must have been coming at a great rate of speed since he was not in sight of Beveridge when he (Beveridge) crossed the street. Now Beveridge does not say that defendant was not in sight; he simply says he did not see him, and it is quite understandable when it is remembered that the car had no head-lights, even if it were not a fair inference from the evidence that Beveridge was not an observant person.

MACDONALD, C.J.A.

Sitting in appeal upon a finding of fact of the trial judge, I have to be satisfied that the learned judge was clearly wrong in his conclusion. The mere fact, however, that the trial judge reaches a conclusion of fact does not oust the jurisdiction of the Court of Appeal. I must give the evidence and all the circumstances due consideration, and if I am convinced that the judgment below is wrong, it is my duty to say so. I have to take into consideration not only the oral evidence but the physical evidence. The inference, in my opinion, which ought to be drawn from the whole evidence, oral and physical, is that both parties were negligent, and that that negligence continued up to the time of the impact, or at all events until too late to avoid the occurrence. It is quite apparent from such evidence that both parties were going at an excessive rate of speed; that neither car had head-lights; that both parties were to a certain extent oblivious to their surroundings, and if either had exercised ordinary caution the occurrence would not have happened,

and that no care on the part of either, when the collision was imminent, could have saved the situation.

With deference, I think the learned judge has failed to give due weight to this phase of the case.

Assuming everything, except ultimate negligence, of which there is not the slightest evidence against the defendant, yet the plaintiff cannot succeed. His car was driven right up to the time of impact negligently and in contravention of law, and in such circumstances it is clear that he has no right of action.

MACDONALD, C.J.A.

The appeal should be allowed.

MARTIN, J.A.: I agree that the learned judge below should have found the plaintiff respondent guilty of contributory negligence, and I am unable to discover anything in the cases cited which would, as a matter of law, prevent that finding in such circumstances as the present.

The subject of negligence has of late been over-refined, and I draw attention to the observations of the Irish Court of Appeal in the instructive case of *Neenan* v. *Hosford* (1920), 2 I.R. 258, particularly at pp. 308-9, and to the valuable and illuminating article by a member of that Court, Lord Justice James O'Connor, entitled "Contributory Negligence," in the Law Quarterly Review for January last, p. 17. He there suggests (p. 22) that the question should be simplified to this:

MARTIN, J.A.

"Was the defendant's negligence the 'real' cause of the accident? or, perhaps, better still, try the case by one question: Whose fault was it?"

That is an excellent working solution, and I propose to adopt it, and after applying it to the present case, my answer is—one is as much to blame as the other, and so the loss must lie where it falls.

I note that my observations upon ultimate negligence in *Tait* v. *B.C. Electric Ry. Co.* (1916), 22 B.C. 571; 34 W.L.R. 684; 10 W.W.R. 523, are supported in the *Neenan* case, *viz.*, that the mere continuation of, *e.g.*, excessive speed, or failure to look, or incapacitating drunkenness causing negligent driving, do not constitute ultimate negligence under *British Columbia Electric Railway* v. *Loach* (1915), 85 L.J., P.C. 23; 8 W.W.R. 1263; 32 W.L.R. 169; 20 Can. Ry. Cas. 309; (1916), 1 A.C.

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719, though, of course, if the continued failure to look were wilful or the excessive speed were persisted in after it became possible to avoid the accident by reducing it, it would be otherwise, just as in the case of the drunken driver who came to his senses in time to take appropriate steps to avoid the accident but did not do so.

GALLIHER, J.A.: With every respect to the learned trial judge, I cannot agree that there was not contributory negligence on the part of Winch. Then given negligence and contributory negligence, there was nothing that either party could have done once the danger became apparent that would have avoided the accident. The question of what is called ultimate negligence, therefore, does not come into the question, nor was it found by the learned trial judge, whose judgment is based upon failure to prove contributory negligence on the part of Winch.

GALLIHER, J.A.

Mr. *Hossie,* junior counsel for Winch, urged that the negligence of Winch's brother, who was driving the car, could not be attributed to the plaintiff, who was not present at the time, and that even if the brother was negligent that did not disentitle the plaintiff to recover.

The proposition is not borne out by the authorities cited, and on the other hand, I should need strong authority to cause me to adopt such a contention.

MCPHILLIPS, J.A.

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

Appeal allowed.

Solicitors for appellant: *Craig & Parkes*
Solicitors for respondent: *Davis & Co.*

KING v. LANCHICK. SAFETY STORAGE AND WAREHOUSING COMPANY, LIMITED v. LANCHICK.

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Practice — Attachment — Order for payment out — County Court Rules, Order 6, r. 5 (586).

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K. obtained judgment against L. there being due $70.40. Subsequently L. did repairs to a motor-truck for S. and on delivery S. thinking L.'s charges exorbitant did not pay. L. then seized the motor-truck, whereupon S. tendered $71 for L.'s services which was refused and then brought action for replevin, paying into Court $61 for L.'s services on repairs ($10 having been paid). K. obtained a charging order against the $61 paid into Court and later obtained an order for payment out to himself. S. appealed from the order for payment out.

Held, on appeal, reversing the decision of LAMPMAN, Co. J. (MCPHILLIPS, J.A. dissenting), that the money paid into Court was not the subject of a charging order in favour of K. as L. had not accepted it or done any act whereby it became his property.

APPEAL by plaintiff Safety Storage and Warehousing Company, Limited, from the order of LAMPMAN, Co. J., of the 24th of January, 1922, ordering that $61 paid into Court in the action of the Safety Storage and Warehousing Company, Limited, against Peter Lanchick be paid to W. A. King, the plaintiff in the action of King v. Lanchick. The action of Safety Storage and Warehousing Company, Limited, against Lanchick was for the return of a motor-truck that the defendant had seized for cost of repairs that he had made and on the 5th of July, 1921, the plaintiff paid into Court $61 as the amount due for repairs. In the action of King v. Lanchick the plaintiff obtained judgment on the 30th of March, 1916, upon which $70.40 was due when the plaintiff applied to LAMPMAN, Co. J. for an order *nisi* on the 27th of September, 1921. An order for payment out to King was made on the 24th of January, 1922.

Statement

The appeal was argued at Vancouver on the 7th of March, 1922, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

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Argument

F. C. Elliott, for appellant: There is no power to make the order: see Order XXIII., r. 3, of the County Court Rules. The trial judge cannot disregard the provisions of Order VI., r. 5, sub-rules 5 and 6. There must be an acceptance of the money before it is his. The case goes on if he does not accept it.

D. S. Tait, for respondent: There is no rule covering a case of the plaintiff paying money into Court. When the $61 was paid in it was held by the Court in trust for Lanchick: see *Stumore* v. *Campbell & Co.* (1892), 1 Q.B. 314. There is no right when the money has got into the Court improperly: see *Gebruder Naf* v. *Ploton* (1890), 25 Q.B.D. 13. There was no appeal from the charging order.

Elliott, in reply.

Cur. adv. vult.

6th June, 1922.

MACDONALD, C.J.A.: This is an appeal from an order of the County Court directing payment out of moneys paid into Court in the action of Safety Storage and Warehousing Company, Limited v. Lanchick. The plaintiff in that action is a judgment creditor of the defendant Lanchick. The facts are, shortly, as follows:

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Lanchick was employed to repair a van of the Storage Company. The Storage Company refused to pay the amount demanded for repairing the van and Lanchick took the van from the Storage Company and held it under an alleged lien for the work done on it. He had no right to do this, but that is not in question here. The Storage Company commenced a replevin action against him and having tendered him the sum of $61, which together with the $10 which had been paid on account of the work, the Storage Company thought sufficient to satisfy Lanchick's claim, and brought this sum into Court. Lanchick declined to accept the sum and the action proceeded to trial. In that action the plaintiffs, the Storage Company, claimed damages for illegal detention and were awarded $175 therefor. The defendant Lanchick counterclaimed for his said charges and was awarded $125 therefor. After all set-offs had been made, a balance was found in favour of the plaintiff.

The money was not paid into Court in strict accordance with the rules contained in Order VI. of the County Court Rules. The proper course for the plaintiffs to have pursued was to have paid into Court the whole amount for which the lien was claimed with costs, whereupon the van would be ordered to be delivered up and the money in Court would stand in its place (*Gebruder Naf* v. *Ploton* (1890), 25 Q.B.D. 13), or if they wished to proceed in the way they did, by replevin, to wait until the counterclaim was set up and bring into Court with the defence to the counterclaim the sum which they thought sufficient to satisfy the defendant's counterclaim. What they did was to pay the money in with their plaint, which was out of accord with the rules.

If we ignore the irregularity and treat it as paid in under Order VI., r. 4(1), then it is money paid in under that rule without denial of liability, the plaintiff not having denied liability to the extent of the money paid in. But notwithstanding non-denial of liability, the plaintiffs were entitled to the notice specified by Order VI., r. 5(1). Such notice was not given, nor was there any acceptance of the money in fact made by the defendant. The defendant might have accepted it at any time prior to the trial, but he did not in fact do so. So that if the payment in is to be treated as payment in pursuance of Order VI., r. 4(1), while it would be an admission *pro tanto* of the claim, yet the mere fact of payment into Court would not of itself operate to change the property in the money from the plaintiffs to the defendant. It would require the act of the defendant to do this, which admittedly he has never done.

MACDONALD, C.J.A.

There was a charging order made before the case came to trial, but this could not operate to change the property in the money, and the plaintiff in this action, King, must rely entirely on the order for payment out which was made after the trial in the replevin action and after the rights of the parties in that action had been fully adjusted by set-off.

But it was contended that the payment into Court not having been regularly made, is not subject to the protection of Order VI. Assuming this to be so, then the money was

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paid in without authority to the registrar, who had no authority to receive it. It was as if it had been paid to a trustee or agent of the Storage Company with instructions to him to pay it to the defendant, if the defendant chose to accept it on the conditions offered, but until acceptance the money would remain the property of the Storage Company. It appears to me that, treated in this way, there has been no passing of the property in the money to the defendant any more than in the case first cited, and hence Lanchick's creditor could have no higher right to the money than he himself had. On either assumption, therefore, the money remained the money of the Storage Company and never became that of the defendant. It was therefore not subject to any order such as the one complained of.

The cases to which we were referred do not assist the plaintiff King. In *Townend* v. *Jones* (1889), 5 T.L.R. 609, the point was as to the jurisdiction of the registrar to make a charging order. Incidentally, it was said that a charging order may be got against money in Court when the plaintiff has accepted it in satisfaction of his claim, but the point here is that defendant did not accept the money. *Stumore* v. *Campbell & Co.* (1892), 1 Q.B. 314, decides that moneys paid to a solicitor for a purpose which has failed remain the client's moneys, notwithstanding that the solicitor could counterclaim against the client for a bill of costs, if the client should sue for the return of the money. It is merely authority for this, that if the money in Court were in fact the money of Lanchick, that is, if he had accepted it, thereby changing the property in it from the Storage Company to himself, the fact that the Storage Company had a counterclaim would not prevent the judgment creditors reaching it by lawful process.

MACDONALD, C.J.A.

It was argued that by the course pursued the plaintiff King was prevented from attaching in garnishing proceedings this money, namely, the debt owing by the Storage Company to the defendant. Whether or not this be so, does not appear to me to be relevant to the issue involved in this appeal.

I would, therefore, allow the appeal.

MARTIN, J.A.

MARTIN, J.A.: I agree that this appeal should be allowed.

GALLIHER, J.A.: I think the appeal should be allowed.

The moneys in Court here were paid in for a special purpose which failed, owing to their non-acceptance by the defendant Lanchick. They therefore never became his moneys and had they been put in the hands of a stakeholder, on failure of the purpose would have been returned to the plaintiff. That they were paid into Court does not, I think, alter the position if we can consider that no property in the moneys passed to Lanchick, as if so there was no moneys of his in Court to which a charging order could attach, even if the County Court judge had the power to make such order.

MCPHILLIPS, J.A.: In my opinion LAMPMAN, Co. J. arrived at the right conclusion. I have no doubt that there is jurisdiction in the County Court, as there is in the Supreme Court, and if it is an unprovided case, the practice in the Supreme Court will prevail (sections 22, 27 and 41 of the County Courts Act, R.S.B.C. 1911, Cap. 53; section 2, subsection (7), Laws Declaratory Act, R.S.B.C. 1911, Cap. 133) to make a charging order on cash in Court payable to the judgment debtor, which is the present case. If authority is needed, I would refer to the following cases: *Watts* v. *Jeffereys* (1851), 3 Mac. & G. 422; *Brereton* v. *Edwards* (1888), 21 Q.B.D. 488; Esher, M.R. at p. 494, Lindley, L.J. at p. 497.

MCPHILLIPS, J.A.

No point can effectively be made that sections 22 and 27 of the County Courts Act have relation only to "cause or matter pending": see *Salt* v. *Cooper* (1880), 16 Ch. D. 544. Section 24, subsection 7 of the Judicature Act, 1873 (Imperial), is similar to section 2, subsection (7), of the Laws Declaratory Act, Cap. 133, R.S.B.C. 1911.

The practice with regard to the appointment of receivers and the making of charging orders is, in the main gathered from what was the prevailing practice in the Court of Chancery, and we have the express aidance as well of the statutory power as conferred by section 13 of the Execution Act (Cap. 79, R.S.B.C. 1911); also see Order XLVI., Rules of the Supreme Court, Charging Orders (see Execution Act). The authorities shew that under the statutes or by virtue of the ordinary jurisdiction of the Court of Chancery, there was always power to make an order charging cash, and this could be done by an

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order made in one Division as against money in another Division, *i.e.*, in the Queen's Bench Division upon cash standing to the credit of the debtor in the Chancery Division. *Brereton* v. *Edwards* (1888), 21 Q.B.D. 488, was a case of that kind. [The learned judge quoted the judgments of Lord Esher, M.R. from the beginning of the third paragraph at p. 493 to the end of the second paragraph at p. 494, and of Lindley, L.J. to the end of the second paragraph on p. 497, and continued.]

The judgment of Bowen, L.J., is most comprehensive in its terms, and it would seem to effectively meet all the arguments advanced by the learned counsel for the appellant. [After quoting the judgment of Bowen, L.J. down to the first paragraph ending on p. 500, the learned judge continued.]

It will be observed that Lord Justice Bowen said (and as I have pointed out, we have exactly similar statute law and applicable to the County Court as well as the Supreme Court), p. 499:

> "What, then, did the Act 1 & 2 Vict. c. 110, enable a Court of Equity to do? Sect. 12 made cheques and money available for execution, and, by analogy, it enabled a Court of Equity to assist a judgment creditor, by means of equitable execution against money belonging to him in its own hands."

MCPHILLIPS, J.A.

That is exactly the present case, and the charging order of LAMPMAN, Co. J. is supported not only by the long existent practice as the cases shew, but by the authority as well of the Execution Act, so well indicated by the Court of Appeal in England in the *Brereton* case. I do not understand that my learned brothers differ from my view that a charging order could be made, but proceed upon the view that the money in Court is not the money of the judgment debtor. I have, though, assumed, as I think correctly, with great respect to all contrary opinion, that the money is the money of the judgment debtor, and was rightly charged under the charging order, and the money so charged should be available to the creditor in the way of satisfying *pro tanto* the judgment debt.

I would dismiss the appeal.

Appeal allowed, McPhillips, J.A. dissenting.

Solicitors for appellant Safety Storage Co.: *Courtney & Elliott.*

Solicitors for respondent King: *Tait & Marchant.*

THE B.C. MILLS, TUG & BARGE CO., LTD. v. KELLEY.

MACDONALD, J.

1922

June 5.

THE B.C. MILLS, TUG AND BARGE CO. v. KELLEY

Contract—Charterparty — Towage — Non-fulfilment — Impossibility of performance—Right of tug owners to charter-money.

Where a contract for towage contemplates that the towing may be delayed owing to stress of weather and provides for a reduced rate if such event occurs, but makes no provision as to who shall decide when the tug should tie up by reason of the weather, the conclusion of the tug's captain on the point, if honest and justifiable, will be held to decide.

Plaintiff was accordingly given judgment for the balance of the charter-money owing under such a contract, although the tug had been tied up because of stress of weather for the whole of the period stipulated under the contract (about six weeks) and the work contemplated thereby had not been completed. The counterclaim for damages for non-fulfilment of the contract was dismissed.

ACTION to recover $803.98 the balance of charter-money payable in respect of the tug "Commodore" under a written contract of the 16th of November, 1921. The defendant had a lumber camp at Cumshewa Inlet near the north end of Queen Charlotte Islands and three rafts of logs, two at Dona Inlet a short distance south of Cumshewa, and a third at Atli Inlet further south. Under the contract the plaintiff was to take the "Commodore" from Nanaimo and tug the rafts across Hecate Strait (a tug of about 30 hours with a raft) and they were to be paid $300 a day from the time the tug left Nanaimo until the 31st of December, when, if the work had not been completed, the contract was to automatically cease. The plaintiff wanted security owing to the danger of bad weather preventing it completing the contract and a letter of credit was arranged with the Union Bank up to $10,000. The tug started from Nanaimo on the 19th of November. Several attempts were made to bring the rafts across but without success, all the actual towing done being the bringing of one raft from Dona Inlet to Thurston Inlet and from there with difficulty to Cumshewa Inlet. The tug remained until the 30th of December, when the defendant ordered it back to Nanaimo. The $10,000 in the Union Bank was paid to the

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plaintiff, the action being for the balance due under the contract. Tried by MACDONALD, J. at Vancouver on the 1st of May, 1922.

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

5th June, 1922.

MACDONALD, J.: Plaintiff seeks to recover from the defendant $803.98, as balance of charter-money owing under a towage contract, dated the 16th of November, 1921. Defendant counterclaims, alleging non-fulfilment of such contract and resulting damages, amounting to $16,958.

Defendant had three cribs of logs or "Davis" rafts at Queen Charlotte Islands, ready for transportation to market, and after negotiations with the plaintiff, selected its tug "Commodore" for towage purposes. The agreement was reduced to writing and provided that the plaintiff should place such tug, at the disposal of the defendant (as "charterer"), for towing the rafts from Queen Charlotte Islands to Captain Cove, Pitt Island and Hardy Bay, Vancouver Island. The first two rafts were to be towed to Captain Cove and the third one to Hardy Bay, and then the tug should return to Captain Cove and tow one of the rafts to Hardy Bay. As soon as such service had been rendered the contract was to expire. It was apparently estimated that the necessary towing would be accomplished by the 31st of December, 1921, as it was stipulated that in any case, the agreement should terminate on that date, unless otherwise mutually agreed.

Judgment

No question arises, as to the suitability and efficiency of the tug "Commodore" to carry out the contract, nor that its crew, tackle and equipment were not such, as should be reasonably expected in a vessel of her class. The tug and its captain were both well known to the defendant.

The contract provided that the defendant should pay for the hire of the tug at the rate of $300 per day, and that such charter hire should commence from the time that the vessel was fully bunkered. This having been accomplished, the tug proceeded in due course to Queen Charlotte Islands, and shortly after its arrival took in tow one of the "Davis" rafts, with a

view to crossing the Hecate Strait to Captain Cove. It was found necessary, in view of the stress of weather, to take shelter, and from that time forward until the 28th of December, 1921, when a request came from the defendant, cancelling the contract, none of the rafts were towed from Queen Charlotte Islands, and the defendant received no benefit under the contract. On the contrary, he authorized payment by the Union Bank of $3,251.90, covering the charges for towage during November, and subsequently the plaintiff received payment from said bank, under its guarantee, of $6,748.10, making a total amount received for towage of $10,000, and still leaving the alleged balance of $803.98. Defendant complains that not only was he thus required to pay this amount for towage, but through non-performance of the contract at the time, he was prevented from disposing of the logs, and thus suffered the damages claimed. It is submitted, on the part of the defendant, that the contract was absolute in its terms, and that there was no discretion reposed in the captain of the tug "Commodore," as to crossing from the Queen Charlotte Islands to the Mainland. In other words, that he was bound to undertake and carry out the service no matter what the state of the weather might be. While this contention was made, on the part of the defendant, the trend of the trial took a different course. A large amount of evidence was adduced on both sides, as to the state of the weather from the arrival of the tug at the Islands until its departure, approximately six weeks after. The plaintiff alleges that it was excused from performance of the contract, during such period, by stress of weather.

Judgment

There is no doubt that before the adoption of cribs or "Davis" rafts, as a means of transporting logs, an attempt would not have been made, with any reasonable hope of success, to tow logs from Queen Charlotte Islands to the Mainland in open rafts. The advent of the scheme of "Davis" rafts, solved the difficulty and enabled a large amount of excellent timber upon the Islands, to be logged and transported to market. It proved of great assistance to the lumber industry, especially for war purposes. In this mode of transporting logs, Frank Johnson, captain of the "Commodore," had considerable experi-

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ence. He had towed extensively along the coast of British Columbia, and brought about 50 "Davis" rafts across the Hecate Strait. He had been in command of the tug, when it had been employed on some occasions by the defendant for that purpose, and no suggestion as to any lack of capability was made. It was, however, contended that, whatever his ability might be, as a tug boat captain, he had been over-cautious in not carrying out the contract with a view to its completion, or to use the expression, when objection was made to the service not being properly performed, that he had "loafed on the job." The period during which Johnson remained with the tug in shelter, and did not after his first attempt, proceed with the towing, would seem very prolonged, but one has to consider the locality and consequent danger, especially during the winter months, in towing logs across such a widely exposed area as Hecate Strait. If Johnson had no discretion in the matter, as contended by defendant, then the state of the weather might be immaterial. He should then, presumably, have acted like one of the witnesses for the defence, who had experience as a tug-boat captain, would have done, and "taken his chances." If he had done so and disaster occurred to any of the rafts, what would be the position of plaintiff? Should Johnson be believed in his statement as to there being no occasion, during the period, when it was safe to proceed? It was pointed out that, in the contract, the plaintiff was only required to furnish the tug "Commodore," with a crew and equipment suitable for carrying out the agreement, and that it should not be "in any way responsible for the safe delivery of the cribs or rafts, which will in all respects be at the charterer's risk." While this provision in the contract was intended to relieve the plaintiff from responsibility, I do not think it would apply where loss ensued, through neglect of the captain in charge of the tug. It would certainly be want of care, amounting, under the circumstances, to negligence, for a tug-boat captain, believing that a storm was impending, which would bring destruction to the property in his charge, to proceed across the strait with one of the rafts. While the logs were insured by the defendant, this did not relieve the captain of the tug from exercising

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reasonable care in towing. In the event of his neglect, while the defendant might, in the meantime, recover from the insurance company, still, the plaintiff would not be relieved.

The law with respect to a clause in a contract for towing, which was at "the owner's risk," was discussed in *The Forfarshire* (1908), 78 L.J., P. 44. It was there contended that liability against the tug-boat owners did not arise. Bargrave Deane, J., at p. 47, in expressing his opinion that the marginal wording in the contract, "all transporting to be at owner's risk," did not protect the defendants, said:

"It would be monstrous to suppose that it was in the contemplation of these two parties that, whatever neglect there might be on the part of the defendants to perform their part of the contract, still the plaintiffs would be responsible if any accident happened to the ship. In my opinion, that which happened is outside the purview of the marginal note. I think it may very well be that what was in view was, that, the defendants performing all their duties in respect of the contract, if anything happened the plaintiffs should suffer any expense which might be incurred; but I do not think it was intended to protect the defendants against the neglect on their part to carry out their part of the contract."

A contrary view seems to have been entertained by Bailhache, J., in *Pyman Steamship Company* v. *Hull and Barnsley Railway* (1914), 2 K.B. 788, in which a somewhat similar provision was held to render the defendants immune from liability, through defective condition of blocks, provided by them in a contract for supporting a vessel when in dock. The judgment in *The Forfarshire, supra,* was questioned. Still, I think there is a distinction and that liability would attach against the owner where a captain in charge of his tug boat, knowingly undertakes a risk, when he is satisfied that such a course is unreasonable and unsafe. His employers would be required, should a raft be destroyed, to give an explanation which, if honestly afforded by the captain, would at the same time admit such neglect. This position of responsibility and necessity of proving absence of negligence, where an accident occurs to property while being towed, is referred to by Vaughan Williams, L.J., in *The West Cock* (1911), 80 L.J., P. 97 at p. 111, as follows:

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"I think that, apart from any warranty, treating the contract of towage as an ordinary contract under which the contracting party is bound to use reasonable care and skill, when in the course of the performance of the contract an accident happens, that fact alone is sufficient to shift the

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onus on to the defendant tug owner, of explaining the accident. Until it is proved that the accident happened in the course of the towage, the onus is on the plaintiff, the shipowner; but when it has been shewn that the ship was injured in the course of the towage the onus shifts, and it is for the tug owner to explain the cause of the accident and to relieve himself from liability by shewing that there was no negligence or want of reasonable care and skill on his part."

This would have been impossible in the present case, in the event of loss, assuming that Johnson would have told the truth, as to "taking chances," in proceeding when he well knew that he was not exercising reasonable caution. Even if the loss were caused by a peril of the sea and plaintiff sought to be excused on that account, the defendant could, under such circumstances, hold the plaintiff liable and come within the requirements of the decision in *The Glendarroch* (1894), P. 226. Compare as to obligations and liabilities of tug-boat owners, *Nemo* v. *Canadian Fishing Co.* (1916), 22 B.C. 455.

In connection with this question of responsibility for negligence, the duties of a tug with respect to its tow, ought, to some extent, to be considered, as being partly applicable, even though such tow be a vessel with a crew. They are stated in Newson on Salvage, p. 136, to be as follows:

"In every contract of towage, there will be implied an engagement that each party will perform his duty in completing the contract; that proper skill and diligence will be used on board both the vessel towed and the tug; and that neither by negligence nor want of skill will unnecessarily imperil the other, or increase any risk, incidental to the towage service. (*The Julia* [(1861)], 14 Moore, P.C. 210; Lush. 224)."

Judgment

Then again Sir Samuel Evans, in *The West Cock, supra,* at p. 102, after referring to the careful examination of authorities made by him, in the *Marechal Suchet Case* (1911), P. 1, refers to the obligations of a tug owner, under a towage contract, as follows:

" 'The owners of the tug must be taken to have contracted that the tug should be efficient, and that her crew, tackle, and equipment should be equal to the work to be accomplished in weather and circumstances reasonably to be expected; and that reasonable skill, care, energy, and diligence should be exercised in the accomplishment of the work. On the other hand, they did not warrant that the work should be done under all circumstances and at all hazards, and the failure to accomplish it would be excused if it were due to *vis major* or to accidents not contemplated, and which rendered the doing of the work impossible.' "

This statement, as to the obligations which would rest upon the plaintiff under the charterparty, and not requiring John-

son to proceed to sea "at all hazards," would, in the absence of any provision for deduction, through not towing on account of bad weather, have entitled the plaintiff to recover at the fixed price per diem. Where freight is payable by time, it is earned at the end of each period specified unless a counter-intention appears, although it may be only payable under the charter at longer intervals. Then in the absence of special agreement, it is also payable during the ship's detention by blockade, embargo, bad weather or repairs, unless the delay involved is so great as to put an end to the whole contract. See Scrutton on Charterparties, 10th Ed., 382, where the charterer could, as defendant did here, cancel the contract, though no weight was attached by plaintiff to this point. The case cited, in support of the proposition that freight is payable, when the ship is detained by bad weather, is *Moorson* v. *Greaves* (1811), 2 Camp. 627. There the plaintiff let his ship to the defendants for a voyage at £6,300 freight for the first eight months, and if the boat should be engaged for a longer time in completing the voyage, then at the rate of 47s. 6d. per ton per month. The ship was seized for attempting to enter a blockaded port and her cargo condemned; but she was afterwards released, and Lord Ellenborough, in his judgment, held that the voyage had not discontinued, and that the freighters were liable for the time the ship was detained in the blockaded port "in the same manner as if it had arisen by contrary winds or from embargo." I think the same principle would apply to the towage contract in question, but aside from any such implication, it would appear that the parties had in contemplation that the actual towing operation might be delayed through stress of weather. The contract gives evidence of this understanding, as it contains a stipulation that,—

Judgment

"If by reason of stress of weather, the said tug is forced to tie up for a longer time than four consecutive days of 24 hours each, at any one time the charter will pay hire for the first four days, she is so tied up, at the rate of $300 per day, and for the remainder of the time she is so tied up, at the rate of $250 per day."

Then it provided that there might be a cessation of towage under the contract, while the tug was engaged in assisting any vessel in distress, and provision is made as to the division of any salvage money that might be earned by such service. In

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construing a contract the object should be, to arrive at the intention of the parties. The Court should not adhere to the literal meaning of the words, if an injury would thereby ensue. All the circumstances of each particular contract should be looked at. What the parties did, as well as what they said in the contract, might be considered as affording a basis of construction, if any ambiguity existed. If the contract in question is to be construed in this manner, one is required to consider it in the light of the nature and details of the adventure contemplated by the parties: *Mackill* v. *Wright Brothers & Co.* (1888), 14 App. Cas. 106, *per* Lord Halsbury at p. 114; Lord Watson at p. 116; Lord Macnaghten at p. 120. Then the construction to be given to charters or bills of lading, is not

> "an unnecessarily strict one, but such a one as, with reference to the context, and the object of the contract, will best effectuate the obvious and expressed intent of the parties":

Diemech v. *Corlett* (1858), 12 Moore, P.C. 199 at p. 224.

I do not think, however, that there is any ambiguity or contradiction in the terms of the contract. Upon its consideration as a whole, in order to arrive at its general meaning, see *Elderslie Steamship Company* v. *Borthwick* (1905), A.C. 93, and in view of the surrounding circumstances I conclude, that the parties intended that the towage should be proceeded with as speedily as possible, subject to the stipulation made as to tying up at any time through stress of weather. In that event the charterer should only pay for the use of the tug at the reduced rate of $250 per day, should such tying up at any one time exceed four days. A reasonable construction would be that such tying up might occur more than once and consequent reduction take place. The incentive to the tugboat owner to proceed expeditiously was the increased hire, while towing, with probably no appreciable increase of expenditure. Here the tying up, as far as the rafts were concerned, was for almost the entire period, for which the plaintiff seeks to recover hire of its tug. If the plaintiff had the right to tie up and not proceed with the towing on account of the weather, without any limitations as to time, then was Johnson, as the captain of the tug, justified in not proceeding across the Hecate Strait during such lengthy period?

Judgment

This involves consideration of his statement, as to the weather preventing him from doing so. I have first to determine whether he was honest in so stating, and then whether his decision was justifiable and relieved the plaintiff from non-performance. Johnson had an admittedly good record as a tug-boat captain. In pursuance of the terms of the contract he kept a log or diary, outlining the state of the weather and other essentials during the time that he was at Queen Charlotte Islands. A copy of this log was forwarded from time to time by Johnson to the plaintiff for transmission to the defendant. This would operate as a check as to the state of the weather, and whether it was fit for towing or otherwise. This clause may have been inserted in the contract for that purpose. Without discussing such reports in detail, suffice to say, that plaintiff contends they support Johnson's statement that during all the time he was at the Islands, it was too stormy for him to cross the Strait to Captain Cove. He asserted that this was the sole reason for not proceeding with the towing. He made ineffectual attempts but claimed that he was prevented by stress of weather and had to seek shelter, generally at Thurston Harbour. He mentioned the general conditions as to wind, sea and weather, which should prevail in order to justify him in making the crossing, but stated that upon no occasion were the conditions such as to warrant the venture.

Judgment

I understood him to say that the weather during all this period was so severe as to be dangerous, even for the "Commodore" to cross alone, without any of the rafts. He explained afterwards that if his statements might be so construed, still that he did not so intend. Except for what I thought at the time was such exaggeration as to the weather, he gave his evidence candidly and impressed me favourably. On consideration I was inclined to the opinion, that he could not have intended to convey the impression that the tug alone, without any raft, could not, during this lengthy period, have proceeded across the strait. While no rafts had been towed across during this time, he was well aware that boats had crossed. He must have known that defendant or some of his witnesses in Court would also have this knowledge. I think

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he misunderstood the purport of the questions on this point, and thus the answers were unresponsive or inaccurate. I am satisfied that Johnson was not wanting in courage to undertake completion of work with which he was so familiar, nor do I think that his log or diary was made up with a view of forming an excuse, for wasting the time of the tug and crew. It would mean that not only was he manufacturing evidence to meet any claim of defendant for not towing, but was preparing material to offset any complaint of his employers for not earning the full rate of hire of the tug. He kept his tug with steam up, apparently ready to cross, whenever he considered the weather favourable for that purpose. While the locality is not thickly peopled, still it must have been common knowledge that Johnson was at the islands with the "Commodore" for the purpose of towing defendant's rafts to the Mainland. As one day followed another without the work proceeding, Johnson must have appreciated the fact that his failure to depart would be noticed and criticized by members of his own crew, as well as all the inhabitants within a reasonable distance. I could see nothing to impute fraud nor dishonesty, and feel satisfied that the log or diary was a correct account of Johnson's observations. Further, I credit his statement, that he honestly believed that the weather was not fit, from the period of his arrival to his departure from the islands, to tow any of the rafts across to the Mainland.

Judgment

Was Johnson justified in coming to this honest conclusion? There was no specific provision in the contract as to who was to determine, when the tug should tie up through stress of weather. It is fair to conclude that, in the absence of any such provision, the captain in charge of the towing operations should have the right to decide such important question. I do not see how the towing of logs, at any rate, along our extensive coast line, could proceed on any other basis. Tug-boat owners must necessarily rely on the judgment and ability of captains in charge of their tugs. I do not think charterers could reasonably contend that, generally speaking, this position was unsound, and did not, in the absence of express provision, impliedly form part of any contract for towing.

While the defendant had John Macmillan, as logging superintendent, representing him at his camp, it was contended that his authority only extended to placing the rafts at the disposal of the plaintiff ready for towing. So the fact that Macmillan did not complain during the time as to the towing not proceeding, was met with the contention that, it was not within the scope of his authority. In other words, it was contended that the contract was absolute and was to be carried out, irrespective of any instructions that might be given by Macmillan or anyone on behalf of the defendant.

Defendant adhered firmly to this ground, to which I have already referred, and cited authorities where non-performance was not excused. I think the facts in these cases are distinguishable from the present one, and that the parties contracted upon the basis that the towing should only proceed in favourable weather, with a good excuse if bad weather prevented performance. On this point, a portion of the judgment of Lord Loreburn, in *F. A. Tamplin Steamship Company, Limited* v. *Anglo-Mexican Petroleum Products Company, Limited* (1916), 2 A.C. 397 at p. 403, might to some extent be aptly applied. He was there construing a contract, and said in every such case it was now necessary

"to examine the contract and the circumstances in which it was made, not of course to vary, but only to explain it, in order to see whether or not from the nature of it the parties must have made their bargain on the footing that a particular thing or state of things would continue to exist. And if they must have done so, then a term to that effect will be implied, though it be not expressed in the contract."

Judgment

There was a large amount of evidence adduced as to the state of the weather during this period. Comparison was made between the statements contained in the log or diary and the witnesses produced on the part of the defence.

I think the decision of Johnson, as captain of the tug, as to the state of the weather, should prevail and be accepted, unless I am satisfied that such decision, though honest, was unjustified. The state of weather at different points along the coast differs, even though the distance between such points is not great. Parties might have gone, even in a small boat, along the eastern side of the Islands towards the north with perfect safety, many days during this period, when a tug-boat captain, with due

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regard for care in operating his tug and tow, would not venture to cross over to the Mainland, some 80 miles distant. There may be an honest difference of opinion, as to the state of the weather on particular days, and yet the decision of a person having such responsibility as Johnson, should be entitled to greater weight than the ordinary observer, moving in a small compass, and not requiring to note conditions indicating the state of the weather 20 or 30 miles distant.

I think the burden rested upon the plaintiff of proving that it was excused from performance of the contract, or in other words, that the "tying up of the tug" was justifiable on account of weather conditions. Johnson was corroborated in his statements by other witnesses, and though met with a mass of evidence to the contrary, coupled with criticism of his log, I have concluded that his decision was not only honestly formed but was justified.

Judgment

It follows that the plaintiff is entitled to the balance still due for towage under the contract. The counterclaim is dismissed with costs.

Judgment for plaintiff.

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Criminal law—Crime on high seas—Obstructing public officers—Offence by foreign seamen—"Port of Vancouver"—Overhauling launch within three-mile limit—Proceedings instituted without leave of Governor-General—Criminal Code, Secs. 168 and 591—41 & 42 Vict., Cap. 73, Secs. 3 and 6 (Imperial)—R.S.C. 1906, Cap. 48, Secs. 16 and 248.

A launch of which the accused were master and engineer respectively came from a United States port into the port of Vancouver and did not make inward entry. They remained over night, took on a cargo of whisky, and left next day from English Bay for American waters without making outward entry. They were pursued by the customs collector who overhauled them beyond the port of Vancouver but within three miles from shore. They resisted capture and were convicted of resisting an officer in the discharge of his duty. The accused were American citizens and leave of the Governor-General under section 591 of the Criminal Code was not obtained until after the commitment but before the trial.

Held, on appeal, reversing the decision of CAYLEY, Co. J. (MCPHILLIPS, J.A. dissenting), that the appeal should be allowed and the conviction quashed.

Per MACDONALD, C.J.A.: Whether the case is governed by section 591 of the Criminal Code or section 3 of the Territorial Waters Jurisdiction Act, 1878 (41 & 42 Vict., Cap. 73), the definition of "proceedings" in the Imperial Act is a logical and reasonable one which should also be applied to the Criminal Code, and makes the commitment the initial proceeding in the trial. As the statute requires that before the offender be committed for trial leave of the Governor-General must be had, the conviction was bad as leave was not obtained until after the committal.

Per MARTIN, J.A.: The customs collector was not acting "in the execution of his duty" since he had gone outside the limits of his jurisdiction over the port of Vancouver.

APPEAL by way of case stated from the decision of CAYLEY, Co. J., of the 8th of April, 1922. The case was as follows:

"The prisoners were committed for trial on the 8th of March, 1922, by H. O. Alexander, stipendiary magistrate in and for the County of Vancouver, on the charge that they, the said Andrew H. Johanson and Charles William Lewis, did in the waters of the Gulf of Georgia, and within the County of Vancouver, wilfully obstruct Alfred Blake Carey, collector of customs of the port of Vancouver, a public officer in the execution of his duty, and were tried before me. Statement

"At the opening of the trial counsel for the prisoners raised as a preliminary objection the point that, under section 591 of the Criminal Code

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the accused were entitled to be discharged because the leave of the Governor-General of Canada and his certificate, that it was expedient that proceedings for the trial and punishment of the accused should be instituted, had not been obtained previous to the committal of accused for trial. I refused to give effect to this objection.

"It appeared from the evidence that the Cisco, a gasoline launch of foreign registry of which the accused Johanson was master and owner, and the accused Lewis engineer, engaged for the trip, both of them foreigners, came into the port of Vancouver on the evening of the 3rd of March, 1922, but failed to make an inward entry as required by section 16 of the Customs Act. She lay alongside a slip in False Creek for the night and on the following morning took on board a quantity of whisky. She then left her moorings without making entry outwards as required by section 96 of the said Act, and proceeded westerly through English Bay, which is within the port of Vancouver (see the Proclamation of 3rd December, 1912, on page xcv., Can. Stats. 1913) on her voyage for United States waters. The late Colonel Carey hearing of her departure, immediately went to Jericho Beach on the south shore of English Bay, and with other officers followed in a fast launch belonging to the Dominion of Canada Air Service, a boat which they believed to be, and which was the Cisco and which was still then "within the limits" of the port of Vancouver. They followed in such a way and at such a speed that they would not overhaul the Cisco until she was outside the port limits, because after she got outside the port limits it would be distinctly a case of the Cisco leaving the port in a manner in contravention of the Customs Act, whereas, if they caught the Cisco within the limits of the port the Captain of the Cisco would say he was only skirting up and down the Bay and always intended to return to his wharf. As soon as the Cisco was definitely outside the westerly limit of the port of Vancouver, being the line from Point Atkinson to Point Grey, they closed up on her and hailed her through a megaphone and ordered her to stop, the customs officer stating that they were customs officers and wanted to come aboard. The Cisco, however, did not stop.

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"The officer again hailed the Cisco and ordered her to stop in the 'King's' name, which she did not do. Johanson manœuvred the Cisco in such a way as to prevent the officers boarding her, but after some delay the launch got alongside and Colonel Carey and special officer Barton jumped aboard.

"The Cisco was leaving Vancouver bound for a foreign port and had got beyond the limits of the port but was within the boundaries of the County of Vancouver as defined by the Counties Definition Act Amendment Act, 1920 [B.C. Stats. 1920, Cap. 20], and within one marine league of the Coast of Canada when they boarded her.

"At the opening of the trial, counsel for the Crown produced in Court the authority of the Governor-General of Canada as required by section 591 of the Code, dated 22nd March, 1922.

"At the conclusion of the case for the Crown, counsel again moved that the accused should be discharged for the same reason as given in his preliminary objection. I again refused the application but stated that I would reserve the question for the opinion of the Court of Appeal.

"Counsel for the accused then moved that they should be discharged on the ground that Colonel Carey being a public officer was not in the execution of his duty at the time of the alleged obstruction, he not being authorized by law to stop and board the Cisco, when she was beyond the limits of the port of Vancouver and bound for a foreign port.

"I refused this application also but stated that I would reserve the question for the opinion of the Court of Appeal.

"Evidence for the defence was then given.

"I found both the accused guilty and remanded them for sentence until the questions herein reserved were decided.

"The questions so reserved by me for the opinion of the Court of Appeal are:

"1. Was I right in holding that it was not necessary that the leave of the Governor-General of Canada, and his certificate, that it was expedient that these proceedings should be instituted should have been obtained before the accused were committed for trial by the magistrate?

"2. Was I right in holding that Alfred Blake Carey, a public officer, was in the execution of his duty when the alleged obstruction took place?"

Statement

The appeal was argued at Vancouver on the 11th of April, 1922, before MACDONALD, C.J.A., MARTIN, MCPHILLIPS and EBERTS, JJ.A.

A. D. Taylor, K.C., for accused: The charge is under section 168 of the Code. Under section 591 of the Code (taken from section 3 of the Territorial Waters Jurisdiction Act, 1878 (41 & 42 Vict., Cap. 73), leave of the Governor-General must be obtained: see *Rex* v. *Neilson* (1918), 30 Can. Cr. Cas. 1; *Rex* v. *Heckman* (1902), 5 Can. Cr. Cas. 242. The authority of the Governor-General was dated March 22nd. Accused was committed on March the 8th. The consent was obtained too late. The learned judge followed *Rex* v. *Tano* (1909), 14 B.C. 200; 14 Can. Cr. Cas. 440. The next point is that the boat was beyond the port when seized. The customs officer exceeded his powers when he hailed or boarded the vessel in the open sea. Section 246 of the Customs Act applies to "port": see *Borjesson and Wright* v. *Carlberg* (*First Appeal*) (1878), 3 App. Cas. 1316 at p. 1321.

Argument

Wood, for the Crown: The Territorial Waters Jurisdiction Act was passed by reason of *Reg.* v. *Keyn* (1876), 2 Ex. D. 63; 46 L.J., M.C. 17. The offence was committed within the three-mile limit. The Gulf of Georgia is not the "open sea." The consent, although after the commitment, was obtained before the trial: see *Rex* v. *Neilson* (1918), 30 Can. Cr. Cas. 1 at

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p. 5. The Customs Act, section 16, requires entry of both ingoing and outgoing vessels. They were in pursuit of this vessel within the jurisdiction: see *The Ship North* v. *Regem* (1906), 37 S.C.R. 385 at p. 394. The pursuit commenced while the vessel was within the port.

Taylor, in reply.

31st May, 1922.

MACDONALD, C.J.A.: The prisoners were arrested for obstructing a public officer in the execution of his duty. A preliminary investigation was held before the stipendiary magistrate for the County of Vancouver, and they were duly committed for trial. They were tried in the County Court Judge's Criminal Court and convicted, whereupon a case stated was prepared by the learned County Court judge, and submitted to this Court for our opinion.

The accused Johanson was the master and owner, and the accused Lewis was the engineer of a launch which came from a foreign port to the port of Vancouver, but did not make the inward entry. They remained overnight and the next morning took a cargo of whisky and started, without making outward entry, upon a voyage to American waters. The customs collector, the late Colonel Carey, pursued them in a fast motor launch, overhauling them just outside the port of Vancouver in the Straits of Georgia, and within one marine league of the shore. They resisted capture, and this resistance of an officer in the discharge of his duty is the offence of which they have been convicted.

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The first question asked is as follows:

"Was I right in holding that it was not necessary that the leave of the Governor-General of Canada and his certificate, that it was expedient that these proceedings should be instituted should have been obtained before the accused were committed for trial by the magistrate?"

The necessity for such leave is alleged to arise by reason of section 591 of the Criminal Code, which enacts that:

"Proceedings for the trial and punishment of a person who is not a subject of His Majesty, and who is charged with any offence committed within the jurisdiction of the Admiralty of England, shall not be instituted in any Court in Canada except with the leave of the Governor-General and on his certificate that it is expedient that such proceedings should be instituted."

This section is taken from the Imperial Act, the Territorial Waters Jurisdiction Act, 1878 (41 & 42 Vict., Cap. 73), Sec. 3, which I need not quote since it is in effect the same as said section 591. If the offence of which the accused were convicted falls within the purview of the said Imperial Act, then section 591 is merely a gratuitous provision intended, no doubt, *ex abundanti cautela,* to facilitate the inforcement of the Imperial Act. There is no doubt in my mind that the Imperial Act is in force in Canada with respect to all waters which fall within its purview; and there is no doubt also in my mind, that the Act relates to the open sea within one marine league of the shore, in other words, it clearly applies to the sea within what is popularly called "the three-mile limit" at least. Now, the Straits of Georgia may or may not be regarded by international law as open sea. If it is to be regarded as open sea, then the marginal waters along the coast of British Columbia, bordering upon the straits within one marine league from low-water mark, are territorial waters within the jurisdiction of the Admiralty of England, or as it is put in the English Act, "within the jurisdiction of the Admiral." On the other hand, if the Imperial Act does not apply to any territorial waters within the jurisdiction of the Admiral, except to those which are part of the open sea within the three-mile limit, and if the Straits of Georgia are not part of the open sea, then section 3 of the Imperial Act, in my opinion, does not apply, but if the Straits of Georgia are part of the open sea, then there is no question in my mind that this case is governed by that Act. Section 3 applies to offences committed within the jurisdiction of the Admiral as declared by that Act, and the interpretation clause contained in the Act itself, section 7, defines territorial waters in reference to the sea to which the Act applies, as meaning

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"such part of the sea adjacent to the coast . . . . as is deemed by international law to be within the territorial sovereignty of Her Majesty; and that for the purpose of any offence declared by this Act to be within the jurisdiction of the Admiral, any part of the open sea within one marine league of the coast measured from low-water mark shall be deemed to be open sea within the territorial waters of Her Majesty's dominions."

In Hall's International Law, 7th Ed., 158, the question is discussed as to whether straits of considerable breadth are or

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are not considered in international law to be territorial waters. The author refers to the Treaty of Washington, 1846, defining the boundary between Canada and the United States through the Straits of Georgia and Juan de Fuca, but makes no definite statement upon the rights of the respective countries in the waters of the Straits beyond one league from shore. He says:

"It seems to be generally thought that straits are subject to the same rule as the open sea; so that when they are more than 6 miles wide the space in the centre which lies outside the limit of a marine league is free, and that when they are less than 6 miles wide they are wholly within the territory of the state or states to which their shores belong."

He does not, however, himself quite agree with this.

Section 591 of the Code, if it is to govern the present dispute, stands alone and unqualified, and is wide enough in its terms to include all territorial waters whether within the three-mile limit or otherwise, being within the jurisdiction of the Admiralty of England. I have no doubt that the waters in question, even if not within the purview of the Imperial Act, are waters within the jurisdiction of the Admiralty, and therefore if the section applies at all, the case clearly falls within it.

In my view it is not necessary to decide which of these two statutory enactments is to govern; if the Imperial Act is to govern, then it must be read with the interpretation of section 3 contained in the Act itself, which is as follows:

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"Proceedings before a justice of the peace or other magistrate previous to committal of an offender for trial or to the determination of the justice or magistrate that the offender is to be put upon his trial, shall not be deemed proceedings for the trial of the offence committed by such offender for the purposes of said consent and certificate under this Act,"

which I take to mean that before the offender shall be committed for trial by the magistrate, the consent must be had. Admittedly it was not obtained until after the committal, and therefore under that Act, if it applies, the question should be answered in the negative. On the other hand, if section 591 is the section which governs the case, it must be read as we find it without any interpretation by Parliament of its meaning. Moreover, we cannot assume that by adopting it from the Imperial legislation, Parliament intended it to have the same interpretation as was given by that legislation. Chapter 1, section 21, subsection 4, R.S.C. 1906, declares that:

"Parliament shall not, by re-enacting any Act or enactment, or by

revising, consolidating or amending the same, be deemed to have adopted the construction which has, by judicial decision or otherwise, been placed upon the language used in such Act, or upon similar language."

Now while not in strictness a re-enactment, it can, I think, be put upon no higher plane than a re-enactment.

In *Rex* v. *Tano* (1909), 14 B.C. 200, MORRISON, J., on an application for *habeas corpus* after the committal of the accused for trial, while professing to follow the English Act, held that the detention was not wrongful notwithstanding that consent had not been obtained before the committal. It was argued that consent is necessary only before the trial is proceeded with in the Court which tries and inflicts the punishment, the words being "Proceeding for the trial and punishment . . . . shall not be instituted in any Court in Canada," without leave.

It is contended on behalf of the Crown that the proceedings for trial and punishment of the accused, were instituted in the County Court Judge's Criminal Court, and not in the magistrate's Court. Counsel for the accused submits that the consent must be had before the inquiry in the magistrate's Court. Unless, therefore, I can hold that the initial steps for the trial and punishment of the accused did not take place until the commencement of the trial in the County Court Judge's Criminal Court, the trial of the accused was illegal. Under the Code the accused might consent to be tried summarily. It is not clear even that he might not have been tried summarily in this Province without his consent, but be that as it may, a summary trial before the magistrate could only take place with the necessary consent of the Governor-General. By the Imperial Act the point of time at which the consent becomes necessary is the eve of committal, when the magistrate has made up his mind to it. Were the accused to consent to be tried summarily, the consent would be required before the summary trial could proceed.

Now, while the interpretation of section 3 of the Imperial Act as to the meaning of "proceedings," making the commitment the initial proceeding in the trial, is purely arbitary and not necessarily logical, still, it appears to me to be logical as well. Up to that time it is not known whether there shall be a trial or not. The moment the prisoner is committed he is

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in jeopardy. The commitment is the initial for his trial. Therefore, apart from the Imperial Act, it would be a reasonable construction of section 591 to hold that before the magistrate could commit, he must have the requisite consent. Moreover, it meets the objection to a construction which would render the Governor-General's leave applicable to the preliminary investigation, that the delay entailed in obtaining the leave would render the section abortive, since the accused would be given ample opportunity and time to escape.

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On principle and in the interest of conformity, section 591 should bear the same meaning in respect to leave to institute proceedings as does said section 3, and therefore it is immaterial in this case which shall be held to govern its decision. The question is answered in the negative.

This conclusion renders it unnecessary to answer the second question.

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MARTIN, J.A.: In my opinion the second question should be answered in the negative, because, in brief, the collector of customs was not acting "in the execution of his duty," as the section (168) hath it, since he had gone outside the limits of his jurisdiction over the port of Vancouver, and hence, though he was a public officer, yet it has not been shewn to be any part of his "duty" to seize vessels which had gone outside the limits of the port over which he had jurisdiction: it is not for me to inquire whose duty it was to make such a seizure, or if, indeed, any one has been deputed by Parliament to do so. Something was said during the first argument about the jurisdiction of the collector being extended beyond his port on the theory of continuous or "hot" pursuit (of which *Rex* v. *The Ship North* (1905), 11 B.C. 473; 2 W.L.R. 74; (1906), 37 S.C.R. 385, is the leading international example in fishery cases on the high seas, where a foreign poaching vessel was seized by a Canadian fisheries protection cruiser), but even assuming (which I do not) that such a doctrine is applicable to this case of the mere limits of an internal port, yet on the facts now before us, as restated in the amended case, it is clear that the pursuit and consequent seizure were deliberately delayed so as to enable the vessel to get beyond the port limits, and therefore

in a maritime sense cannot legally be regarded as either continuous or "hot," concerning which Mr. Justice (now Chief Justice) Davies observed, p. 394:

"This clear terse statement of the law and the reason for it is amply sustained by the array of authorities cited by MARTIN, J., the local judge in admiralty, in his judgment. The right of hot pursuit of a vessel found illegally fishing within the territorial waters of another nation being part of the law of nations was properly judicially taken notice of and acted upon by the learned judge in this prosecution."

And at p. 400, there is the following appropriate observation by Mr. Justice Idington:

"It is just as if a statute authorized in like words a sheriff to seize goods or person. That would be read as meaning, though not expressly saying so, within his county."

Such being my opinion, it is not necessary to give an answer to the first question as to the jurisdiction of the Admiralty under section 591, and the more I reflect upon it the more am I inclined not to express an opinion thereupon till the difficult and important question it raises is more fully debated. It has been overlooked that the extension of the international boundary line (49th parallel) between Canada and the United States has created a very exceptional condition of affairs at Point Roberts, as is shewn by the map before us, and it is undesirable that the effect of it upon the Gulf of Georgia (wherein this seizure took place, outside the port or harbour of Vancouver) and the application of the "headland to headland" theory (as to which *Cf. Rex* v. *The Ship North, supra,* p. 479), should be determined without cautious investigation. Those cases which have been referred to wherein the matters complained of admittedly occurred within ports or harbours within the body of a county, or inland bays or gulfs *inter fauces terræ,* are of little, if any, assistance, and the matter is complicated by the very unsatisfactory decision of the judges of England in *Reg.* v. *Keyn* (1876), 2 Ex. D. 63; 466 L.J., M.C. 17 (a Crown case reserved), which is distinguished by the conflict of opinion between distinguished judges (the opinion of seven prevailing against that of six out of a bench of thirteen) and the doubts they left upon the very important matter before them.

MARTIN, J.A.

McPHILLIPS, J.A.: This appeal has relation to a conviction

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of the prisoners for wilfully obstructing Alfred Blake Carey, collector of customs of the port of Vancouver, a public officer, in the execution of his duty.

The trial took place before CAYLEY, Co. J., in the County Court Judge's Criminal Court holden at Vancouver. The prisoner Johanson was master and owner, and the prisoner Lewis engineer of the Cisco, a gasoline launch of foreign registry, and both the prisoners are foreigners.

No inward entry was made under the Customs Act. The Cisco laid alongside a slip on False Creek, within the port of Vancouver, on the night of the 3rd of March, 1922, and on the following morning took on board a shipment of whisky and left her moorings without making outward entry and proceeded westerly through English Bay (English Bay being within the port of Vancouver) on her voyage for United States waters. The collector of customs (the late Colonel Carey) hearing of the departure of the Cisco, immediately pursued the Cisco in a fast launch of the Dominion Air Service. The Cisco when being pursued by the collector of customs was still within the limits of the port of Vancouver, and the Cisco proceeded outside the westerly limit of the port of Vancouver beyond the boundary line, *viz.*, beyond the line from Point Atkinson to Point Grey, and when without the port of Vancouver the collector of customs hailed the Cisco and called upon her to stop, stating that customs officers wished to board her. The Cisco did not stop, but on the contrary, the Cisco was so manœuvred that it was not possible for a time for the customs officers to board her, but finally the collector of customs and officer Barton got aboard.

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The Cisco was leaving the port of Vancouver for a foreign port and was beyond the limits of the port of Vancouver, but still within the boundaries of the County of Vancouver when boarded by the customs officers.

The two questions set forth in the stated case read as follows:

"1. Was I right in holding that it was not necessary that the leave of the Governor-General of Canada and his certificate, that it was expedient that these proceedings should be instituted should have been obtained before the accused were committed for trial by the magistrate?

"2. Was I right in holding that Alfred Blake Carey, a public officer, was in the execution of his duty when the alleged obstruction took place?"

I would answer both questions in the affirmative. The present case is one where the offence was committed within the County of Vancouver, and the prisoners were apprehended and held in custody within the County of Vancouver, and tried before a Court having jurisdiction within the County of Vancouver. In view of this, I am of the opinion that the leave of the Governor-General was not a condition precedent to the institution of proceedings against the prisoners, *i.e.*, section 591 of the Criminal Code had not to be complied with in the present case, but if I were wrong in this, the proceedings before the stipendiary magistrate, that is, the committal for trial, were not proceedings within the purview of section 591, not being proceedings "instituted in any Court of Canada." The proceedings contemplated by the section are the trial proceedings—putting the accused in peril before a competent Court for the trial of the offence, and the leave was obtained from the Governor-General and placed in evidence at the trial before CAYLEY, Co. J. (see Chisholm, J., *Rex* v. *Neilson* (1918), 30 Can. Cr. Cas. 1 at p. 9).

Here we have an offence committed within the County of Vancouver, and within the territorial jurisdiction of the Court which tried the offenders, the offenders being brought in custody before that Court, and upon the special facts of the case I am not of the opinion that it can well be said that the offence to be inquired into was an offence "committed within the jurisdiction of the Admiralty of England." The offence was committed in interior waters off the mouth of Vancouver harbour, not off the Coast of British Columbia or within one marine league of the Coast (see *Duguay* v. *North American Transportation Co.* (1902), 22 Que. S.C. 517; *Rex* v. *Schwab* (1907), 12 Can. Cr. Cas. 539; *The Wavelet* (1867), Young Adm. 34; *Bruce's Case* (1812), 2 Leach, C.C. 1093; *Reg.* v. *Keyn* (1876), 46 L.J., M.C. 17, Cockburn, C.J. at pp. 63-4; *Reg.* v. *Hughes* (1879), 4 Q.B.D. 614; *Attorney-General for the Dominion of Canada* v. *Attorney-General for the Provinces of Ontario, Quebec and Nova Scotia* (1898), A.C. 700 at p. 707, "public harbours"; *In re Walton* (1905), 10 O.L.R. 94; "the circumstances under which the prisoner was brought back

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to Canada could not be inquired into, that being a matter to be raised by the Government of the country whose laws were alleged to have been violated, or at the suit of the party injured, against the person who had committed the alleged trespass against him": Osler, J.A. at p. 100; *Constable's Case* (1601), 3 Co. Rep. 107; *Admiralty* (1611), 6 Co. Rep. 79; 2 Hale, P.C. 18; 2 East, P.C. 804; *Cunningham's Case* (1859), Bell, C.C. 72; 28 L.J., M.C. 66; Archbold's Criminal Pleading, 25th Ed., pp. 31, 33, 334.)

Then as to whether the collector of customs was a public officer and was in the execution of his duty when the obstruction took place? There can be no question upon this point, in my opinion. In the English Court of Criminal Appeal, *Whitaker* (1914), 10 Cr. App. R. 245, it was held that:

"A 'public officer' is one who discharges any duty in which the public are interested, for which he is paid out of moneys provided for the public service, and must be either a 'judicial' or a 'ministerial' officer."

Section 168 of the Criminal Code reads as follows:

"168. Every one is guilty of an indictable offence and liable to ten years' imprisonment who resists or wilfully obstructs any public officer in the execution of his duty or any person acting in aid of such officer."

And subsection (29) of section 2 of the Criminal Code reads as follows:

"'Public officer' includes any inland revenue or customs officer. . . . ."

Therefore there can be no question that the collector of customs is a "public officer," and when interfered with and obstructed in his duty the persons who obstruct, as the prisoners here did, are guilty within the meaning of section 168 of the Criminal Code.

MCPHILLIPS, J.A.

It cannot be doubted that within the port of Vancouver the collector of customs would have been entitled to board the Cisco in the discharge of his duty and acting under the provisions of the Customs Act, particularly in the present case, where admittedly the Cisco did not make entry or clear from the port, in fact flagrantly flouted the customs authorities.

During the argument I had occasion to make some observations upon this point, and I see no reason to change them. The case is a flagrant one and cannot be allowed to pass without some trenchant disapproval of such conduct; to not make entry or clear the ship was reprehensible conduct, only to be

aggravated when there was refusal to stop when commanded to do so in the King's name. The collector of customs rightly pursued the Cisco in the discharge of his duty, and the pursuit was continuous from within the port of Vancouver to a point just across the westerly boundary of the port. Upon that state of facts, unquestionably the collector of customs was justified in boarding the Cisco in the discharge of his duty, and being interfered with in that discharge of duty the offence was committed.

In this connection it is well to note what Chief Justice Marshall said in *The Exchange* (1812), 7 Cranch 116 at p. 144:

"When merchant vessels enter [foreign ports] for the purposes of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such . . . . merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country."

MCPHILLIPS, J.A.

The above language of Chief Justice Marshall was referred to by my brother MARTIN in his judgment in *Rex* v. *The Ship North* (1905), 11 B.C. 473, a very notable case which was affirmed by the Supreme Court of Canada (37 S.C.R. 385). There it was held that a foreign vessel found violating the fishery laws of Canada within three marine miles off the sea-coasts of the Dominion, may be immediately pursued beyond the three-mile zone, and be lawfully seized on the high seas. The *ratio decidendi* of that case amply justifies the action of the collector of customs in the present case. There would be an end to all Sovereign authority if what was done here could be done with impunity.

EBERTS, J.A. would allow the appeal.

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Appeal allowed, McPhillips, J.A. dissenting.

Solicitor for appellant: *W. F. Brougham.*
Solicitors for respondent: *Lane, Wood & Co.*

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THE ENGINEER MINING CO. v. FRASER

THE ENGINEER MINING COMPANY AND ATTORNEY-GENERAL FOR BRITISH COLUMBIA v. FRASER *ET AL.*

Mines and minerals—Certificate of improvements—Application for withdrawal and claims relocated—On lapsing of relocations ground located by others who obtained Crown grants—Action to set aside—Fraud—Mistake of official—Laches—R.S.B.C. 1911, Cap. 157.

The owners of a group of claims formed the plaintiff Company to which the claims were assigned with the exception of two one-twenty-fourths' interests in the group. On the necessary work being done these assignments with applications for certificates of improvements were sent to the mining recorder. Both the mining recorder and the Company's officials later concluded that certificates of improvements could not be issued until all the interests were in the Company and on the mining recorder's suggestion the applications for certificates of improvements were withdrawn and the claims were allowed to expire and the ground was relocated. In the following year the Company failed to do the representation work and also allowed its free miner's certificate to expire. On the claims lapsing A. (now deceased, the defendants being administrators and beneficiaries of his estate) and associates relocated the same ground, did the necessary work without molestation and obtained certificates of improvements and eventually Crown grants. Twelve years after A. and associates relocated, the plaintiff Company brought action to set aside the Crown grants on the ground that the mining recorder erred, in that the Company should have been granted certificates of improvements when it applied for them. The learned trial judge dismissed the action holding that the plaintiff Company should have adversed the defendants' application for certificates of improvements.

Held, on appeal, affirming the decision of CLEMENT, J. (MCPHILLIPS, J.A. dissenting), that the failure of the plaintiff Company to take adverse proceedings when A. applied for certificates of improvements was a bar to its claim; also the deliberate withdrawal of the applications, even upon the advice of the mining recorder was fatal to the Company's case. There was the further bar to the plaintiff's claim that subsequent to the withdrawal of the applications the Company allowed its free miner's certificate to expire and ceased to carry on operations for some years.

Per MACDONALD, C.J.A.: Section 27 of the Mineral Act which provides that a free miner is not to suffer from the mistakes of officials, must not be construed too widely and was not intended to relieve a party in the position of the plaintiff Company from the consequences of its actions even if those of an official contributed in some degree to the loss.

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

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APPEAL by plaintiffs from the decision of CLEMENT, J. of the 5th of October, 1921, in an action for a declaration that certain claims in the Atlin district are valid and existing mineral claims and that certain restakings over the said claims by the defendant Alexander, for which he received Crown grants, be declared to have been a fraudulent jumping of the plaintiff Company's claims and that he fraudulently caused Crown grants to be issued therefor. The ground in question was first staked in 1899, there being 16 claims including fractions. In December, 1899, the owners of these claims bound themselves into a partnership by a co-ownership agreement and called it the Aga Gold Mining Company, Limited Liability, but it was not a limited liability company nor was a free miner's certificate issued to it. The document of transfer or co-ownership was duly recorded at Atlin in February, 1900. Later in the same year all of said claims and interests in the Aga Gold Mining Company were transferred to the plaintiff Company. The Company had the claims surveyed in 1905 and on the said surveys being deposited with the proper officers at Victoria, applied for a certificate of improvements. The certificate of improvements was not issued on the ground that the Aga Gold Mining Company had not a free miner's certificate and that there was outstanding from the plaintiff Company a two-twenty-fourths' interest in the claims. The expiration of the time for record of the next year's assessment was nearing and those interested on hand decided to withdraw the applications for certificates of improvements and on the claims lapsing the ground was relocated as the Engineer No. 1, Engineer No. 2, Engineer No. 3, Engineer No. 4 and Engineer No. 5. After the first year's work was recorded these claims, with the exception of Engineer No. 1, were allowed to run out and were relocated by Alexander and associates in 1909, with the exception of three fractions that were relocated, one in 1910 and two in 1912. On the necessary representation work being done, Alexander and associates obtained Crown grants. After the original claims were relocated in 1907 the plaintiff Company appeared to have lost interest, as the assessment work was not done for the following year and the Company allowed its free

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miner's certificate to expire. The defendants were unmolested in the performance of the necessary work to obtain certificates of improvements, which were granted in November, 1911, and Crown grants duly issued thereon. No adverse proceedings were taken by the Company in respect of defendants' applications for certificates of improvements. The writ was issued in this action on the 21st of February, 1921. The learned trial judge dismissed the action on the ground that when Alexander applied for certificates of improvements the Company failed to take adverse proceedings pursuant to section 85 of the Mineral Act.

The appeal was argued at Vancouver on the 3rd, 4th and 5th of April, 1922, before MACDONALD, C.J.A., GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Argument

Mayers, for appellants: The plaintiff Company should have received its certificate of improvements. The so-called Aga Company was a mere partnership. Each individual had his free miner's certificate and that was all that was necessary. A certificate could not have been issued to the Aga Company. As to the effect of the partnership see Lindley on Partnership, 8th Ed., 137; *Wray* v. *Wray* (1905), 2 Ch. 349. The action of the mining recorder came within section 27 of the Mineral Act: see *Kitchin* v. *The King* (1922), [30 B.C. 421]; 1 W.W.R. 697; *Lawr* v. *Parker* (1900), 7 B.C. 418; *Tanghe* v. *Morgan* (1904), 11 B.C. 76; and *Collister* v. *Reid* (1919), 27 B.C. 278; 59 S.C.R. 275, which covers this case. There is still a right of action notwithstanding the lapse of time: see *Ross* v. *Grand Trunk R.W. Co.* (1886), 10 Ont. 447; *Essery* v. *Grand Trunk R.W. Co.* (1891), 21 Ont. 224; *In re Maddever. Three Towns Banking Company* v. *Maddever* (1884), 27 Ch. D. 523 at p. 531; *In re Birch. Roe* v. *Birch, ib.* p. 622; *In re Baker. Collins* v. *Rhodes* (1881), 20 Ch. D. 230 at p. 238. In the case of a legal right the question is whether the law has run out or whether there has been a release: see *Cook* v. *Cook* (1914), 19 B.C. 311 at p. 317. As to his rights under the Crown grant see *Cornelius* v. *Kessel* (1888), 128 U.S. 456; *Deffeback* v. *Hawke* (1885), 115 U.S. 392; *Benson Mining Co.* v. *Alta Mining Co.* (1891), 145 U.S. 428;

Wirth v. *Branson* (1878), 98 U.S. 118. The King in giving the grant was deceived and it is therefore void: see *Alcock* v. *Cooke* (1829), 5 Bing. 340 at p. 348. Alexander who was a chain-bearer on the original survey, knew all the circumstances. The claims were highly developed when he staked, the improvements being valued at $40,000. The Company should have received certificates of improvements so it was not necessary to adverse the defendants' applications: see *In re American Boy* (1899), 7 B.C. 268 at p. 271.

Symes, for respondent: When they relocated they withdrew their record of all the claims and on the 31st of May, 1907, the Company's free miner's certificate expired, and was not revived until 1921, and rights cannot be revived against existing rights: see *Woodbury Mines* v. *Poyntz* (1903), 10 B.C. 181; 2 M.M.C. 76. *Collister* v. *Reid* (1919), 27 B.C. 278 does not apply as that was an adverse action. As to the mining recorder's mistake we say there was no mistake as there were two one-twenty-fourth's interests outstanding irrespective of whether the Aga Company should have had a free miner's certificate. Assuming there was error it was not an act of omission or commission within section 27 of the Mineral Act: see *Kitchin* v. *The King* (1922), [30 B.C. 421]; 1 W.W.R. 697. One, Dyer, who had an outstanding one-twenty-fourth's interest, allowed his certificate to expire in 1920, but the Company allowing its free miner's certificate to expire is fatal. On the question of fraud on the part of Alexander who is now deceased see *Attorney-General* v. *Dunlop* (1900), 7 B.C. 312; 1 M.M.C. 408 at p. 411; *Nelson and Fort Sheppard Railway Co.* v. *Dunlop* (1900), 7 B.C. 411; 1 M.M.C. 414; *McMeekin* v. *Furry et al.* (1907), 2 M.M.C. 432; *In re Garnett. Gandy* v. *Macaulay* (1885), 31 Ch. D. 1. It was their duty to have adversed: see *Tanghe* v. *Morgan* (1904), 11 B.C. 76. As to the lapse of time especially in a mining case, estoppel has arisen: see *Ramsden* v. *Dyson* (1866), L.R. 1 H.L. 129 at p. 141; *Attorney-General to the Prince of Wales* v. *Collom* (1916), 2 K.B. 193. The action should be dismissed for the following reasons: The lapse of the certificate was a complete bar. Our Crown grants can only be set aside by proof of

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fraud. Their only course was an adverse action; lapse of time is a bar. The main property was sold to us by their agent and there was no error in the action of the mining recorder as to the Company's properties.

Mayers, in reply: On the question of delay see *Willmott* v. *Barber* (1880), 15 Ch. D. 96 at p. 105.

Cur. adv. vult.

6th June, 1922.

MACDONALD, C.J.A.: The defendant Fraser is the administrator with will annexed of James Alexander, deceased, and the other defendants are the beneficiaries under the said will.

The Engineer Mining Company is a foreign company incorporated in Alaska, and was registered in this Province on the 4th of June, 1900. The Company claims to have acquired ownership of the several mineral claims in question in this action, and to have applied in the year 1906 for a certificate of improvements thereof. The interest of the Company in the said claims is alleged to have been acquired through the acquisition by it of the several interests of the partners in a mining partnership known as the "Aga Gold Mining Company, Limited Liability," which was not a corporate body. The plaintiff Company claims that it had got in all the partnership interests and had complied with all the conditions to its right to have issued to it by the mining recorder, certificates of improvements under the Mineral Act.

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The Company had procured assignments, from several of the individuals composing the partnership, of their respective interests in the claims and had forwarded these to the mining recorder, but it appears by the evidence before us that these assignments embraced only twenty-two twenty-fourths of the total of the interests in the claims. The claim of the Company, however, now is, that apart from these assignments it was the owner of all the claims through its purchase of the partnership assets and that the mining recorder ought to have complied with the Company's application for certificates of improvements, even though the fact were that only twenty-two twenty-fourths of the interests in the claims were covered by the assignments deposited with him. The applicants for the certi-

ficates who represented the Company and the mining recorder were on the most friendly terms, both he and they appeared to have thought that the assignments were necessary to complete the Company's title, but owing to the late partners being scattered, the final two twenty-fourths were not obtained, and as the time was at hand when the certificates must be issued or further representation work done on the claims, to avoid the lapse thereof, it was decided that the applications should be withdrawn, the claims allowed to lapse, and relocations made of the same ground by the applicants and others interested in the Company.

This decision was come to, as I have just said, by those acting on behalf of the Company, and doubtless with the advice and on the suggestion of the mining recorder, which advice or suggestion appears to have been freely concurred in by the applicants. The plan was carried out and the ground was relocated in the names of several parties representing and interested in the Company. It was contended that this action was without the official authority of the Company, but I think I must hold that it was taken by those who were in fact the agents of the Company for making the applications for the certificates of improvements, and that they had no greater authority for that purpose than for the other purpose of withdrawing the application and relocating the claims. However, it does not seem to me to matter whether they had authority to relocate the claims or not; if they had authority to make application for certificates of improvements, I think they had the same authority for withdrawing them. The relocation of the claims, I must assume, was lawfully made since no question was raised to the contrary, except as above intimated. The locators, however, failed to do and record the requisite assessment work required to be done and recorded by the Mineral Act, and therefore by force of the Act itself, these relocations expired on the effluxion of the time for recording the work. In addition to allowing the claims to expire, the Company allowed its free miner's certificate to lapse and lost its legal *status* as a Company entitled to hold mineral claims in this Province. It did not rehabilitate itself until several years

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thereafter. In the meantime Alexander, after the expiry of the said relocations, caused the same ground to be located, obtained certificates of improvements in due course, and eventually obtained grants of the claims from the Crown. This action is brought to set these aside. Several grounds of attack were raised, but the learned trial judge disposed of the case on one ground only, namely: That when Alexander applied for certificates of improvements the plaintiff Company failed to take proceedings adverse thereto pursuant to section 85 of the Mineral Act. It was strenuously contended by Mr. *Mayers* that the mining recorder was in error in not issuing the certificates of improvements to the plaintiff Company upon the material before him prior to the withdrawal of the applications as aforesaid. He relies upon the equitable doctrine that that must be taken to have been done which ought to have been done, and on this principle submits that the case is as if the certificates of improvements had actually been issued in 1906 to the plaintiff Company. He urged, upon authority, that the holders of certificates of improvements are not obliged to adverse subsequent claimants, and that therefore section 85 is not a bar to the plaintiff's claim. But I cannot help but think that the Act deals with actualities and not with equitable principles. The provisions for the protection of holders of certificates of improvements are based not upon what ought to have been done, but upon what actually was done, and as there were in fact no such certificates actually issued, the plaintiff Company could only protect its rights against a subsequent applicant by taking advantage of said section 85. The case of *Collister* v. *Reid* (1919), 27 B.C. 278, affirmed by the Supreme Court of Canada (59 S.C.R. 275), was cited by Mr. *Mayers* as an authority in his favour, but I think it is not such. The plaintiffs in that case were in the position which the plaintiff Company claims to be in in this case. They had applied for certificates of improvements which had not been granted; subsequently, relocators applied for certificates of improvements and the Collisters, taking advantage of section 85, adversed their claim successfully. I think, therefore, the learned judge came to the right conclusion. But apart from this answer to

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the action, it appears that the plaintiff Company ceased to be the holder of a free miner's certificate subsequent to the withdrawal of the said applications. The Mineral Act, section 12, provides:

"That no person or joint-stock company shall be recognized as having any right or interest in or to mining property unless he or it shall have a free miner's certificate unexpired."

Not only did the Company fail to renew its free miner's certificate, but it appears to have abandoned all operations within the Province for some years after the withdrawal of the said applications. I do not think it necessary to deal with all of the several contentions put forward on the plaintiff's behalf, but I do think that the deliberate withdrawal of the applications, even upon the suggestion or advice of the official, is fatal to the plaintiff's success. The principle underlying the Mineral Act is certainty of and simplicity of title to rights which are essentially speculative in their nature and in most cases transitory. The innocent locator, and I hold that the deceased was innocent of any wrong-doing, was intended to be protected; the record office is the place where, speaking broadly, the rights of locators and holders of mineral claims are to be searched for, and he who fails, not wholly through the fault of the official, to get his rights recorded, cannot be allowed long afterwards to assert them against a subsequent recorded owner, who has obtained his title without fraud. Section 27 of the Mineral Act, which provides that a free miner is not to suffer from the mistakes of officials, must not be construed too widely, and was, I think, not intended to relieve a party in the position of the plaintiff Company from the consequence of its actions, even if those of an official contributed in some degree to the loss.

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I would, therefore, dismiss the appeal.

GALLIHER, J.A.: After the best consideration I can give the matter, I find myself in accord with the views expressed by the Chief Justice, whose judgment I have had the advantage of perusing. So aptly do they express my own views in the matter, on the various points considered, that I deem it unnecessary to add to his reasons.

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McPHILLIPS, J.A.: This appeal involves the determination of whether certain mineral claims, 16 in number, are valid and existing mineral claims, and whether the plaintiff Company is the owner thereof, and entitled to have issued to it certificates of improvements thereto which would later entitle Crown grants being issued therefor.

It would appear that the plaintiff Company was duly entitled to all the mineral claims and the procedure was followed as provided by the Mineral Act (Cap. 135, R.S.B.C. 1897) for the obtainance of certificates of improvements (section 36). There had been expended up to that time approximately $40,000 in buildings, tunnellings and other improvements and development. The evidence is very voluminous, but in my opinion it cannot be successfully contended that the plaintiff Company had not become possessed of all title, right and interest in all of the mineral claims, and that there was no outstanding interest. I do not purpose to in detail refer to the many points of evidence that, all being added together, establish conclusively that the complete title in the mineral claims was vested in the plaintiff Company. James Allen Fraser, one of the defendants in the action, was at the time of the happening of the material events called in question in the present action, the gold commissioner, acting under the provisions of the Mineral Act, and the administrative officer of the Crown in charge of the Atlin Mining Division of the Cassiar District of British Columbia, the mining division in which the mineral claims are situate, being in the northern and remote section of the Province, not far removed from the Alaska Territory of the United States of America, and the plaintiff Company is an Alaskan corporation with its head office at Skagway, Alaska, duly registered and licensed as a foreign Company under the Companies Act (Cap. 39, R.S.B.C. 1911). The gold commissioner (Fraser) when examined for discovery, upon the question of the non-issue of the certificates of improvements, duly applied for, stated that the statutory certificates of improvements failed to issue, because of the fact that in the opinion of the Deputy Attorney-General, the mineral claims were still vested in the Aga Gold Mining Company, Limited Liability, not a corporate

company, but a partnership formed under the Mineral Act (sections 59 to 81). The gold commissioner acted upon the opinion of the Deputy Attorney-General and refused the certificates of improvements, which would have otherwise issued to the plaintiff Company, as the gold commissioner was, on evidence adduced before him, satisfied that complete title in the mineral claims was in the plaintiff Company. Admittedly, although it is true it was argued to the contrary, but I hardly think very seriously or with any confidence, the opinion of the Deputy Attorney-General acted upon and given effect to by the gold commissioner was in error in law, owing to some misconception of the *status* of the Aga Gold Mining Company, Limited Liability, the same being, amongst other things, confounded with the *status* of that of a corporate company. In any case, it is plain to demonstration upon the facts, that there was absolute error in law in the opinion forwarded and acted upon of the Deputy Attorney-General, arising from whatever cause it may have, defective instructions or otherwise. Were it not for that opinion, the certificates of improvements would have undoubtedly issued. Such may reasonably be said upon a careful review of the evidence adduced at the trial, and it was the opinion of the gold commissioner that certificates of improvements should issue, only stayed by reason of the legal opinion of the Deputy Attorney-General. In truth and in fact, as the evidence led at the trial upon the part of the appellants amply discloses, the plaintiff Company was possessed of all the interests in the mineral claims held by the individual members of the Aga Gold Mining Company, Limited Liability, *i.e.*, the property in the mineral claims of the mining partnership by assignments and lapses at the time of the application for the certificates of improvements, was wholly vested in the plaintiff Company. The gold commissioner (Fraser), with the view of protecting the plaintiff Company in its proprietorship of the mineral claims, advised the restaking of the claims, which was done, but it cannot, upon the facts, be rightly said that the plaintiff Company did so by any corporate act or took any steps that can be held to create an estoppel against the Company. That was also an error upon the part of the gold

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commissioner equally with the error of the Deputy Attorney-General, both being errors of commission and within the remedial provisions of section 53 of the Mineral Act.

The plaintiff Company would apparently have ceased to function in any corporate way from and after the denial of the certificates of improvements, which, in my opinion, the plaintiff Company was entitled to have issued to it, and at that time the plaintiff Company was clothed with the legal capacity to be accorded and granted the certificates of improvements and, although some years have elapsed since then, the evidence does not, in my opinion, disclose any valid reason for the further withholding of the certificates of improvements which were statutorily earned under the provisions of the Mineral Act, but which by misadventure have been so far withheld.

It would appear that the restakings, which, in my opinion, cannot be said upon the evidence to have been restakings binding upon the plaintiff Company, were allowed to lapse, and one James Alexander (now deceased), following the lapsing of the restakings, located mineral claims over the same ground as that covered by the holdings of the plaintiff Company, and for which the certificates of improvements duly applied for should have issued. The said James Alexander, though (the successors in interest by way of administration and by devise being the respondents in this appeal), had been in the employ of the surveyor of the plaintiff Company when the mineral claims had been surveyed previous to the application for the certificates of improvements by the plaintiff Company, acting as chain-bearer, and was affected with notice of the boundaries and improvements of the plaintiff Company and took advantage of this knowledge in locating over the mineral claims of the plaintiff Company, being ground at the time of the locating by Alexander, rightfully and legally held and owned by the plaintiff Company then being a free miner of the Province of British Columbia under what, in my opinion, were valid and existing mineral claims. Upon the facts it cannot be gainsaid that the locations as made by Alexander were not open for location, not being waste lands of the Crown (section 12), being lawfully occupied for mining purposes by the plaintiff Com-

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pany, and all the proof made by Alexander was in its nature in effect, fraudulent and false, having regard to the provisions of the Mineral Act. Amongst other things, Alexander had not found mineral in place but relied upon the discovery of the plaintiff Company and its predecessors in title. The ground was palpably in the occupation of the plaintiff Company, and it was the owner thereof to the knowledge of Alexander. He was conversant with the exact situation of affairs, that the plaintiff Company had expended large sums of money upon the ground and at the time of the location by Alexander the plaintiff Company was in actual occupation of the ground, and upon the ground were tools, provisions and machinery, the plaintiff Company having merely closed down owing to the winter season, that being necessitated by climatic conditions. The fraudulent and wrongful conduct of Alexander, which in its effect it was, deceived the officers of the Crown, and following this deception, Alexander wrongfully obtained certificates of improvements and Crown grants to the ground covered by the mineral claims of the plaintiff Company, for which certificates of improvements should have issued to the plaintiff Company. In the result, and consequent upon the false and fraudulent representations of Alexander, Crown grants improvidently issued covering the ground lawfully possessed and owned by the plaintiff Company.

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Now, it cannot be gainsaid upon the facts, and following upon the statute law, that is to say, the Mineral Act, that the plaintiff Company had achieved a position which gave it the right to the certificates of improvements, and if they had been obtained there would have followed in due course Crown grants. The position achieved was really that of being entitled to receive by virtue of the Act of Parliament, a complete title to the mineral claims. That being the situation, in what way can it be said that the plaintiff Company has been exploited out of that statutory right? Is it sufficient to say that the plaintiff Company has lost its right to the ground in question because of the fact that locations made, not upon waste lands of the Crown, but upon occupied lands, has been followed up, certificates of improvements obtained and Crown grants issued when

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there was knowledge of the existent claims and the Crown was deceived in making the Crown grants? In my opinion any such contention is untenable.

Section 53 of Cap. 135, R.S.B.C. 1897, reads 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."

It is clear that the plaintiff Company suffered by the conduct of the officers of the Crown and there was error within the purview of the statute law, which should be relieved against. The legislation is in its nature mandatory and the plaintiff Company is entitled to be restored to its original position, a position really in fact never lost, *i.e.*, the right to have certificates of improvements issued covering the mineral claims, to be followed by Crown grants (*Lawr* v. *Parker* (1901), 8 B.C. 223; 1 M.M.C. 456; *Tanghe* v. *Morgan* (1904), 11 B.C. 76; 2 M.M.C. 178).

At this bar counsel for the respondents stated that it could not be denied that there was knowledge of the facts and circumstances relating to the ground in question, but it was contended that there was no knowledge that the plaintiff had any earned legal right to certificates of improvements or Crown grants.

In *Reid* v. *Collister* (1919), 59 S.C.R. 275, it was held that pending the issue of the certificates of improvements there was no necessity of doing further work upon the claims (applying the *ratio decidendi* of that case to the present case), there being the right to the certificates of improvements. Nothing further was required to be done by the plaintiff Company. There was then, and there always has been the right in the plaintiff Company to have issued to it the statutorily-earned certificates of improvements to the mineral claims in question, which would have entitled the Crown grants to issue, and it is to be noted that the present action is not only in the name of the plaintiff Company but in the name of the Attorney-General representing the Crown. The position really was and is the denial of the statutory right to the certificates of improvements covering the mineral claims, and that statutory right once earned cannot be taken away save by express statute law. It is idle for the respondents to come in as they do and say, we,

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pursuing the same general statute law, located the same ground, obtained certificates of improvements, followed by Crown grants—that position could only be attained if the ground had been waste lands of the Crown and was, at the time, open for location, but it was not, and the circumstances were known to Alexander. With the statutory right in the plaintiff Company, upon what authority can it be said that the statutory right has been destroyed? I fail to see that there is any authority, and nothing happened to destroy that statutory right that I can see, and nothing has been referred to, but the fact alone that Alexander proceeded to locate and obtain title to the mineral claims in defiance of the governing statute law, and by misadventure Crown grants eventually issued to ground that the plaintiff Company had and still has the statutory right to. That statutory right could only be barred by some statute, "and if there is no statute barring it, we cannot make one": see Armour, J., in *Ross* v. *Grand Trunk R.W. Co.* (1886), 10 Ont. 447 at p. 453; also see *Essery* v. *Grand Trunk R.W. Co.* (1891), 21 Ont. 224.

In *In re Baker. Collins* v. *Rhodes* (1881), 20 Ch. D. 230 at p. 238, Jessel, M.R., said:

"There is no distinction on this point between equity and law. If the statute has run, then the debt or claim is barred; if not, then there is nothing else to be said in the case."

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The strength of the position, as I view it, of the plaintiff Company is that there was and is still in the plaintiff Company the absolute statutory right to have issued to it the certificates of improvements which had been statutorily earned by extensive and costly development work upon the mineral claims, and everything had been done to fully comply with the statute. In such a case is it possible to say that that statutory right can be in any way displaced and, in particular, can it be displaced by a title obtained by Alexander, who was fully aware of all the facts and who had proceeded fraudulently?

In *In re Maddever. Three Towns Banking Company* v. *Maddever* (1884), 27 Ch. D. 523, an action under 13 Eliz., c. 5 (Fraudulent Conveyance), Baggallay, L.J., at p. 531 said:

"The deed was executed on the 19th of October, 1871, and the bank became aware of it almost immediately after the death of the

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father, but took no proceedings to impeach it for nearly ten years. It was urged for the defendant that, assuming the deed to have been one which ought originally to have been set aside, it ought not to be set aside now, after such delay. The bank appear from the first to have known a good deal about the facts, and if the case had been one where the plaintiffs were coming to set aside, on equitable grounds, a deed which was good at law, I should have thought that the defence was good. But the plaintiffs had a legal right, and I do not see how that right can be lost by mere delay to enforce it, unless the delay is such as to cause a statutory bar. Cases have been cited where Courts of Equity have refused to interfere on the ground of delay, but they have been cases where relief was sought merely on equitable grounds; here the plaintiffs have a legal right."

And at p. 532, Cotton, L.J., said:

"I am of opinion that in the case of a legal right we cannot refuse relief to the plaintiff on the mere ground of delay, unless there has been such delay as to create a statutory bar. The plaintiffs have made an attempt to explain their delay; an attempt in which I am of opinion they have not succeeded, but, there having been no such delay as to bar their legal right, it is, in my judgment, immaterial that they have shewn no sufficient reason for not coming sooner."

In *Stackhouse* v. *Barnston* (1805), 10 Ves. 453, Sir William Grant, M.R., at p. 466, said:

"As to a waiver, it is difficult to say precisely, what is meant by that term, with reference to the legal effect. A waiver is nothing; unless it amount to a release."

There are no facts in the present case which will admit of it being said that there has been any waiver or release of the statutory right in the plaintiff Company to be accorded by the Crown the mineral claims to which it has established title, and anything that stands in the way must be set aside if there be no statutory foundation to support the barrier. Here the present apparent barrier are Crown grants, but founded upon fraudulent and invalid locations upon ground already in occupation, and further by one affected with notice of the statutory rights of the plaintiff Company and the Crown was deceived in its grants. Further, there is the remedial or relief section (53, R.S.B.C. 1897):

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"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."

And we have here the plain error made of the denial of certificates of improvements that should have issued being acts of omission, commission and delay, which resulted in the bringing about of the present condition of matters, but the title which stands in the way cannot stand in face of knowledge of the facts

and being affected with fraud. In truth, the locations of already occupied ground were nullities, and foundationless, and all that followed, *viz.*, the certificates of improvements and Crown grants, should be set aside *ex debito justitiæ*.

In *Cornelius* v. *Kessel* (1888), 128 U.S. 456, it was held that:

"When an entry is made upon public land subject to entry, and the purchase-money for it is paid, the United States then holds the legal title for the benefit of the purchaser, and is bound, on proper application, to issue to him a patent therefor; and if they afterwards convey that title to another, the purchaser, with notice, takes subject to the equitable claim of the first purchaser, who can compel its transfer to him."

And see *per* Field, J., at p. 462. (Also see *Deffeback* v. *Hawke* (1885), 115 U.S. 392).

In *Benson Mining Co.* v. *Alta Mining Co.* (1891), 145 U.S. 428, it was held:

"When the price of a mining claim has been paid to the government, the equitable rights of the purchaser are complete, and there is no obligation on his part to do further annual work in order to obtain a patent."

And see judgment of Brewer, J. in that case at p. 434, first paragraph.

In *Wirth* v. *Branson* (1878), 98 U.S. 118, it was held:

"1. Where, in ejectment, it appeared that a location of a military bounty land-warrant, duly made by A. on the demanded premises, the same being a part of the surveyed public land of the United States, had not been vacated or set aside,—*Held*, that a subsequent entry of them by B. was without authority of law, and that a patent issued to him therefor was void.

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"2. A party who has complied with all the terms and conditions which entitle him to a patent for a particular tract of public land, acquires a vested interest therein, and is to be regarded as the equitable owner thereof. While his entry or location remains in full force and effect, his rights thereunder will not be defeated by the issue of a patent to another party for the same tract."

"3. *Branson* v. *Wirth* (17 Wall. 32) commented on and approved."

Mr. Justice Bradley, in that case, said, at pp. 121-2: [after quoting from "The rule is well settled" at p. 121 to the end of the third paragraph on p. 122, his Lordship continued].

Then we have *Alcock* v. *Cooke* (1829), 5 Bing. 340, 354 (30 R.R. 625). In that case Chief Justice Best, at p. 354, said:

"If the King is deceived in his grant, the grant is altogether void; and it appearing by decided cases, that it must be taken that the King is deceived in his grant when he grants that which he cannot give according

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to the terms of his grant; it appearing also, that at the time the grant of 6 Car. 1, was executed, the property granted was already in the possession of Livingstone, under a lease for years, and that that lease had several years to run; the grant of the 6 Car. 1, is altogether void."

In the present case everything had been done to admit of the certificates of improvements issuing and that would have been followed in due course by Crown grants, and everything having been done nothing more was needed to be done (*Reid* v. *Collister, supra*). Lord Selborne in *Great Eastern Railway Co.* v. *Goldsmid* (1884), 9 App. Cas. 927, 940-41, referred to the *Alcock* case, and there a question of waiver came up, there having been an enquiry under a writ of *ad quod damnum*, but here nothing of the kind took place. In the report of the *Great Eastern Railway Co.* v. *Goldsmid* case, in 54 L.J., Ch. 162 at p. 169, Lord Selborne said:

"In the case mentioned at bar of *Gledstanes* v. *The Earl of Sandwich* [1842], 4 Man. & G. 995; 12 L.J., C.P. 41, the Court took pains to classify those cases in which it appeared that the King's grant had been held to be avoided by reason of any misdescription or mistake therein, and they were referred to three classes—one, where the King professed to give a greater estate than he had himself in the subject-matter of the grant; that can have no application here, for the King had no estate in the subject-matter of the grant, and did not profess by the charter of Edward the Third to give one; the second, where the King had already granted the same estate—upon which the case of *Alcock* v. *Cooke* [(1829)], 5 Bing. 340 was referred to: the same observation applies here—the King has granted no estate, there is at the most a promise not to make a grant; the third, where the King had been deceived in the consideration as expressed in the grant."

Now in the present case the Crown really, according to the statute law, held the mineral claims in question for the plaintiff Company and was, under statutory requirement to recognize the title of the plaintiff Company. Section 34 of the Mineral Act (Cap. 135, R.S.B.C. 1897) reads:

"The interest of a free miner in his mineral claim shall, save as to claims held as real estate, be deemed to be 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."

No further performance could be required, all had been done requisite to the issuance of certificates of improvements, and had they been issued as they should have been issued, to the plaintiff Company, then such further steps for the obtainance of Crown grants would have followed. The Crown upon the

facts was disentitled at all times from doing anything which would displace the plaintiff Company in the statutory right it had earned, and the plaintiff Company was the rightful lessee from the Crown of the mineral claims, entitled to the issuance of certificates of improvements therefor, and it should be so declared that which has intervened is altogether void. Lord FitzGerald in *Great Eastern Railway Co.* v. *Goldsmid, supra,* said at p. 181:

"We are not here to make laws, we are not here to legislate—we are here to administer the existing laws. We are not here to interfere with or to confiscate private right—our province is to protect it."

And in the present case the Attorney-General appears and is a plaintiff, which admits of the Court in pursuance of the statute law declaring the statutory right of the plaintiff Company and a declaration that the Crown grants which have intervened and the mineral claims issued to Alexander or his predecessors in title are altogether void.

It cannot be successfully said in the present case there was waiver, all that was required to be done was done (*Reid* v. *Collister* (1919), 59 S.C.R. 275). Lord Justice Bowen in *Selwyn* v. *Garfit* (1888), 57 L.J., Ch. 609 at p. 615, says delay is not waiver. Inaction is not waiver, though it may be evidence of waiver. But here all that was required to be done was done, and there was no requirement in the plaintiff Company to do more, and Alexander was fully aware of the legal and statutory rights of the plaintiff Company; it is not the case of innocent parties or purchasers without notice for valuable consideration. A search in the mining recorder's office would fully apprize all parties that the plaintiff Company had performed all statutory requirements and had claimed and were entitled to have issued to it certificates of improvements to all of the mineral claims, all of which facts were well known to Alexander, and it is the title of Alexander only that stands in the way of the plaintiff Company being accorded its statutory right to the mineral claims in question in this action, and the respondents in the appeal, of course, have no better position than Alexander would have were he living and the defendant in the action.

MCPHILLIPS, J.A.

There is no point in the contention made that the plaintiff

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Company, after the right to the certificates of improvements had accrued, allowed the free miner's certificate to lapse. The plaintiff Company was in good standing at that time, and for a year afterwards had a free miner's certificate, and had legal corporate existence in the Province of British Columbia. The real legal position the plaintiff Company is entitled to have declared, it would seem to me, is, that of being entitled to the mineral claim in question and be viewed as having had issued to it the certificates of improvements followed by the Crown grants. That was the statutory position that had been earned after great development work and expenditure of large sums of money. See *Tanghe* v. *Morgan* (1904), [11 B.C. 76]; 2 M.M.C. 178, *per* MARTIN, J. at p. 182. My brother MARTIN at that time sitting in the Supreme Court was considering section 19 in the Placer Mining Act Amendment Act, 1901, exactly similar to section 53 of the Mineral Act above quoted. And the judgment of my brother MARTIN was affirmed upon appeal to the then Full Court. Here we have Alexander affected with notice of all the facts and circumstances surrounding the holding of the mineral claims by the plaintiff Company, in fact, counsel for the respondents at this bar so admitted, but it is contended that there was no knowledge of any earned legal right and that that cannot be effectively asserted. Upon the facts it is abundantly clear that Alexander knew that the plaintiff Company had got in all outstanding interests and was the holder of all the mineral claims, and was only refused the certificates of improvements because of the legal opinion given by the Deputy Attorney-General—that was a matter of record in the mining recorder's office. In *Willmott* v. *Barber* (1880), 15 Ch. D. 96 at pp. 105-6, Fry, J. (afterwards Lord Justice Fry), dealt with the circumstances under which the owner of a legal right will be precluded by his acquiescence from asserting it, and I cannot persuade myself that the plaintiff Company can, upon the facts, be said to be in any way precluded from asserting its legal right to the mineral claims, the certificates of improvements and Crown grants.

MCPHILLIPS, J.A.

The strength of the position of the plaintiff Company is the statutorily-earned legal right to have the certificates of improve-

ments issued to it. This was in 1906 and no subsequent conduct is established upon the facts binding upon the plaintiff Company which disentitles the plaintiff Company asserting the statutorily-earned legal right.

The respondents here do not make out that the plaintiff Company knew that Alexander was acting in reliance on the acquiescence of the plaintiff Company, or that there were any acts of the plaintiff Company such as would induce Alexander to reasonably believe that the plaintiff Company acquiesced in his obtaining title to the mineral ground in question, in fact, there is an entire absence of any such evidence, there being no acts whatever upon the part of the plaintiff Company which could have induced Alexander to form any such opinion (see *Smith* v. *Hayes* (1867), I.R. 1 C.L. 333).

The Crown grants issued in respect of the Alexander locations should be cancelled as being improvidently issued, and all necessary consequential relief accorded (*Howard* v. *Miller* (1915), A.C. 318).

I am not of the opinion that the present case is one that admits of giving effect to section 37 of the Mineral Act, 1897, as amended by section 9 of the Mineral Act Amendment Act, 1898, in that the plaintiff Company having done all that it was required to do was entitled to have the certificates of improvements issued to it, and was not called upon to adverse the claims so wrongfully and illegally located by Alexander (see *Collister* v. *Reid* (1919), 27 B.C. 278; 59 S.C.R. 275; *In Re American Boy* [(1899), 7 B.C. 268]; 1 M.M.C. 304 at pp. 306-8).

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It is true there has been long delay in bringing this action, yet under the circumstances the case is not one in which it can be urged that there has been such laches as disentitles relief being granted to the plaintiff Company. The respondents here can have no higher position than that Alexander would have had if living, and it is clear that by reason of the acts of omission and commission of the officers of the Crown, the plaintiff Company on the 31st of May, 1907, believing that it had no further title to the mineral claims allowed its free miner's licence to lapse (the members of the Company had

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become disheartened, no doubt, at the unfortunate result of things, being dispersed as they were throughout the United States of America), there was, however, no act done that could be said to be a corporate act of the Company binding upon the Company so as to create any estoppel, the whole facts not being known to it. The contention is that not until the year 1918 did the plaintiff Company discover that the officers of the Crown were guilty of acts of omission and commission, which had resulted in its being denied its statutory right to certificates of improvements to the mineral claims in question in this action, and it was not until the month of February, 1921, that the necessary information was obtained to set up the cause of action here set up. On the 21st of February, 1921, the plaintiff Company again became a free miner of the Province of British Columbia and continues to be a free miner. The circumstances disclosed in the present case are such that no equity can be said to exist entitling any protection being accorded to the respondents. They are not transferees of the mineral claims for value or in the position of innocent purchasers for value, so that no difficulty exists to effectuate complete justice to the plaintiff Company, *i.e.*, vesting in the plaintiff Company title to the mineral claims.

I would allow the appeal.

EBERTS, J.A.

EBERTS, J. A. would dismiss the appeal.

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitors for appellants: *Mayers, Stockton & Smith.*
Solicitor for respondents: *A. Whealler.*

CHONG JAN v. QUON WO ON.

LAMPMAN, CO. J.

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May 26.

CHONG JAN v. QUON WO ON

Contract—Guarantee—Payment in advance to workman—Guarantee that he would arrive at cannery for work—Workman arrested in transit to cannery—Liability on guarantee.

The plaintiff hired Leong Jiong Yee at Victoria to go to Rivers Inlet and work in the cannery. Leong Jiong Yee wanted $85 in advance. The plaintiff was unwilling to make the advance without some guarantee, and Leong Jiong Yee brought him to the defendant where the contract between the plaintiff and Leong Jiong Yee was written out in Chinese at the bottom of which were the words (translated) "If Leong Jiong Yee does not arrive at cannery the payment in advance to be refunded by person guaranteeing" and was signed "Quon Wo On [defendant] person guaranteeing." The plaintiff then paid Leong Jiong Yee $85, and Quon Wo On $2. Leong Jiong Yee started for Rivers Inlet but on reaching Alert Bay was arrested on a charge of having opium in his possession. In an action against Quon Wo On to recover the $85 advance:—

Held, that the defendant was liable on his guarantee.

Held, further, that the defendant in signing his name with a stamp was as effective as if he had written his own name, and no defence to the action.

ACTION to recover $85 on a guarantee. The facts are set out in the head-note and reasons for judgment. Tried by LAMPMAN, Co. J. at Victoria on the 23rd of May, 1922. Statement

Moresby, for plaintiff.

C. E. Wilson, for defendant.

26th May, 1922.

LAMPMAN, Co. J.: The plaintiff is a cannery contractor of Vancouver, and the defendant is a Chinese mercantile partnership, carrying on business in Victoria.

The plaintiff being desirous of getting men to work in a cannery at Rivers Inlet, sent an agent named Chung Chow to Victoria in an endeavour to find men, and he on visiting Victoria came in touch with a Chinaman named Leong Jiong Yee, who was willing to go to the Rivers Inlet cannery, but he wanted an advance of $85, which Chung Chow was unwilling to give him unless some one guaranteed the workman. Judgment

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It seems that the practice is that when men are engaged in this way, that before the advance money is paid some firm guarantees that the workman will either leave for the cannery with his employer or will actually arrive at the cannery and take up his work. This workman Leong Jiong Yee took Chung Chow to the defendant's store with the idea of having the defendant guarantee him and on their arrival there, Chung Chow paid the $85 and he also paid $2 to the defendant, who signed a written contract, the translation of which is as follows:

"Upon engagement of Leong Jiong Yee to go to Rivers Inlet Fish Canneries to work, and having paid him in advance $85 it is agreed that the monthly wage shall be $65 for 26 days work, irrespective of the date the work starts. The day shall be eleven hours, and anything over eleven hours to be regarded as overtime for which extra pay shall be 25 cents per hour. Unless employee stays to the end of the season no overtime will be paid. Wages for overtime will be paid to the employee upon his departure when the season closes. Food, passage both ways, and poll-tax to be provided by employer.

"The date of departure of employee is definitely settled to be 16th day of June.

"If Leong Jiong Yee do not go to shop does not arrive at cannery the payment in advance to be 'asked' refunded 'of' by person guaranteeing, without demur.

"1921 June 15th day,

"Leong Jiong Yee.

"(Chop) Quon Wo On Person Guaranteeing."

[Stamp]

Judgment

The workman left Victoria along with some others, who were also going to the cannery at Rivers Inlet, but when the boat on which Leong Jiong Yee was travelling reached Alert Bay, he was arrested on a charge of having opium in his possession, and was subsequently convicted and sentenced to six months imprisonment, and as he served his sentence, he was unable to do the work which he had contracted to do at the cannery. Plaintiff then sought to recover from the defendant the $85, and upon the defendant refusing to pay, action was commenced.

At the time the contract was entered into, Chung Chow paid the defendant the sum of $2. Just what this payment is, there was some conflict at the trial, the plaintiff contending that it was a commission and the defendant that it was "Tea money," but it seems to me more in the nature of an insurance premium.

There is a conflict as to the proper interpretation of the contract, which was in Chinese. In the last paragraph the

plaintiff's contention that the proper translation is that Leong Jiong Yee should arrive at the cannery, but the defendants say that it is "if he does not go to the cannery," and the defendants contend that by reason of the fact that he left Victoria on his trip to the cannery the provisions of the contract were fulfilled.

I think in deciding what is the proper construction to be put on this last clause of the contract, the whole contract must be looked at. It is clear that what the plaintiff wanted was a man to go and work at the cannery, and unless the man would actually arrive at the cannery and work he would lose his $85, so I think, having regard to the object of the contract, plaintiff's contention is correct and the contract requires that the workmen should actually arrive at the cannery.

There is a further defence in that the defendants' name is signed with a stamp and there is no initial or name to authenticate it. The stamp has the name of the partner who affixed it to the document, and opposite the stamp there are the words "Person guaranteeing." The partner who affixed the stamp says that he did not consider the putting on of the stamp as a serious matter and says that had he considered he was signing a contract he would have written in his name or his initials.

Judgment

I do not think that this defence can prevail. I think it is clear that a person may bind himself by putting his name to a document without putting it in his own handwriting, and if he uses a stamp it seems to me that it is just as effective as if he writes his name. See *Schneider* v. *Norris* (1814), 2 M. & S. 286 and *Baker* v. *Dening* (1838), 8 A. & E. 94.

As the sum of $2 was paid to the defendants at the time this contract was entered into and they have stamped their name on the document opposite to the words "Person guaranteeing," I do not think they can now be heard to say that they did not consider the contract as binding on them. The result is that the plaintiff is entitled to judgment for $85 as claimed.

Judgment for plaintiff.

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THE ROYAL BANK OF CANADA AND THE LITTLE RIVER POLE AND TIMBER COMPANY AND HELM v. J. H. BAXTER & CO.

Contract—Alternative claims—Costs—New cause of action in reply—Application to strike out—Application to add to statement of claim—R.S.B.C. 1911, Cap. 203, Sec. 26—B.C. Stats. 1914, Cap. 32, Sec. 26.

The plaintiff in his reply set up a new cause of action. The defendant moved to strike it out and the plaintiff at the same time moved to amend his statement of claim by adding thereto the allegations in the reply. Both applications were granted and the costs reserved to be dealt with by the trial judge, who on the trial gave judgment for the plaintiff but the costs reserved he gave to the defendant in the cause. The defendant claimed on appeal that he should have been given the costs of all proceedings up to the date of the amendment.

Held, on appeal, affirming the decision of MORRISON, J. that the judge below disposed of the costs referred to him and there was nothing in the material to shew that the payment of the costs of the application to amend and of the amendment was not full compensation for the omission to plead the allegations in question at the proper time.

Statement

APPEAL by defendant from the decision of MORRISON, J. of the 1st of February, 1922, in an action to recover $5,855.66, the purchase price of 1,008 poles delivered by the plaintiff The Little River Pole and Timber Company to the defendant on the 27th of September, 1921, pursuant to a contract of the 13th of April, 1921, whereby the defendant agreed to purchase said poles from J. H. Williams and Charles Prest, the contract of the vendors by *mesne* assignments coming into the hands of The Little River Pole and Timber Company, which Company later assigned to the Royal Bank of Canada. Under the agreement, the poles were to be boomed in a safe loading place and be clear of encumbrances and free of all Canadian charges. The defendant sent a ship to Comox dock, and on the 26th of September, 1921, they proceeded to load the poles on the boat. On the following day, when 308 poles were on board, at about 10.30 a.m. the sheriff of Nanaimo seized all the poles under woodmen's liens. The manager of the plaintiff Company, one Guy, then told Littlefield, the manager of the defendant Com-

pany, who was there with the captain of the boat, that he would fix it up, so they all went to the Royal Bank at Courtenay (about three miles), but there was delay about arranging with the Bank. Littlefield got impatient at about one o'clock and told Guy he would give him half an hour to fix things. Just after 1.30 p.m. Littlefield went into the Bank and Guy told him it had been arranged as to the sheriff, but Littlefield said it was too late, and on going back with the captain they found a boom of about 300 logs was not marked as required by the Act, so they proceeded to throw back into the water the poles that were already loaded. In the statement of claim the plaintiffs sued on a written contract, but in their reply set up a new verbal contract. The defendant moved to strike out certain paragraphs of the reply, on the ground that the reply could not depart from the original pleading and set up a new cause of action, and at the same time the plaintiffs applied to amend the statement of claim by setting up the new verbal agreement. Chief Justice HUNTER acceded to the defendant's application, but allowed the plaintiffs to add the paragraphs to their statement of claim. It was ordered that the costs of these applications be reserved to be dealt with by the judge on the trial of the action. On the completion of the trial it was ordered that said costs be defendant's costs in the cause. The defendant claims, on appeal, that it should have been directed that the defendant be paid all costs of the action up to the date of the amendment.

Statement

The appeal was argued at Vancouver on the 6th, 7th and 10th of April, 1922, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Mayers, for appellant: Unless the property in the goods passed to the purchasers they have no such action as this. They must come within section 26 of the Sale of Goods Act. We must be supplied with goods of the contract description. On the question of acceptance and power of repudiation see *Kibble* v. *Gough* (1878), 38 L.T. 204 at p. 206; *Taylor* v. *Smith* (1893), 2 Q.B. 65 at pp. 70-1. There was an express condition in the contract as to payment: see *Bettini* v. *Gye* (1876),

Argument

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1 Q.B.D. 183 at p. 187. The question as to costs is an incident of the whole appeal. On the amendment to their claim they succeeded, and we should have the costs up to the amendment: see *Ayscough* v. *Bullar* (1889), 41 Ch. D. 341 at p. 346; *Attorney-General* v. *Pontypridd Waterworks Company* (1908), 1 Ch. 388; *Mavor* v. *Dry* (1824), 2 Sim. & S. 113; *Kernot* v. *Critchley* (1867), 17 L.T. 134; *Jacobs* v. *Schmaltz* (1890), 62 L.T. 121.

Alfred Bull, for respondents: To get the poles from lots other than 217 was agreed to when it was found sufficient could not be got off that lot. This variation to the original contract was made. There was no royalty due on the few logs not marked. They received the costs of the applications and the amendment.

Argument

Sir C. H. Tupper, K.C., on the same side: On the question of a term going to the root of the contract see Anson on Contract, 14th Ed., pp. 183 and 188; Halsbury's Laws of England, Vol. 26, p. 99, par. 177; *Wallis, Son & Wells* v. *Pratt & Haynes* (1910), 2 K.B. 1003 at p. 1012; (1911), A.C. 394. There is an implied warranty; the goods were free from charge: see Halsbury's Laws of England, Vol. 25, p. 154, par. 282(3); *Munro* v. *Butt* (1858), 8 El. & Bl. 738. On the variation of the contract by oral agreement and the right to rescind see Halsbury's Laws of England, Vol. 7, p. 422, pars. 864-6; *Goss* v. *Lord Nugent* (1833), 5 B. & Ad. 58 at p. 65; *Thomas* v. *Brown* (1876), 1 Q.B.D. 714 at p. 722. The learned judge found there was delivery and acceptance, and the captain paid the men for loading into the ship. It was a complete contract: see *Jackson* v. *Rotax Motor and Cycle Company* (1910), 2 K.B. 937 at p. 942; *Abbott & Co.* v. *Wolsey* (1895), 2 Q.B. 97. As to the property passing see *Clarke* v. *Spence* (1836), 4 A. & E. 448 at p. 466; Benjamin on Sale, 6th Ed., p. 12. As to including in the sale Cleland's poles see Benjamin on Sale, pp. 345-6; *Ajello* v. *Worsley* (1898), 1 Ch. 274 at p. 280. The ratification by Cleland relates back to the sale by Guy: see *Lockhart et al.* v. *Pannell* (1873), 22 U.C.C.P. 597 at pp. 606-9. The object of the Forest Act was to protect the revenue, not to prohibit a sale: see *Whiteman* v. *Sadler* (1910), A.C.

514 at pp. 525-6; *Smith* v. *Mawhood* (1845), 14 M. & W. 452.

Mayers, in reply: A contract in writing cannot be varied by parol: see *Morris* v *Baron and Company* (1918), A.C. 1. He must shew an entire new contract. Unless it is shewn the property has passed, his recourse is an action for damages: see *Gilmour* v. *Supple* (1858), 11 Moore, P.C. 551 at p. 563. As to there being a cause of action on the contract see *Cooke* v. *Gill* (1873), L.R. 8 C.P. 107 at p. 116. On the question of costs see *Farquhar, North, and Co.* v. *Edward Lloyd (Limited)* (1901), 17 T.L.R. 568; *Boulton* v. *Jones* (1857), 2 H. & N. 564; *Grierson, Oldham, & Co., Limited* v. *Forbes, Maxwell, & Co., Limited* (1895), 22 R. 812.

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Argument

Cur. adv. vult.

6th June, 1922.

MACDONALD, C.J.A.: I would dismiss the appeal. The whole trouble was brought about by the ill temper of the captain of the ship. Had he allowed his common sense to assert itself, there would have been no dispute upon any of the points urged in argument.

There was a further ground of appeal taken on the question of the costs in the Court below. The plaintiffs pleaded in their reply to the statement of defence matters which ought to have been in the statement of claim, that is to say, an alternative claim. Defendant moved to strike this out and succeeded. Plaintiffs at the same time moved to amend their statement of claim by including this alternative claim in it and succeeded. The learned judge in Chambers reserved the costs of these motions and of the amendment. The order allowing the amendment contained these words:

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"And it is further ordered that the costs of this application and of the amendments, be reserved to be dealt with by the judge on the trial of this action."

By the judgment of the Court, the costs so reserved were disposed of in the following words:

"The costs of defendant's application by summons dated the 30th day of December, 1921, and of the plaintiffs' application by summons, dated the 31st day of December, 1921, and of the amendments allowed by the order of the 4th day of January, 1922, made on the plaintiffs' said application . . . . shall be the defendant's costs in the cause."

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It will therefore be seen that the learned judge disposed of the only costs referred to him in favour of the defendant. It is claimed in the appeal that he ought to have given the defendant the costs of the action up to the date of said amendment, but these were not reserved to him.

The cases to which we were referred are mostly cases where the application to amend came up as of first instance, and where the Court or judge had to exercise discretion where none had been exercised in the Court below. It seems clear, upon these cases, that the Court or the judge before whom the application comes may grant the amendment on terms, that is to say, he can put it to the applicant to take the amendment on the terms imposed, or to go without it. Terms have often been imposed as a condition to leave to amend, that the applicant should pay the costs of the action up to the time of the amendment. Lord Bramwell said in *Tildesley* v. *Harper* (1878), 10 Ch. D. 393 at pp. 396-7:

> "My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting *male fide*, or that, by his blunder, he had done some injury to his opponent which could not be compensated for by costs or otherwise."

And this was approved in *Steward* v. *North Metropolitan Tramways Company* (1886), 16 Q.B.D. 556.

MACDONALD, C.J.A.

The Court is not to penalize the applicant for the amendment, but to make such orders as to costs or otherwise as will put him in the position he would have occupied if the matter had been pleaded at the proper time. The plaintiff could have pleaded the claim, set up in the amendment, in his statement of claim, and there is nothing in the material before us to shew that the payment of the costs of the application to amend, and of the amendment, was not full compensation for his omission to do so.

In this view, it becomes unnecessary to decide whether the order as to costs was appealable or not, or what are the powers of a judge over part of the costs of an action, having regard to the statute, which provides that costs of the action shall follow the event, unless otherwise ordered for good cause.

MARTIN, J.A.

MARTIN, J.A. would dismiss the appeal.

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

As to the question of costs of the interlocutory motions that were referred to the trial judge at the hearing, it seems to me that under the terms of the order of reference he could not dispose of the costs otherwise than he did. If I understood Mr. *Mayers* aright, his argument on clause 14 of his notice of appeal was directed to the costs reserved for the trial judge, and if so, those were prescribed by the terms of the order of reference.

The appeal should be dismissed.

MCPHILLIPS, J.A.: I cannot say that it is not without some hesitancy that I arrived at the conclusion that the appeal should be dismissed. However, the course of conduct of the agent for the appellant would appear to have been such that it is impossible to give effect to the able argument of the learned counsel for the appellant.

At the outset it may be admitted that there was non-compliance with some of the terms of the written contract, but it would appear, according to the finding of the learned trial judge, that a new contract, not in writing, was entered into, and following that the poles were provided and piled upon the bank of the river, and the agent of the appellant would appear to have accepted them. A difficulty arose when the delivery of the poles was being made, 300 having at that time been placed aboard the ship, that is, a lien was claimed thereon, and the sheriff appeared on the scene to enforce the lien. Then was the time for the appellant to have elected to treat the contract as at an end, as counsel for respondents admit at this bar that although what is relied upon is the verbal contract it was in the same terms as the written contract. However, that course was not adopted, the agent for the appellant treated the contract as being still open for further performance, and it would appear that the agent for the appellant took part in the endeavour to have the lien released, an application being made to the Bank which was in the end successful, but the agent for the appellant apparently would seem at the conclusion of things, and when

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the lien stood released, to have acted in a most extraordinary manner, out of pure caprice. He then attempted to disaffirm the contract, and the poles already loaded upon the ship were thrown into the stream. This conduct cannot be viewed with approval, and in view of the fact that the learned trial judge had opportunities this Court has not, *i.e.,* to see the witnesses and observe their demeanour, it is not a case which admits of the decision of the learned trial judge being reversed (see *Coghlan* v. *Cumberland* (1898), 67 L.J., Ch. 402). It is true that the poles were required to be marked to comply with the law, but the marking was being carried out as the poles were being delivered at the ship's side, so that no objection upon that ground is tenable. There would appear to have been evidence before the learned trial judge which would admit of his holding as he did, that the poles were appropriated to the contract, and that the property therein passed to the appellant. Further, upon the facts, it would appear that there was evidence which admitted of the learned trial judge holding that the poles were at the buyer's risk, in that the property therein stood transferred to the buyer (see sections 24, 26, Sale of Goods Act, Cap. 203, R.S.B.C. 1911). Now in the present case there was readiness and willingness to deliver the poles, which had already been accepted by the appellant, and, in fact, some of the poles had already been taken aboard the ship, and the balance of the poles were alongside the ship, the appellant, as we have seen, having previously examined them and accepted them, and upon the facts there was evidence upon which the learned judge could proceed, and decide that the appellant wrongfully refused to take delivery.

During the argument I was somewhat impressed with the view that the action was wrongly conceived, and that if there was a right of action at all, that it could only be for damages for breach of contract in refusing to take delivery. However, I have been constrained to hold that there was evidence entitling the learned trial judge to hold as he did, and having held that the property in the poles had passed to the buyer, *i.e.,* the appellant, an action was admissible for the price. Sections 63

and 64 of the Sale of Goods Act (Cap. 203, R.S.B.C. 1911) read as follows:

"63. (1.) Where, under a contract of sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods.

"(2.) Where, under a contract of sale, the price is payable on a day certain, irrespective of delivery, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract.

"64. (1.) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.

"(2.) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.

"(3.) Where there is an available market for the goods in question, the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or if no time was fixed for acceptance, then at the time of the refusal to accept."

It is evident that the sellers, the respondents, had a choice of remedies, and have chosen to sue for the price of the poles. The contract was in its nature severable, and where the buyer, the appellant, as it has been held in this case, accepted the poles, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and cannot be a ground for refusing the poles and treating the contract as repudiated, there being no term of the contract, express or implied, to that effect. This would go to the question of the non-giving of the bill of sale and the other provisions relied upon by counsel for the appellants (see section 19 (3), Sale of Goods Act).

MCPHILLIPS, J.A.

Further, section 79 of the Sale of Goods Act reads as follows:

"79. Where any right, duty, or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage be such as to bind both parties to the contract."

The course of dealing between the parties in the present case seems to me to have obviated anything further being done. The poles were being delivered, and all would have ended well had the agent for the appellant not acted in the unwarranted and

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precipitate way in which he did. It is regrettable that the appellant should, under the circumstances, be called upon to pay for poles which were in the end not received, and many of which would appear to be now irretrievably lost, but all that can be said about that is, that the appellant must be answerable for the conduct of the agent, who seems to have proceeded in a manner utterly unmindful of the interests of his principal, and it is trite law that the principal must be held answerable for the conduct of the agent, and to the agent the principal must look in the present case for relief. The liability therefor would not appear to be chargeable to the respondents.

MCPHILLIPS, J.A.

Upon the whole case, I am unable to come to the conclusion that the learned judge was clearly wrong in the decision he arrived at, and being of that opinion, it follows that the appeal should stand dismissed.

EBERTS, J.A.

EBERTS, J.A. would dismiss the appeal.

Appeal dismissed.

Solicitors for appellant: *Wilson & Jamieson.*
Solicitors for respondents: *Tupper & Bull.*

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Landlord and tenant — Lease — Covenant not to assign — Non-payment of rent—Proviso for re-entry—Waiver.

A lease with proviso not to assign without leave and for re-entry by the lessor on non-payment of rent, provided for the payment of rent monthly and in advance. After a monthly payment was overdue and unpaid for over fifteen days, the lessor consented to and executed an assignment of the lease on condition that the overdue rent be paid. Two days later, the overdue rent not having been paid the lessor re-entered for non-payment thereof. In an action for damages for wrongful re-entry:—

Held, that as the consent to the transfer of the lease was on the condition that the overdue rent should be paid there was no waiver or election not to exercise the right of forfeiture.

APPEAL by plaintiff from the decision of MURPHY, J. in an action tried by him at Vancouver on the 14th and 25th of November and 19th of December, 1921, for damages for interfering with the right of the plaintiff as mortgagee of goods and chattels of the Brown Garage Limited, at 634 Howe Street, Vancouver, to possession of said goods and chattels. The facts are that on the 20th of August, 1920, the defendant, owner of the premises known as 634 Howe Street, leased the premises to one G. W. Erickson, the lease containing a covenant not to assign or sub-let without the consent of the lessor. On the 26th of March, 1921, Erickson assigned the lease to the Brown Garage Limited without the consent of the lessor. The plaintiff held a chattel mortgage on the goods and chattels of Brown Garage Limited on the premises in question, and under the powers therein contained entered into possession for the purpose of selling the same. The rent due under the lease given by the defendant to Erickson on the 20th of May, 1921, was not paid. In the early part of June, the parties interested came together with a view to selling the Brown Garage to other parties, and the defendant agreed to an assignment of the lease to said parties if his rent were paid. The arrangement fell through, the Brown Garage Limited became bankrupt, and the plaintiff

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endeavouring to make a sale of the chattels, the defendant re-entered into possession for non-payment of rent and stopped the sale on the 28th and 29th of June and ejected the bailiff who was selling under the chattel mortgage. The defendant then sold certain of the chattels for arrears of rent. The learned trial judge dismissed the action.

Davis, K.C., and *Warner,* for plaintiff.

McDonald, K.C., and *DesBrisay,* for defendant.

MURPHY, J.: Admittedly both points raised by plaintiff and dealt with on the adjourned argument are mainly questions of fact. As to the first, I am of opinion the evidence sufficiently shews that rent was overdue for 15 days and longer before defendant entered, that he entered because of such non-payment of rent, and not by virtue of the surrender afterwards obtained with the intent of ending the lease, and did thereby legally terminate it.

As to the second point, that the assignment to Duckworth and Elliott was made subsequently to such re-entry and therefore the forfeiture was waived, I think the evidence shews this assignment to have been made prior to the entry. On these findings I think the action fails, except that plaintiff is entitled to a reference as to the difference between 65 gallons of oil which defendant says he returned, and the quantity named in the particulars as being in the tanks when defendant took possession. Defendant had no right to take this oil, and there is therefore a heavy onus on him to shew he returned it all, and that onus I hold not satisfied.

MURPHY, J.

From this decision the plaintiff appealed. The appeal was argued at Vancouver on the 14th of March, 1922, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Argument

Mayers, for appellant: We say he agreed to the assignment and waived forfeiture: see *Ward* v. *Day* (1863), 4 B. & S. 337 at pp. 352-3, and on appeal in (1864), 5 B. & S. 359 at p. 362; *Ex parte Newitt* (1881), 16 Ch. D. 522 at p. 533. The right of re-entry relates back to the first breach in respect of which

the right to re-enter arose: see *Grimwood* v. *Moss* (1872), L.R. 7 C.P. 360 at p. 364; *Great Western Railway Co.* v. *Smith* (1876), 2 Ch. D. 235 at pp. 247 and 253; *Parker* v. *Jones* (1910), 2 K.B. 32; 79 L.J., K.B. 921; *Doe, dem. Beadon* v. *Pyke* (1816), 5 M. & S. 146 at p. 153; *Evans* v. *Davis* (1878), 10 Ch. D. 747.

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McDonald, K.C., for respondent: We say there are three causes of forfeiture: (1) The assignment of the 26th of March, 1921, was made without the lessor's consent; (2) Erickson was in default for 15 days in payment of rent on the 5th of June, 1921, when we were entitled to re-enter, and (3) if the lease was assigned to the Brown Garage Limited, the Brown Garage Limited was bankrupt prior to the 25th of June, 1921. We did not know Erickson assigned to the Brown Garage. We entered for non-payment of rent: see *Parker* v. *Jones* (1910), 2 K.B. 32 at p. 36; *Walter* v. *Yalden* (1902), 2 K.B. 304 at p. 310. Our right of entry arose on the 5th of June, and we did nothing to waive right of entry until June the 25th, when we re-entered. We had a right to collect the rent on the 5th of June: see *Price* v. *Worwood* (1859), 4 H. & N. 512.

Argument

Mayers, in reply, referred to *Evans* v. *Wyatt* (1880), 43 L.T. 176.

Cur. adv. vult.

6th June, 1922.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I agree with the conclusion arrived at by the learned trial judge, and therefore would dismiss the appeal.

I think there was no waiver of the forfeiture for non-payment of rent. The rent fell due on the 20th of May, and there could be no re-entry for 15 days thereafter. Therefore, the landlord could have re-entered on the 5th of June. He did not do so then. On the 14th of June he was requested to consent to a transfer of the lease, and consented conditionally, *i.e.,* he executed the assignment and delivered it upon the condition that overdue rent should be paid. It was not to come into force until this condition had been performed. The condition was not performed, but it is argued by counsel for the appellant

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that whether the assignment was delivered conditionally or not, there was an election not to exercise the right of forfeiture. With this submission I cannot agree.

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MARTIN, J.A. would dismiss the appeal.

GALLIHER, J.A.: On the points argued before us, I think the appeal must fail.

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With regard to the surrender, the defendant had already elected and gone into possession, thereby declaring a forfeiture under the lease, and the surrender, although on the same day, was at a later hour. Possession was not taken by reason of it, and it was a voluntary suggestion and act, not required or called for by the defendant, and once having taken possession and forfeited his lease, his election was made and could not be altered by the acceptance of a voluntary surrender under which possession was not taken.

GALLIHER, J.A.

With regard to the assignment, in my opinion, that never got beyond being an escrow. It is true that if the proposed arrangement had gone through by acceptance and payment of rent due, and the substituting of a new tenant, it might have been satisfactory to McKercher, but this never got beyond the stage of an executory agreement as I understand the evidence.

MCPHILLIPS, J.A.: This case involves the consideration of rival statements of fact and the application of the law thereto, but in the main the findings of fact determine the appeal.

The learned trial judge, without hesitancy, found the fact to be that rent was overdue under the lease for 15 days and more, and that there was the right of re-entry upon this ground alone. Then as to the assignment of the term, the finding is that that was prior to the entry, not subsequent thereto, and this was followed by bankruptcy and the surrender of the lease.

MCPHILLIPS, J.A.

Upon these findings of fact the action for damages would be rightly dismissed, and such was the decision of the learned trial judge, save that judgment went in favour of the plaintiff for the value of certain lubricating oil and other goods of the plaintiff wrongly converted by the defendant.

The learned counsel for the appellant contended strongly that although it was true that there was no privity of contract as to the demised terms between the respondent and the appellant, yet, that the appellant was entitled to be in possession of, or upon, the premises by reason of the leave and licence, if nothing more, of Erickson, the lessee by assignment of the term, but this is not, with deference, a tenable proposition, as Erickson had no right, under the assignment of the term consented to by the respondent, to further assign or sub-let. The appellant was really a trespasser under the circumstances, therefore *Parker* v. *Jones* (1910), 79 L.J., K.B. 921 is not helpful to the appellant, but on the other hand, as submitted by the learned counsel for the respondent, is an authority in his favour (also see *Walter* v. *Yalden* (1902), 2 K.B. 304 at p. 310).

I cannot come to the conclusion that between the 4th of June and the 25th of June, the date of re-entry, the respondent (the lessor) did anything that amounted to a waiver of the forfeiture of the term. The re-entry was for non-payment of rent; there was no knowledge that there had been any assignment of the term. Note the language of Darling, J. in *Parker* v. *Jones*, *supra*, at p. 923:

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"But here it is said that the lessor did not know of the sub-letting, and that, as there can be no waiver without knowledge of the facts, the landlord could not be said to have waived his right to evict the plaintiff. If the question had arisen between the lessor and the plaintiff, it may be that that contention would have been right and that the lessor might have treated the plaintiff as a trespasser . . . . . "

Then there is the rather insuperable objection that waiver was not pleaded, but it is contended that the question was considered and was debated in the course of the trial. In any case, in my opinion, waiver could not, upon the facts, be sustained. The case is not one in which the Court should grant relief against forfeiture (see *Hamilton* v. *Killick* (1920), 28 B.C. 418).

I would dismiss the appeal.

Appeal dismissed.

Solicitor for appellant: *Wm. Warner.*
Solicitors for respondent: *Bourne, McDonald & DesBrisay.*

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GRANBY CONSOLIDATED MINING, &C., CO. v. ATTORNEY-GENERAL FOR BRITISH COLUMBIA

THE GRANBY CONSOLIDATED MINING, SMELTING & POWER COMPANY LIMITED v. ATTORNEY-GENERAL FOR BRITISH COLUMBIA.

Taxation—Provincial—Income—Omission to assess in 1917 and 1918—Supplementary roll for current year in 1921—Discount under section 10 of Taxation Act—R.S.B.C. 1911, Cap. 222, Secs. 10 and 103—B.C. Stats. 1921, Cap. 63, Sec. 29.

The term "the current year's roll" in section 103 of the Taxation Act refers to the roll that has been completed by the assessor and finally transmitted to the surveyor of taxes under section 98 of said Act. A supplementary roll therefore made in 1921 is supplementary to the roll then in existence and complete which is the roll of 1920.

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

Statement

APPEAL by the Attorney-General for British Columbia from the decision of MURPHY, J. of the 2nd of December, 1921, in an action for a declaration as to the rights and liabilities of the plaintiff Company under the Taxation Act. The Province claims that after the final revision of the assessment roll before the 31st of December, 1920, it was discovered that the plaintiff Company had escaped taxation on its income for the years 1917 and 1918, and the Provincial assessor, pursuant to the provisions of section 103 of the Taxation Act assessed and taxed the plaintiff Company on the 12th of July, 1921, for the amount so omitted upon a supplementary roll for the then current year, such taxes amounting to $324,303.99 for the year 1917 and $106,937.52 for 1918. The plaintiff Company claims that the said taxes were not due and payable until the 2nd of January, 1922, and were not in arrears until the 31st of December, 1922, and that by paying the taxes on or before the 30th of June, 1922, they were entitled to deduct therefrom 10 per cent., pursuant to section 10 of the Taxation Act, and that section 29 of the 1921 amendment to said Act entitles the Company to said deduction. On the trial the plaintiff obtained judgment.

The appeal was argued at Vancouver on the 27th of March, 1922, before MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

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Argument

Carter, for appellant: The question is whether there is the right to deduct 10 per cent. discount under section 10 of the Act. We say the right to deduct the 10 per cent. expired the 31st of December, 1921. The question is when the roll became effective.

Mayers, for respondent: If his argument is correct, in order to save the discount we have to pay before we know what our tax is. We are entitled to proper notice, and if not satisfied with the Court of Revision we are entitled to go to the Court of Appeal, and should have the necessary time for doing so. In each year the roll is taken of the previous year. The assessment roll was for 1921. We are not in default until the 31st of December, 1922.

Carter, in reply.

Cur. adv. vult.

6th June, 1922.

MARTIN, J.A.

MARTIN, J.A.: This case turns upon the meaning of the expression "the current year's roll" in section 103 of chapter 222, R.S.B.C. 1911, and after a very careful consideration of all the sections of the Act, I can only reach the conclusion that by it is meant the roll which was "completed" by the assessor under section 81 and "finally revised" by the Court of Revision "on or before the twenty-first day of December" (as the time then was) under section 93, and "certified" under section 97, and "transmitted" to the surveyor of taxes before February 15th, under section 98. If so, then the "supplementary roll" authorized under section 103, while it may be made, as here, on July 12th following, yet it is not attached, so to speak, to the new roll then under preparation as directed by section 34 *et seq.,* but to the current year's roll "after the final revision" thereof, which can only relate to the said certified and transmitted roll. As applied to the case at bar, this construction means that the supplementary roll of July 12th, 1921, in question, is a "supplement" to the roll then in existence, which is that for 1920. The difficulty has arisen from some ambiguity of expression in the pleadings, and probably in the argument below, as here, which led the learned judge to say

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mistakenly, with all respect, that "it is admitted in the pleadings that this is a supplementary roll for 1921." It appears, however, after the very careful consideration we have given it, to be in truth a supplementary roll made in 1921 for 1920.

It follows that the appeal should be allowed.

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

The learned trial judge has held that the plaintiff fell within the provisions of section 29 of Cap. 48, B.C. Stats. 1921. This, it was admitted in argument before us was erroneous. The learned judge further says in his oral reasons:

"It is admitted in the pleadings that this is a supplementary roll for 1921, and I do not think it could be anything else."

In the plaintiff's statement of claim it is put thusly:

"The Provincial assessor of the Province of British Columbia in respect of the year 1918 has on the 12th day of July, 1921, assessed the plaintiff Company upon its income for the year 1918," etc.

This also applies to the 1917 taxes.

In the statement of defence, the defendant states that the income taxation for 1917 and 1918 was omitted, and that in pursuance of section 103 of the Taxation Act, R.S.B.C. 1911, Cap. 222, the Provincial assessor assessed and taxed the plaintiff Company for the amount so omitted on the 12th of July, 1921, upon a supplementary roll "for the then current year." The point to determine is: Of what roll was this supplementary roll of July 12th, 1921, a part? The plaintiff claims that it was the roll of 1921, upon which taxes would, under the Act, be due on January 2nd, 1922, and would not be delinquent until the 31st of December, 1922, and that if paid on or before June 30th, 1922, they are entitled to 10 per cent. discount.

GALLIHER, J.A.

The defendant, on the other hand, says this supplementary roll on which plaintiff was placed, is part of the roll of 1920, finally revised in December, 1920, upon which the taxes were due on the 2nd of January, 1921, delinquent on the 31st of December, 1921, and discount could only be allowed if paid by June 30th, 1921.

There is no dispute as to the amount or that plaintiff is properly on the roll. The question is, what roll is it? Upon

the assessment roll of 1920, as finally revised, the taxes become due and payable in 1921. That was the only roll in existence on July 12th, 1921, to which a supplementary roll could attach. The roll to be prepared in 1921 and to be finally revised in December, 1921, and under which taxes would become due and payable in 1922, was not in existence at the time the supplementary roll was prepared. It seems to me clear that it was not designed that this roll would be supplementary to a roll not then in existence. If it was intended to apply to the roll to be prepared and revised in 1921, the taxation would have been made a part of that roll in its preparation and revision, and not supplementary to it. The use of the words "for the then current year" in the pleadings is somewhat misleading, but the roll compiled in 1920 and upon which taxes were to be paid during the current year 1921, *i.e.*, current year in connection with the supplementary roll, is, I think, what is intended.

McPHILLIPS, J.A.: The operative part of the order for judgment appealed from by the Attorney-General reads as follows, and is explanatory of the subject-matter:

"That the income taxes of the Province of British Columbia assessed and taxed against the plaintiff on the 12th day of July, 1921, in respect of the years 1917 and 1918, on a supplementary roll for the year 1921 at the sum of four hundred and thirty-seven thousand three hundred and fifty-three dollars and two cents ($437,353.02); and in respect of the year 1918, at the sum of one hundred and ninety-five thousand eight hundred and three dollars and eighty cents ($195,803.80), are not due and payable until the 2nd day of January, 1922; and shall not be deemed to be delinquent until the 31st day of December, 1922; and the plaintiff shall be entitled to the discount of ten per cent. (10 per cent.) on said sums of four hundred and thirty-seven thousand three hundred and fifty-three dollars and two cents ($437,353.02), and one hundred and ninety-five thousand eight hundred and three dollars and eighty cents ($195,803.80), provided by section 10 of Chapter 222 of the Revised Statutes of British Columbia, 1911, up to and including the 30th day of June, 1922, upon paying on or before such date the said sum of four hundred and thirty-seven thousand three hundred and fifty-three dollars and two cents ($437,353.02), less the sum of one hundred and thirteen thousand and forty-nine dollars and three cents ($113,049.03), already paid in respect of mineral tax for the year 1917; and also upon paying the said sum of one hundred and ninety-five thousand eight hundred and three dollars and eighty cents ($195,803.80), less the sum of eighty-eight thousand eight hundred and sixty-six dollars and twenty-eight cents ($88,866.28), already paid in respect of mineral tax for the year 1918."

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It would appear that there was default upon the part of the officials of the Government to make the assessment under review, and that point is admitted and it is not a matter of contestation at all as to the assessment made or the *quantum* thereof, the whole matter in dispute is when can it be said the taxes as levied became due and payable? If the taxes were not due and payable until the 2nd of January, 1922, and will not be in arrears until the 31st of December, 1922, which is the contention of the respondent and given effect to by Mr. Justice MURPHY, in the order for judgment above set forth, there is the right in the respondent to pay the taxes on or before the 30th of June, 1922, with the further right to have allowed to it the discount at 10 per cent. as provided by section 10 of the Taxation Act, Cap. 222, R.S.B.C. 1911.

The whole difficulty arises from the mistake made by the officers of the Crown in not assessing the respondent as it should have been assessed, and in the result the respondent has escaped taxation on its income for the years 1917 and 1918, and upon this being discovered, the Provincial assessor, pursuant to the provisions of section 103 of the Taxation Act, upon a supplementary roll for 1920 in 1921 assessed and taxed the respondent for the taxes omitted, being the taxable income of the respondent for the years 1917 and 1918, of which assessment it would appear due notice was given to the respondent, *i.e.*, there were amended assessments made for 1919 and 1920.

MCPHILLIPS, J.A.

Section 103 of the Taxation Act reads as follows:

"103. If, after the final revision of the current year's roll, the Assessor should discover that any person has escaped taxation (other than upon land), for which such person would have been liable had he been assessed and taxed, he shall, upon a supplementary roll for the current year, assess and tax such person for the amounts omitted, according to the information then had and obtained, but for a period limited to ten years preceding the date of such supplementary roll; and due notice of such assessment shall be given to such person, who shall have the right to appeal to the special Court of Revision at its next or some subsequent meeting after said notice of assessment has been given, and such appeal shall be lodged with the Assessor within fourteen days after the date of the notice of assessment. Before making such assessment, the Assessor shall have the right to examine the taxpayer on oath or otherwise, and to demand and obtain production of the taxpayer's books, papers, and accounts, and to examine the same. If after such examination it is proved that the taxpayer has wilfully

evaded just taxation, or withheld correct information for the due assessment for which he would have been liable during any portion of the said period, the taxpayer shall be liable in the penalties mentioned in sections 30, 31 and 32 of this Act; but if the omission has been caused unintentionally by the taxpayer, he shall be liable for the correct taxes only, and he shall have no right to claim that all the taxes for which he had been assessed had been paid in full by any official receipts which he may produce, if the omitted amounts, or any balance thereof, are not included therein."

The contention of the Crown is that the discount as contended for by the respondent is not allowable, the taxes not having been paid before the 30th of June, 1921, or before the extended period allowed in the amended assessment, *viz.*, before the 20th of July, 1921 (sections 10, 104, 105, Cap. 222, R.S.B.C. 1911).

It was stated by counsel at this bar and agreed to by counsel for both sides, that the governing and controlling statute in this appeal is the Taxation Act, as contained in the Revised Statutes of British Columbia, 1911, Cap. 222. The section which deals with delinquent taxes is section 211, which reads as follows:

"211. All taxes on real property, personal property, and income which became due on the second day of January in each year, remaining unpaid on the following thirty-first day of December, shall be deemed to be delinquent on the said thirty-first day of December."

It is to be observed that section 103 which provides for the supplementary assessment for other than land, gives the right of appeal from any supplementary assessment but halts at any other provisions, save that if upon an examination there was wilful evasion or withholding of information the penalties mentioned in sections 30, 31 and 32 may be imposed, but if the omission be unintentional then the taxpayer shall be liable for the correct taxes only with no right, though, to claim payment in full by any official receipts if the omitted amounts or any balance thereof, are not included therein.

MCPHILLIPS, J.A.

Giving careful consideration to section 103, and reading sections 30, 31 and 32, and there is, in my opinion, clear interpretation of the intention of the Legislature, and that is, that the supplementary assessment is deemed to be in the like situation to an assessment of the year before, *i.e.*, in the present case the supplementary assessment was supplementary to the roll of 1920, not supplementary to the roll of 1921 (sections 104 and 105).

Although the right is given of appeal from the supplementary

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assessment, that is a concession made, and cannot be held to operate to any further extent. It is plain that what the Legislature is providing for, is the addition to the roll upon which the assessment should have been made and as we have it in the appeal book before us, the notices of assessment as given to the respondent, read respectively, "Amended Assessment for 1919" —"Amended Assessment for 1920." I therefore, with great respect, cannot agree with the determination arrived at by the learned trial judge, that the assessment in question "is a supplementary roll for 1921," and it was not argued at this bar that there was any binding admission to that effect upon the pleadings; as a matter of fact, there would be an assessment of the respondent for income tax for 1921 upon the roll of 1921, quite independent of the supplementary assessment which is for 1920. The assessment in question here relates to the roll of 1920, that is, the respondent having escaped taxation and that being discovered is put down and assessed by way of supplementary assessment, that assessment to have relation to and be supplementary to the roll of 1920, not 1921, and that as a matter of procedure it is done in 1921 cannot alter its effect, it is an addition to the roll of 1920.

It is to be noted that under section 10 the discount "shall apply only to the taxes of the then current year, and not to arrears." If the contention of the respondent is to have force—then these taxes added by the supplementary assessment to the roll of 1920, being really taxes for the years 1917 and 1918, shall equally with the taxes assessed upon the roll of 1921, be allowed the discount. This is a highly unreasonable contention and is against the plain reading of the section, which is, "apply only to the taxes of the then current year."

MCPHILLIPS, J.A.

The taxes of 1917 and 1918, being the subject-matter of the supplementary assessment cannot be said to be "taxes of the then current year," and subject to a discount of 10 per cent. up to and including the 30th of June, 1922. It is indeed questionable whether the discount could be said to be allowable in the year 1921. However, the Crown by notice offered to accept the taxes subject to the discount in respect of the supplementary assessments if paid before the 20th of July, 1921.

The Crown apparently did not consider it a case of wilful evasion of taxation, and the supplementary assessment being made the notice of assessment issued with the discount allowed and deducted from the taxes, *viz.*, reductions of $43,735.30 and $19,580.38 respectively, from the taxes of the year 1917 and 1918.

It was pressed strongly at this bar that it was highly inequitable that with the right to appeal from the assessment that nevertheless to get the discount payment would have to precede the appeal to the Court of Revision, and this was urged as giving some aid in arriving at the intention of the Legislature, but as to this, it would only be a matter of adjustment of accounts with the Crown and no risk would attach to payment made before the determination of the Court of Revision if an appeal were taken. (Somewhat analogous statute law is to be found in the Income Tax Act, 1918 (8 & 9 Geo. V., c. 40), Imperial, sections 146 to 159—note section 149 (1) (*d*) as to refund, and section 159 dealing with discount). In the present case, evidently there was no appeal as against the assessment and the amount of the taxes have not been disputed. It would seem to me that the contention of the Crown is most consonant with convenience, reason and justice, and is in no way in antagonism with the language of the statute or against legal principles, whilst with deference, the contention on the part of the respondent would seem to partake of absurdity. (See *William Cory & Son* v. *William France, Fenwick & Co.* (1910), 80 L.J., K.B. 241 at p. 346; also, see *per* Lord Halsbury, *Cooke* v. *Charles A. Vogeler Company* (1901), A.C. 107, and Maxwell on the Interpretation of Statutes, 6th Ed., 339).

MCPHILLIPS, J.A.

I would allow the appeal.

EBERTS, J.A. would allow the appeal.

EBERTS, J.A.

Appeal allowed.

Solicitor for appellant: *J. W. Dixie.*

Solicitors for respondent: *Mayers, Stockton & Smith.*

CLEMENT, J.

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GROSS v. WRIGHT, WRIGHT ESTATES LIMITED, AND BRIER.

Party-wall—Agreement—Equal amount of wall to be on each side—Wall narrowed on builder's side—Breach—Remedy.

An agreement between plaintiff and defendant provided for the construction by the defendant of a party-wall two feet in thickness and that an equal proportion shall be on each side of the line dividing their lots. The basement and first story were properly constructed, but the second story was narrowed by four inches on the defendant's side and the third story by a further four inches, the wall on the plaintiff's side being kept perpendicular to the top. The wall formed one of the sides of the defendant's building. The plaintiff discovering the improper construction in the wall twelve years after it was built brought action for a mandatory injunction to compel the defendant to pull down that portion of the wall not erected in compliance with the agreement and for specific performance thereof. An injunction was granted on the trial.

Held, on appeal, reversing the decision of CLEMENT, J. (MCPHILLIPS, J.A. dissenting), that there was no trespass but a breach of the agreement, the proper remedy being for damages the measure of which was the value of the space of which the plaintiff was deprived by the middle line not coinciding throughout with the boundary line between the lots.

[Reversed by Supreme Court of Canada.]

Statement

APPEAL by defendants from the decision of CLEMENT, J. of the 21st of October, 1921, in an action for damages for the unlawful erection of a party-wall, for an injunction and specific performance in respect of the said wall. The plaintiff and defendant Wright owned adjoining lots and by agreement in writing of the 31st of January, 1908, Wright was given the liberty to erect a party-wall between the lots so that the centre line thereof should coincide with the boundary line between the two lots. The wall (four stories high) was properly erected two feet thick with one foot each side of the centre line for the basement and the first story, but the wall was narrowed four inches for the second story and a further four inches for the third story all of which was taken off the defendant's side, there being a straight wall up the four stories on the plaintiff's side. The defendant constructed a building on his lot of which the wall formed part. The defendant Wright transferred his lot

to Wright Estates Limited in 1917 and the defendant Brier became a mortgagee in 1918. The defendants other than Wright did not know of the improper construction of the wall until 1920.

Arnold, for plaintiff.
J. S. MacKay, for defendants.

21st October, 1921.

CLEMENT, J.: The defendant Wright was given liberty by the party-wall agreement of 1908 to enter upon plaintiff's lot 11 for the purpose of building the party-wall as provided for but not otherwise or for any other purpose. From the top of the first story the defendant Wright departed from the contract and, in my opinion, at once became a trespasser upon lot 11, occupying without leave 12 inches of that lot, admittedly the plaintiff's property. I know of no principle under which this Court can say to the plaintiff you must let the defendants have that 12 inch column of air from the first story up to the present height of the wall, and this Court will decree compensation. The only remedy for a violation of right as I read *Stollmeyer* v. *Petroleum Development Co.* (1918), 87 L.J., P.C. 83, is the grant of an injunction. No damage, it is true, has been suffered to date and possibly no damage will ever be suffered. At present, at all events, plaintiff has no intention of further heightening his building on lot 11. But for the trespass, I should allow nominal damages, say 30 cents. He is also entitled to his costs. I regret this. The evidence seems to shew that for all purposes, having in view the locality, the wall as it now exists, is of sufficient strength to carry any structure the plaintiff is ever likely to put upon his lot 11; so that it looks very much as if defendants are to be put to considerable expense without any corresponding benefit to plaintiff. But the defendant Wright has only himself, or his architect, to blame for the muddle. Curiously enough there is nothing in the agreement of 1908 to justify any lessening of the thickness of the wall as it goes skyward. The sketch plan attached to the agreement is a ground plan only and, in any case, it cannot weaken the force of the words "two feet or more in thickness" in the written

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agreement. But, there being no time limit set by the agreement, it is not too late for the defendant Wright to retrace his steps and put himself right, and following the case in the Privy Council, I think defendants should be allowed two years within which to make the wall to conform to the agreement and the injunction to that effect should not be enforced meanwhile. There is no need that I can see for any undertaking as to damages to be suffered by plaintiff meanwhile. Liberty to apply.

From this decision the defendants appealed. The appeal was argued at Vancouver on the 31st of March and the 3rd of April, 1922, before MACDONALD, C.J.A., GALLIHER, MCPHILLIPS, and EBERTS, JJ.A.

A. H. MacNeill, K.C., for appellants: The wall was 120 feet extending from Hastings Street to the lane at the back. They agreed to a two-foot thickness and this was only maintained for the first floor. As long as only one party uses it, it is not a party wall: see *Weston* v. *Arnold* (1873), 8 Chy. App. 1084; *Drury* v. *Army and Navy Auxiliary Co-operative Supply* (1896), 2 Q.B. 271 at p. 277. The wall is just as strong and safe as if the space were filled in. He is in no sense a trespasser: see *Knight* v. *Pursell* (1879), 11 Ch. D. 412 at pp. 414-5; *Adams* v. *Marylebone Borough Council* (1907), 2 K.B. 822 at p. 839. On the question of the contract see *H. Dakin & Co., Limited* v. *Lee* (1916), 1 K.B. 566. The plaintiff has used the wall for 11 years. There is provision for arbitration and there is no cause of action until an arbitration is had.

Argument

J. A. MacInnes, for respondent: The plaintiff agreed to allow the defendant build a party-wall. It was built under the terms of the document. Defendant cannot now after so many years go behind the licence and say he did not build a party-wall. The wall is not in compliance with the agreement and does not occupy an equal space on each side of the line dividing the lots.

Cur. adv. vult.

6th June, 1922.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The parties being the owners of adjoin-

ing lots entered into an agreement for the erection of a party-wall. It was agreed that Wright might build the wall two feet or more in thickness, the half on each lot. He built a wall the foundation and basement and first story of which were in accordance with the agreement. He narrowed the second story by four inches on his own side of the wall, and the third story by a further four inches, keeping the wall on the outside, on plaintiff's side, perpendicular. The wall was erected several years ago and forms one of the walls of the defendant's building. The agreement provided that "the middle line of which (the wall) would coincide with the said boundary line." The plaintiff claims to have recently discovered this departure from the agreement and sued for a mandatory injunction to compel the defendants to pull down that part of the wall not erected in compliance with the agreement, also for specific performance of the agreement and such other relief as the nature of the case may require.

The learned judge held that there had been a trespass and granted an injunction which he stayed for a period to enable the defendants to make the wall conform to the agreement.

It is admitted by the plaintiff himself, that the wall as built is a good and sufficient wall for the purpose for which it was built, in other words, he has no complaint to make to it, except that it was narrowed from the defendant's side and not equally from both sides. He admits that it was proper and in accordance with practice to narrow the wall as it gained height, but claims that it puts an undue burden upon his lot and deprives him of space to which he was entitled.

MACDONALD, C.J.A.

The first question to be decided is as to whether or not there was a trespass. In my opinion, there was not. It was at most a breach of the agreement. The agreement being one affecting an interest in land could be ordered to be specifically performed, but as that remedy is one which is discretionary with the Court, it will not be ordered where great loss would be caused to one party without a corresponding benefit to the other, and where the breach of the agreement may be reasonably compensated for by awarding damages. There is no evidence in the case upon which we can decide what the damages are. It appears to me

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that what the plaintiff is entitled to is the value of the space of which he has been deprived, namely, four inches of the second story, eight inches of the third, and I think, part of the wall has been built slightly above the third story narrowed an additional four inches which should be taken into account. The value of such space is the measure of damages.

The case by which the learned judge felt himself bound to give the relief granted, *Stollmeyer* v. *Petroleum Development Co.* (1918), 87 L.J., P.C. 83, is one of nuisance not of contract, and with deference, does not, in my opinion, conclude this case. The other authorities to which we were referred on behalf of the appellant, were authorities under the Building Acts in England, and furnish no guide in this case. The authorities cited by the respondent's counsel are like *Stollmeyer* v. *Petroleum Development Co., supra,* cases of nuisance or other tort and are likewise not applicable to this case.

I would therefore allow the appeal and order a new trial for the purpose of ascertaining the damages.

The appellant is entitled to the costs of the appeal. The extra costs occasioned by the new trial to be disposed of by the trial judge.

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

I do not think the evidence in this case justifies me in concluding that there was a trespass. Such being the case, there remains only the question as to what, if any, damage has been suffered by the plaintiff by reason of the wall being constructed in its present form.

GALLIHER, J.A.

The most that can be said, and I think it can be properly said, that the plaintiff has been deprived of a certain amount of space if he should decide to make use of the party-wall to the extent to which it is constructed. That space he is entitled to under the agreement to construct and if the parties cannot agree as to the value of this, there should be a new trial to fix the value.

The appellant is entitled to the costs of appeal, and as to the costs below, each party is entitled to costs on the particular issues upon which they succeed.

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

EBERTS, J.A. agreed in allowing the appeal and ordering a new trial.

Appeal allowed and new trial ordered, McPhillips, J.A. dissenting.

Solicitor for appellants: *F. G. Crisp.*
Solicitor for respondent: *C. S. Arnold.*

WHITNEY-MORTON & COMPANY LIMITED v. A. E. SHORT LIMITED.

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WHITNEY-MORTON & CO. v. A. E. SHORT LTD.

Sale of Goods—Conditional sale agreement—Repossession—Authority to sell—Mercantile Agent—52 & 53 Vict. (Imperial), Cap. 45, Secs. 2 to 6—R.S.B.C. 1911, Cap. 203, Sec. 69.

A motor-truck sold under a conditional sale agreement (duly registered) which was assigned to the defendant, was seized by the defendant who notified the defaulting purchaser that if the amount due was not paid within the statutory period the truck would be sold. Defendant left the motor pending sale under seizure and for the purpose of having certain repairs with a company whose business it was to make repairs to motors and carry on sales. The repairs were completed and ten days after the defendant had seized the motor and without his instructions or knowledge the repairing company sold the truck to another under a conditional sale agreement which was assigned to the plaintiff who (their purchaser having defaulted and returned the truck to the motor-truck company) brought action to recover from the defendant who had taken possession. The action was dismissed.

Held, on appeal affirming the decision of MURPHY, J., that the defendant had left the truck with the repairing company for storage and repairs only and was entitled to retain it and did not place it with said Company as a "mercantile agency" within the purview of section 69 of the Sale of Goods Act.

APPEAL by plaintiff from the decision of MURPHY, J. of the 11th of January, 1922, in an action to recover a Giant truck Statement

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and for an injunction to restrain the defendant from selling or dealing with it. The facts relevant to the issue are as follow: The Giant Truck Company Limited sold a one-ton truck to one McMullin in January, 1921, on a conditional sale agreement which was immediately assigned for valuable consideration to the defendant. The conditional sale agreement was registered in the County Court registry on the 1st of February, 1921, and McMullin was in default in his payments in March, April and May, 1921. Under the conditional sale agreement the defendant seized the truck on the 17th of May, 1921, and put it in the hands of the Giant Truck Company Limited for the purpose of repairs and for storage pending sale under the seizure. On the 22nd of June, 1921, the Giant Truck Company paid the defendant $119.17 in full of the March payment for which seizure had been made, advised the defendant the payment was made for McMullin and that the other arrears would shortly be paid up. The defendant then withheld sale but instructed the Giant Motor Truck Company not to let the truck out of its possession. Ninety-one dollars and fifty-nine cents was paid the defendant on the 9th of September, 1921, which was credited to the April payment and that was all he was paid. On the 27th of May, 1921, the Giant Motor Truck Company sold the truck to one A. S. Dhelo under a conditional sale agreement and the truck was delivered to Dhelo who operated it until the middle of August, 1921. On the 10th of August, 1921, the Giant Motor Truck Company assigned the said conditional sale agreement for valuable consideration to the plaintiff. The conditional sale agreement from Dhelo dated the 27th of May, 1921, was registered in the County Court on the 30th of August, 1921, under an order of the Court of the 24th of August, 1921. On the 26th of August, 1921, the defendant removed the truck from the Giant Motor Truck Company premises to the Maple Leaf Motor Truck Company on Granville Street where it is still held for the defendant. On the 15th of August, 1921, Dhelo having been in default in his payments due on the 27th of July, 1921, to the plaintiff, the plaintiff instructed a bailiff to seize the truck by virtue of the provisions of the conditional sale agreement of the 27th of May, 1921. The bailiff found the

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truck in the Maple Leaf Company's premises but the manager thereof refused to allow the bailiff to seize or remove the truck on the ground that it was the defendant's and under seizure by reason of default in payments. Action was then brought by the plaintiff to recover possession.

The appeal was argued at Vancouver on the 10th of March, 1922, before MACDONALD, C.J.A., MARTIN and MCPHILLIPS, JJ.A.

Jeremy, for appellant: The sale to Dhelo was valid and we are protected by section 69 of the Sale of Goods Act. We were innocent purchasers for value. In any case the Giant Motor Truck Company were agents of the defendant and defendant's agent committed the fraud: see *Oppenheimer* v. *Attenborough & Son* (1907), 77 L.J., K.B. 209 at p. 211.

Housser, for respondent: There is nothing to shew they were mercantile agents: see *Cole* v. *North Western Bank* (1875), L.R. 10 C.P. 354 at p. 376. *Biggs* v. *Evans* (1894), 1 Q.B. 88 was before the 1889 Act. See also *Oppenheimer* v. *Attenborough & Son* (1907), 1 K.B. 510; *Fuentes* v. *Montis* (1868), L.R. 3 C.P. 268 at p. 278. We are in possession and have the strongest claim. Even if they were agents there is nothing to shew they were licensed to deal in second-hand trucks.

Argument

Jeremy, in reply: That we have a good title under the Act see *Moody* v. *Pall Mall Deposit and Forwarding Co. (Limited)*; *Societe Des Galeries Georges Petit* v. *Moody* (1917), 33 T.L.R. 306; *Oppenheimer* v. *Frazer & Wyatt* (1907), 1 K.B. 519 at p. 527.

Cur. adv. vult.

6th June, 1922.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The case was tried on a statement of facts agreed upon by counsel. This statement shews that the Giant Motor Truck Company, Limited, on January 28th, 1921, sold the truck in question to one McMullin by a conditional sale agreement, and on the same day assigned this agreement to the defendant. The assignment was endorsed on the agreement and the agreement was thereafter registered according to law.

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McMullin made default in payment of instalments and the truck was repossessed by the defendant, who left it with the Giant Company, "pending sale under seizure and for the purpose of having certain repairs made thereto," but without express authority to sell it. The Giant Company nevertheless sold the truck to one Dhelo ten days thereafter, *viz.*, on the 27th of May, and gave in their own name a conditional sale agreement to Dhelo, who took possession of the truck and on the 10th of August the Giant Company assigned the Dhelo agreement to the plaintiff who registered it on the 30th of August. Dhelo having made default returned the truck to the Giant Company on the 15th of August, and on the 26th the defendant took possession of it under the agreement and assignment thereof of the 28th of January, and removed it to the garage of the Maple Leaf Company. The plaintiff then attempted to get possession from the Maple Leaf Company, claiming under the second agreement above recited, but failed and they then brought this action for wrongful detention.

MACDONALD, C.J.A.

The question is, is the defendant entitled to the truck under the agreement of the 28th of January, or on the contrary, is the plaintiff entitled to it under the agreement between the Giant Company and Dhelo of the 27th of May assigned to the plaintiff on the 10th of August. The decision of the appeal hinges on the construction to be placed upon section 69 of the Bills of Sale Act, R.S.B.C. 1911, Cap. 203, as applied to the facts of this case. The facts as stated are peculiar in some respects. The Bills of Sale Act, Sec. 32, gives the purchaser 20 days from the date of the vendor's retaking within which to redeem. This truck was resold by the Giant Company ten days after the date of retaking, in violation apparently of McMullin's right. Dhelo who had statutory notice of the title must be taken to have been aware of McMullin's rights in the premises. Then again, a fire occurred on the 13th of August while the truck was still in Dhelo's possession, causing injury to it but the insurance moneys were paid to the defendant upon proof of loss made by McMullin. Again the case shews that after the sale to Dhelo, namely, on the 22nd of June, the Giant Company paid a considerable sum of money to the defendants as a payment by

McMullin on the purchase price. I cannot help but think that if the facts had been ascertained by evidence at the trial, some explanation of these circumstances would have been offered, but I have to deal with the case as I find it. The following passage from Benjamin on Sale, 6th Ed., deals succinctly with the point argued before us, namely, whether section 69 as it stands today is to be construed differently from the similar section in the English Factors Act, as it stood prior to the year 1889. Prior to the last-mentioned date, the section made use of the word "entrusted." That word was eliminated in 1889 and the section of the English Act of that year is similar to our section 69. I quote from Benjamin, at p. 43:

"The Factors Acts of 1825 and 1842 provided that the agent or 'person' should be '*entrusted*' with the possession of the goods or documents of title. But notwithstanding the changed wording [in the section as amended in 1889], it is conceived that those cases (*City Bank* v. *Barrow* (1880), 5 App. Cas. 664; *Cole* v. *N.W. Bank* (1875), L.R. 10 C.P. 354; *Cf. Biggs* v. *Evans* (1894), 1 Q.B. 88) under the earlier Acts are still law which decided that a mercantile agent, who *in some other capacity* was entrusted with goods was not entrusted with them as a mercantile agent, and could not in consequence pass a good title to a third person. In other words, section 2 (1) of the Act of 1889 should be read as if it ran: 'Where a mercantile agent is, with the consent of the owner, in possession, *as a mercantile agent.*'"

MACDONALD, C.J.A.

Now, the admission of facts states that the truck was left with the Giant Company pending a sale under seizure and for repairs. The notice served on McMullin dated the 17th of May, when defendants repossessed themselves of the truck, tells him that if the price be not paid within 20 days, the truck will be sold. It was sold within ten days by the Giant Company and without the instructions or knowledge of the defendants, shewing that it was at the time of sale, at all events, not in the possession of the Giant Company as mercantile agents but for storage and repairs.

The appeal should therefore be dismissed.

MARTIN, J.A.: I agree that the appeal should be dismissed.

MARTIN, J.A.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: In my opinion, Mr. Justice MURPHY arrived at the right conclusion.

Firstly, the appellant must be held to be affected by and conclusively bound by the provision of the Sale of Goods

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Act (Cap. 203, R.S.B.C. 1911) and in particular the provisions governing conditional sales (sections 27 to 36 inclusive). The appellant is in the position of having statutory notice that the truck in question was sold and held under a conditional sale agreement, and upon the facts as stated there was not at the time the purchase was made, the right to effect a sale of the truck, and the appellant, as a matter of legal sequence, could not upon this point alone, obtain a good title. That a search was not made in the office of the County Court and the appellant was not aware of the true facts, cannot avail him in this appeal. Secondly, if the matter were still open and this was not an insuperable objection, the appellant cannot succeed, because the truck was not placed with the mercantile agent within the purivew of section 69 of the Sale of Goods Act. I would refer to what Channell, J. said at p. 527 in *Oppenheimer* v. *Attenborough & Son* (1907), 1 K.B. 510 (affirmed (1907), 77 L.J., K.B. 209 (1908), 1 K.B. 221), when referring to the change in the Imperial Act, and we have the like statute law:

"It seems to me that the words of the present Act, 'Where a mercantile agent is, with the consent of the owner in possession of goods,' mean precisely the same as the former words as to entrusting, with the exception that the present Act brings in the statutory definition of a mercantile agent which previously was only a matter of the decisions of the Courts."

MCPHILLIPS, J.A.

Now, here there was no entrusting of the truck at all for sale, it was there for repairs, never was entrusted for sale, and the place of business was not only one where sales were carried on, but where repairs were made; it was true the repairs had been effected, but surely if one had his motor-car for repairs in an establishment where motor-cars are also for sale, could it be for a moment contended that nevertheless one's motor-car could be sold and the owner lose his car? This would be a monstrous happening and the statute law cannot be applied to work such a manifest injustice. The statute law is not so intractable as to necessitate any such injustice being worked and I would refer to what Lord Shaw of Dumfermline, in *Attorney-General of Southern Nigeria* v. *John Holt and Company (Liverpool), Limited* (1915), A.C. 599 (84 L.J., P.C. 98), said at p. 617:

"The law must adapt itself to the conditions of modern society and trade . . . . "

This was not a case within the language of Lord Alverstone, C.J. in the *Oppenheimer* case (1907), 77 L.J., K.B. 209 at p. 213:

"I cannot think that it was intended to exclude from the protection of the Factors Act the case of a mercantile agent who, having got possession of goods with the consent of the owner for the purpose of selling them, tells a lie to the pledgee when he gives them in pledge."

Here the truck was not in the possession of the mercantile agent for the purpose of selling it at all, the possession was in quite another capacity, *i.e.,* for repairs, and there was continuance of possession after the repairs had been made, and as we have seen there was not, at the time, the right to sell owing to there still being necessary steps to take under the conditional sale agreement to admit of a sale being made. The stated cases in its terms does not admit of it being said that this was a case of a mercantile agent being in possession of goods for sale and held in the ordinary course of business of a mercantile agent for sale. Then it is manifest that the law remains as repeatedly expounded, that a sale made by a mercantile agent cannot be supported if the goods were entrusted to the mercantile agent as they were here, not for sale, but entrusted to the mercantile agent in another capacity, *i.e.,* for repairs (see *City Bank* v. *Barrow* (1880), 5 App. Cas. 664; *Cole* v. *N.W. Bank* (1875), L.R. 10 C.P. 354; 44 L.J., C.P. 233; *Biggs* v. *Evans* (1894), 1 Q.B. 88; Benjamin on Sale, 6th Ed., pp. 41 to 43; Chalmers's Sale of Goods, 8th Ed., pp. 148, 150, 151).

MCPHILLIPS, J.A.

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

Appeal dismissed.

Solicitors for appellant: *J. E. Hutton Jeremy.*
Solicitor for respondent: *W. W. Walsh.*

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SKIDMORE v. B.C. ELECTRIC RY. CO.

SKIDMORE v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED.

Negligence—Run down by street-car—Contributory negligence—Ultimate negligence—Not applicable.

The plaintiff got off the back end of a street-car on a dark rainy night, turned, and crossed the track at the back of the car but before clearing the adjoining track was struck by a car coming from the opposite direction at an excessive rate of speed. The jury found negligence on the part of the defendant, contributory negligence on the part of the plaintiff and in answer to a question whether the motorman after he became aware that an accident would likely occur could have prevented such accident by the exercise of reasonable care, said "too late." On this finding the action was dismissed.

Held, on appeal, affirming the decision of MACDONALD, J., that as the defendant's negligence was in excessive speed and the plaintiff's negligence in not taking due care to avoid danger, the negligence of both of them continuing until it was too late for the motorman to avoid the accident the plaintiff could not recover.

Loach v. *British Columbia Electric Railway Company, Limited* (1916), 1 A.C. 719 followed.

APPEAL by plaintiff from the decision of MACDONALD, J. and the verdict of a jury, in an action for damages for negligence, tried at Vancouver on the 24th of November, 1921. At about 11:30 on the evening of the 27th of November, 1920, the plaintiff was a passenger on an eastbound Hastings Street car. The car stopped on the west side of Woodland Drive and the plaintiff got off at the rear end and passing behind his own car with the intention of crossing the other track nearly got across when he was struck a glancing blow by a car going west on said track at an excessive rate of speed, which threw him about 15 feet. The night was dark and rainy. He suffered dislocation of the shoulder-blade, the breaking of three ribs and other injuries. The jury found the defendant guilty of negligence and the plaintiff guilty of contributory negligence; also that when the motorman became aware that an accident was likely to occur it was too late to avoid the accident. On the finding of the jury the action was dismissed.

Statement

Robert Smith, and *G. L. Fraser,* for plaintiff.
McPhillips, K.C., for defendant.

28th November, 1921.

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MACDONALD, J.: In this action certain questions were submitted to the jury. They found negligence as against the defendant Company; and also, in answer to appropriate questions, found that the plaintiff was guilty of contributory negligence. The negligence of the Company was found to be of operating the car at too great a speed, and the negligence of the plaintiff was held to be, failure on his part to be more cautious. The jury also found that, when it became apparent that the accident was likely to occur, it was impossible then for the motorman to avert the accident on account of the speed the car was running. Both counsel contended that the answers are in their favour and verdict should be entered accordingly.

While there might be some difficulty in distinguishing *British Columbia Electric Railway Company, Limited* v. *Loach* (1916), 1 A.C. 719, from the present one, still it seems to me that the distinction so ably pointed out in the case of *Smith* v. *Regem* (1917), 1 W.W.R. 1444 is applicable to the situation here presented. That was a case in which the jury found that the motorman was running a street-car at a higher rate of speed than was really safe and also found that the plaintiff had been guilty of negligence in not taking proper precaution in crossing the street and looking for approaching traffic. While the plaintiff in that case was running an automobile, still it seems to me there is very little difference in the two cases. I will not attempt to interfere in any way with the finding of the jury as to the speed of the street-car being too great nor discuss the lack or degree of evidence to support such a conclusion. I think the jury was quite justified in finding that the plaintiff had not exercised the caution that was required of a person under the circumstances existing that evening. The plaintiff was then well aware of the fact that he was about to cross a street-car track. He did not exercise due caution. The result was, at the time the accident occurred, even accepting the finding of the jury as to the speed of the car, the plaintiff on his part was in a position of danger caused by his negligence. There was

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thus joint negligence on the part of the plaintiff and the defendant. The principle of "ultimate negligence" as against the defendant Company does not arise to relieve the plaintiff from the negligence on his part. The motorman was not, as in the *Loach* case, prevented by some permanent defect from stopping his car; he did not have the requisite time to do so. Without further enlarging upon the matter I take the liberty of adopting the reasons of Lamont, J. in *Smith* v. *Regem*, *supra*. In my opinion, on the findings of the jury, the action should be dismissed with costs.

From this decision the plaintiff appealed. The appeal was argued at Vancouver on the 10th and 11th of April, 1922, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Argument

A. Alexander (*G. L. Fraser*, with him), for appellant: The question is, whose fault was it? We say the accident occurred by reason of the excessive speed of the car. In the case of *Smith* v. *Regem* (1917), 1 W.W.R. 1444, the judgment of Lamont, J. is wrongly decided: see *Critchley* v. *C.N.R.* (1917), 2 W.W.R. 538 in which the *Smith* case is commented upon and disapproved. The question is what construction should be put on the *Loach* case (1916), 1 A.C. 719; see also *Fraser* v. *B.C. Electric Ry. Co.* (1919), 26 B.C. 536; *Tait* v. *B.C. Electric Ry. Co.* (1916), 22 B.C. 571; *Columbia Bithulitic Limited* v. *British Columbia Electric Rway. Co.* (1917), 55 S.C.R. 1; 2 W.W.R. 664. The case of *Neenan* v. *Hosford* (1920), 2 I.R. 258 at p. 274 discusses the *Loach* case, *supra*. After the motorman saw the plaintiff he could have avoided the accident if he had not been exceeding the speed limit. It was a dark night and raining. On the question of a new trial see *Ontario Hughes-Owens Limited* v. *Ottawa Electric R.W. Co.* (1917), 40 O.L.R. 614; see also *Parsons* v. *Toronto R. W. Co.* (1919), 45 O.L.R. 627 at pp. 631-2.

McPhillips, K.C., for respondent: The *Loach* case does not apply as there were defective brakes in that case that rendered the defendant liable and the *Columbia Bithulitic* case was

decided on the *Loach* case. We rely on *Smith* v. *Regem* (1917), 10 Sask. L.R. 72 at p. 76. See also *Critchley* v. *C.N.R.* (1917), 12 Alta. L.R. 522 at pp. 524 and 527; *Leech* v. *The City of Lethbridge* (1921), 62 S.C.R. 123 at p. 129.

Alexander, in reply, referred to *Brenner* v. *Toronto R. W. Co.* (1907), 13 O.L.R. 423 at pp. 424 and 426; *British Columbia Electric Rway. Co.* v. *Dunphy* (1919), 59 S.C.R. 263.

Cur. adv. vult.

6th June, 1922.

MACDONALD, C.J.A.: The appeal can only succeed if the Court is prepared to abrogate the doctrine of contributory negligence. We have not gone as far as that yet, and I am not prepared to go that far now.

The jury answered questions finding the defendant guilty of negligence in running its car at an excessive rate of speed. They found the plaintiff guilty of contributory negligence in not taking due care. They negatived ultimate negligence when they said that after the defendant's motorman became aware, or ought to have become aware, of plaintiff's danger, it was too late to save him.

The facts are clearly and well defined. The defendant's only negligence was in the rate of speed, the plaintiff's only negligence was in not looking out for the danger; the negligence of each continued until it was too late to avoid the injury of which the plaintiff complains.

MACDONALD, C.J.A.

The statement of these facts would appear to me to lead only to one conclusion, namely, that the action was properly dismissed. I understand the rule of law which has long prevailed in our Courts to be, that when both parties are at fault in respect of the occurrence and neither could, by the exercise of reasonable care, after the danger had become or ought to have become apparent, have prevented the injury, neither can recover against the other. *British Columbia Electric Railway Company, Limited* v. *Loach* (1916), 1 A.C. 719, a much canvassed decision of the Privy Council, was cited to us, as were also conflicting decisions of the Courts of Alberta and Saskatchewan, but I think no useful purpose can be served by further discus-

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sion of these cases. As I understand *Loach's* case, it does not strike at the doctrine of contributory negligence, but decides that if the failure of the one to avoid the occurrence was due to his having disabled himself by antecedent neglect to supply the usual facilities to enable him to do so, then that party must be held to be the real author of the injury.

The appeal should be dismissed.

MARTIN, J.A.: This appeal should, I think, be dismissed; the findings of the jury can only, in the light of the circumstances, be interpreted as against the plaintiff, who is in a position indistinguishable in principle from that of the unsuccessful plaintiff in the instructive case of *Neenan* v. *Hosford* (1920), 2 I.R. 258, which I have noticed in *Winch* v. *Bowell* [*ante*, p. 186], wherein judgment is being delivered this day. I regard the present case as being, shortly, one wherein the plaintiff negligently stepped into immediate and unavoidable danger.

MARTIN, J.A.

GALLIHER, J.A.: In my opinion this appeal must fail. It was ably and ingeniously argued by Mr. *Alexander*, but unless the principle laid down in the *Loach* case by the Privy Council can be applied here to the circumstances of this case, the appeal cannot succeed. That case, is, in my opinion, distinguishable on the facts. Here, the unfortunate man stepped around the rear of the car from which he alighted, right into danger without looking, and to say that had the defendant been running at a less rate of speed, the accident might have been avoided, may be true, but the rate of speed was the original negligence of the defendant, and had the plaintiff looked before stepping into danger, he could have seen the car coming and avoided the accident.

GALLIHER, J.A.

Under such circumstances, it does not seem to me he can succeed.

MCPHILLIPS, J.A.

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

EBERTS, J.A.

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

Solicitor for appellant: *G. L. Fraser.*

Solicitors for respondent: *McPhillips, Smith & Gilmour.*

LEE MONG KOW AND CHETHAM v. REGISTRAR-GENERAL OF TITLES.

MCDONALD, J.

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June 20.

LEE MONG KOW *v.* REGISTRAR-GENERAL OF TITLES

Real property—Overlapping of surveys—Certificate of indefeasible title—Issued on later plan—"Mistake" of Registrar-General of Titles—B.C. Stats. 1906, Cap. 23, Sec. 99—B.C. Stats. 1893, Cap. 66.

On the 5th of February, 1890, map No. 263 representing the survey of section 4 of the City of Victoria was filed in the Land Registry office. On the 4th of October, 1907, map 858 representing a survey of section 48 immediately adjoining section 4 on the east was filed pursuant to an order of the Supreme Court under the City of Victoria Official Map Act, 1893. In 1909 the city surveyor of Victoria brought to the attention of the Registrar-General of Titles that plan 858 encroached on plan 263 but after some correspondence and investigation the Registrar-General decided both maps were properly filed. The land in question under plan 858 was purchased by Lee Mong Kow in January, 1910, and on the 20th of June following a certificate of indefeasible title was issued by the Registrar-General of Titles to him. In an action in 1915, between the plaintiff, Lee Mong Kow and the British Columbia Electric Railway Company it was held that map number 858 was wrongfully filed in the Land Registry office and null and void in so far as it conflicted with map number 263. In an action against the Registrar-General of Titles for damages under section 99 of the Land Registry Act, 1906:—

Held, that the Registrar-General of Titles was guilty of a "mistake" within the meaning of said section in issuing a certificate of indefeasible title to the plaintiff of certain lots according to a certain registered plan after becoming aware that it was at least doubtful as to whether or not said plan failed to correspond with another plan already filed and there being an overlapping whereby the plaintiff sustained loss he could maintain an action against the Registrar-General of Titles (who as he acted *bona fide* was protected from individual liability under the Act) as nominal defendant and recover damages from the assurance fund.

The provision in section 105 of said Act that the assurance fund should not be liable "for any error or shortage in area of any lot, block or subdivision according to any map or plan filed or deposited in the office of the registrar" held not to apply to a case such as this.

ACTION for damages against the Registrar-General of Titles by reason of his negligence in issuing in error a certificate of indefeasible title to the plaintiff Lee Mong Kow for lots 6 to 13 in block 20 according to a map or plan numbered 858 which was received by the defendant in the Land Registry office in

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Victoria in error as it overlapped a former plan duly filed in 1890 and numbered 263. The facts are set out fully in the judgment of the learned trial judge. Tried by McDONALD, J. at Victoria on the 19th of June, 1922.

W. J. Taylor, K.C. (*W. A. Brethour,* with him), for plaintiffs.

Pattullo, K.C., for defendant.

20th June, 1922.

McDONALD, J.: The plaintiffs claim damages against the defendant by reason of his "negligence, mistakes, omissions or commissions," and by reason of misrepresentations made by him in that he received and filed a map or plan known as No. 858 in the Land Registry office in the City of Victoria, and later issued a certificate of indefeasible title to the plaintiff Lee Mong Kow, for lots 6 to 13, in block 20, according to the said map or plan No. 858. The facts are as follows:

On February 5th, 1890, map No. 263 was filed, representing the survey of section 4, and on the 4th of October, 1907, map No. 858, representing the survey of section 48 immediately adjoining section 4 on the east, was also filed, pursuant to an order of the Supreme Court of British Columbia made under the City of Victoria Official Map Act, 1893, being Cap. 66 of the statutes of 1893. Some considerable time later, in or about the month of February, 1909, the city surveyor of the City of Victoria brought to the notice of the Registrar-General of Titles, who had received and filed the latter of the above plans, the fact that the boundary line between sections 4 and 48 was not properly fixed, and that map No. 858 encroached upon the lands shewn on map No. 263. Some interviews took place between the city surveyor and the Registrar-General and considerable correspondence passed between them, the result of which was that the Registrar-General upon investigation, decided that both plans were properly filed. In my opinion the Registrar-General acted *bona fide* in dealing with the matters then before him, but in the result it appears that he acted in error.

Judgment

At the time of the filing of map No. 858, the title to the lands represented thereby was in one, C. H. Lugrin, who afterwards

died in June, 1917. On the 5th of December, 1906, Lugrin conveyed the lands in question to one Gray; on the 21st of December, 1906, Gray conveyed to Gunn and Smith; on the 18th of June, 1907, Gunn and Smith conveyed to Gray, Hamilton, Donald and Johnston, Limited; on the 10th of June, 1909, Gray, Hamilton, Donald and Johnston, Limited, conveyed to Martin and Martin, and on the 29th of January, 1910, Martin and Martin conveyed to the plaintiff Lee Mong Kow, who procured, on the 20th of June, 1910, a certificate of indefeasible title to the lots in question in this action, according to said map 858. Lugrin remained the registered owner until the said 30th of June, 1910, Lee Mong Kow's application for registration being accompanied by the various documents shewing the links in the chain of title from Lugrin to Lee Mong Kow. This certificate of indefeasible title was issued by the Registrar-General of Titles nearly a year and a half after it had been brought to his notice that there was some question as to whether or not map No. 858 "overlapped" map No. 263.

The plaintiff Chetham made certain advances to Lee Mong Kow on the security of the lands in question, and is for that reason joined as a plaintiff in this action.

On the 6th of April, 1915, in an action in the Supreme Court of British Columbia, wherein the plaintiff Lee Mong Kow was plaintiff and the British Columbia Electric Railway Company, Limited, was defendant, it was held that map No. 858 was wrongfully deposited in the Land Registry office in so far as the same conflicted with map No. 263, and that map No. 858 was void and invalid in so far as it so conflicted, and that the plaintiff's certificate of title should not include any part of section 4; the result being that the plaintiff lost a large proportion of his lots as shewn on map No. 858, and was obliged to return to several persons who had purchased from him various of the lots in question the moneys which they had paid on account of the purchase price.

Judgment

In March, 1911, Gray, Hamilton, Donald and Johnston, Limited, being a company incorporated under the laws of Saskatchewan and licensed to carry on business in British Columbia, was struck off the register upon evidence being pro-

MCDONALD, J. duced to the registrar of joint-stock companies, that it had been wound up in the Province of Saskatchewan.

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As stated above, plan No. 858 was filed pursuant to an order of the Supreme Court of British Columbia, made under the provisions of sections 23 to 35 inclusive, of the City of Victoria Official Map Act, 1893, as amended and consolidated by B.C. Stats. 1893, Cap. 66, which provided in effect that no plan or subdivision of land within the corporate limits should be deposited with the Registrar-General, except under the authority of an order of a judge of the Supreme Court of British Columbia obtained in the manner in the statute stated. By section 68 of the Land Registry Act, B.C. Stats. 1906, Cap. 23, being the statute applicable in this action, it was provided

"that the registrar may in his discretion, refuse to accept any map or plan the measurements of which do not correspond with any map or plan, or maps or plans, covering the same land in whole or in part already deposited in his office."

The two Acts must be read together, and it seems to me that notwithstanding the provisions of said section 68, the Registrar was obliged to accept plan No. 858, in pursuance of said order. Nevertheless, I am of opinion that when the Registrar some months after the filing of plan No. 858, with full knowledge that it was, at least, doubtful as to whether or not such plan failed to correspond with plan No. 263 already filed, issued the certificate of indefeasible title to the plaintiff Lee Mong Kow, he was guilty of a "mistake" within the meaning of section 99 of the Act, as a result of which mistake the plaintiffs "sustained loss or damage," and this, even though his act was *bona fide* done (as I think it was) so as to protect him from any individual liability as provided for by section 85 of the Act.

Judgment

If I am right in the above conclusion, then the plaintiffs are entitled to maintain this action for damages against the Registrar-General as nominal defendant, and to recover such damages out of the assurance fund, unless the plaintiffs are deprived of such remedy by some other provision of the Act. In the first place, it is suggested that the notice of action served upon the Attorney-General and upon the Registrar-General one month prior to the commencement of the action was not a sufficient notice to satisfy the requirements of the proviso to

section 99. I think such notice was sufficient upon the principles laid down in *Jones* v. *Bird* (1822), 5 B. & Ald. 837 at p. 845.

Next it is contended that the action cannot succeed by reason of the provisions of the last clause of section 105 of the Act, inasmuch as this is a case of an "error or shortage in area" of a lot, block or subdivision, "according to any map or plan filed or deposited in the office of the Registrar."

With considerable doubt, I have reached the conclusion that this clause was not intended to apply to a case such as this, but that the words "any error or shortage in area . . . . . according to any map" refer rather to a case, for instance, where a map shews on its face a distance of, say, 500 feet, whereas the real distance on the ground is, say, 450 feet.

It is further contended that the plaintiffs are barred by the terms of subsection (*i*) of section 81 of the Act. I cannot agree. In my opinion this subsection was intended to save the rights of a person in a position similar to that of the British Columbia Electric Railway Company in the action above mentioned, and it was by virtue of this subsection that the Railway Company was enabled to succeed in that action notwithstanding that Lee Mong Kow held his certificate of indefeasible title. The subsection was not, I think, intended in any way to protect the assurance fund.

Judgment

I have considered sections 96, 97 and 98 of the Act and have concluded that they do not apply to the facts of this case.

Following the above conclusions, there will be judgment for the plaintiffs with a reference to the Registrar to ascertain the amount of the damages. Upon final judgment being entered, the necessary certificate to the minister of finance will be given pursuant to section 99 of the Act.

Judgment for plaintiffs.

LAMPMAN, CO. J.

1922

April 4.

REX v. WONG

REX v. WONG *ET AL.*

Criminal law—Disorderly house—Frequenter—Common gaming-house—Kept for gain—Criminal Code, Secs. 226, 229, 641, and 986.

The accused were found in a room at the rear of a fruit and tobacco shop at a table on which there were dice, dominoes and $17 in money. There was no "rake off" from the games to the proprietor but the tobacco was at times sold to the players.

Held, that it was a common gaming-house, as the game was allowed to be carried on for the purpose of acquiring gain for the keeper of the shop.

APPEAL from a conviction by the magistrate at Victoria, whereby he convicted Wong and thirty-four other persons for the offence of being found in a disorderly house, to wit, a common gaming-house. The accused were found by the police in a room at the rear of a fruit and tobacco shop, and one of the accused, who operated the shop, also rented the room in the rear of the shop and allowed persons to go through his shop to such room and play domino games. The police found dice, dominoes and about $17 in money on the table in the room, the door between the shop and the room being open. No "rake off" or direct profit from the games played were paid to the person operating the shop and the position of the banker moved from player to player in rotation. Persons who went to the room sometimes made purchases of tobacco. The appeal was argued before LAMPMAN, Co. J. at Victoria on the 4th of April, 1922.

Statement

W. A. Brethour, for accused: There is no evidence that a warrant was obtained under section 641 and section 986 does not apply. Even if they did apply the place is not a common gaming-house: see *Rex* v. *Johnson* (1920), 1 W.W.R. 93; *Reg.* v. *Saunders* (1897), 3 Can. Cr. Cas. 278; *Rex* v. *James* (1903), 7 Can. Cr. Cas. 196; *Rex* v. *Sillers* (1922), 1 W.W.R. 769; *Rex* v. *Gow Bill* (1920), 33 Can. Cr. Cas. 401-403; *Rex* v. *Covert* (1916), 28 Can. Cr. Cas. 25; *Rex* v. *Hung Gee* (No. 1) (1913), 21 Can. Cr. Cas. 404; *Rex* v. *Charlie Yee* (1917), 27 Can. Cr. Cas. 441. The game *per se* is not an

Argument

unlawful game as the position of "banker" moves from player to player by rotation. There is no "rake off" and there is not sufficient evidence that the proprietor of the shop operated for "gain," so that the place is not a common gaming-house.

C. L. Harrison, for the Crown: Gain need not be proved; the inference is that the proprietor of the shop allowed the games to be played with the intention of deriving gain: see *Rex* v. *Sala* (1907), 13 Can. Cr. Cas. 198; *Rex* v. *Ah Pow* (1880), 1 B.C. (Part I.) 147. A warrant under section 641 is not necessary under the latter part of section 986: see *Rex* v. *Ah Sing* (1920), 3 W.W.R. 629.

Argument

LAMPMAN, Co. J.: A warrant under section 641 is not necessary for the purpose of the latter part of section 986. When the police arrived, which was after 11 o'clock at night, there were 19 men in this small room, which is about 10 feet square, and the proprietor was in bed in a room adjoining. Light and heat were provided by the proprietor, who said that after the players had gone he would have got up and locked the place for the night had the police not come and interrupted the proceedings. The men in the room were composed largely of regular customers of the shop and I do not think that it is reasonable to suppose that the proprietor would have allowed his premises to be so used had he not expected some gain. Appeal dismissed and conviction affirmed.

Judgment

Appeal dismissed.

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June 6.

CORPORATION OF THE ROYAL EXCHANGE ASSURANCE CO. (OF LONDON) v. KINGSLEY NAVIGATION CO.

THE CORPORATION OF THE ROYAL EXCHANGE ASSURANCE (OF LONDON) AND PACIFIC MILLS LIMITED v. THE KINGSLEY NAVIGATION COMPANY LIMITED.

Shipping—Loss of cargo by fire—Unseaworthiness—Passing of property—Bill of lading—18 & 19 Vict., Cap. 111 (Imperial)—R.S.C. 1906, Cap 113, Sec. 964; Cap. 118—Can. Stats. 1910, Cap. 61, Sec. 7.

In an action against the owner of a ship for the loss of goods destroyed by fire while in transit on the ship, the plaintiff, on proving that the ship was unseaworthy, has the burden on him of also proving that the loss was caused by such unseaworthiness.

Per MACDONALD, C.J.A. and GALLIHER, J.A.: Under the Water-Carriage of Goods Act, Can. Stats. 1910, and section 964 of the Canada Shipping Act a ship-owner is not absolutely exempt from liability for loss of goods on board by fire. He is liable if such loss occurs through his negligence.

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

APPEAL by defendant from the decision of MACDONALD, J., of the 8th of December, 1921 in an action to recover $5,891, by way of damages for the loss of 3,000 barrels of lime. The Pacific Mills Limited purchased from the Pacific Lime Company the 3,000 barrels of lime and requested the Pacific Lime Company to ship same from Blubber Bay to the Pacific Mills Limited at Ocean Falls *via* tug and barge "Queen City," owned and operated by The Kingsley Navigation Company Limited. In pursuance of said instructions the Pacific Lime Company shipped the lime on the 10th of November, 1920, accompanied by a bill of lading in the usual form to be delivered at Ocean Falls. On the 11th of November the barge arrived at Beaver Cove and shortly after its arrival the barge caught fire and both barge and cargo were completely destroyed. The Pacific Mills Limited had insured the lime with the plaintiff The Corporation of the Royal Exchange Assurance (of London) and the said Company paid the Pacific Mills Limited $5,891 in settlement for the loss and received from the Pacific Mills Limited an assignment in writing of all the rights and claims of the Pacific Mills Limited arising out of the loss.

Statement

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CORPORATION OF THE ROYAL EXCHANGE ASSURANCE CO. (OF LONDON) v. KINGSLEY NAVIGATION CO.

The appeal was argued at Vancouver on the 21st, 22nd and 23rd of March, 1922, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, J J.A.

McPhillips, K.C. (*Brown, K.C.*, with him), for appellant: Judgment was given on the bill of lading. We are protected by both section 7 of The Water-Carriage of Goods Act, Can. Stats. 1910, and section 964 of the Canada Shipping Act: see also Mayers's Admiralty Law and Practice, 161. We are absolved from loss by fire subject to being negligent. The English Act relating to bills of lading is chapter 111 of 18 & 19 Vict. The onus is on the plaintiffs: see *Asiatic Petroleum Company, Limited* v. *Lennard's Carrying Company, Limited* (1914), 1 K.B. 419 at pp. 428-9; (1915), A.C. 705 at pp. 714-5; *Ingram & Royle, Limited* v. *Services Maritimes du Treport, Limited* (1914), 1 K.B. 541 at p. 549. The English statute is Provincial law as incorporated in the Provincial statutes: see *Beard et al.* v. *Steele* (1873), 34 U.C.Q.B. 43 at p. 54. On the question of passing of property in goods and right of action see *Sewell* v. *Burdick* (1884), 10 App. Cas. 74 at p. 91. The statute applies to both a seaworthy and unseaworthy vessel unless unseaworthiness was the cause of the fire: see *Virginia Carolina Chemical Company* v. *Norfolk and North American Steam Shipping Company* (1912), 1 K.B. 229 at pp. 235-6. The ship was not unseaworthy but even if it was we are not liable.

Argument

Mayers, for respondent: Chapter 118, R.S.C. 1906, is the same as the Imperial Act of 1855 (Cap 111). We are the consignees and have a right of action: see *Browne* v. *Hare* (1858), 3 H. & N. 484; (1859), 4 H. & N. 822. The property was paid for and passed to the plaintiffs: see *The Prinz Adalbert* (*Part Cargo Ex.*) (1917), 33 T.L.R. 490. The position of a ship-owner is that of a common carrier: see Halsbury's Laws of England, Vol. 26, par. 448, p. 328. *Internationale Guano en Superphosphaatwerken* v. *Robert Macandrew & Co.* (1909), 2 K.B. 360 at p. 365; *James Morrison & Co., Limited* v. *Shaw, Savill and Albion Company, Limited* (1916), 1 K.B. 747 at p. 757; (1916), 2 K.B. 783. They did not deliver and the

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Argument

burden is on them: see *Baxter's Leather Company* v. *Royal Mail Steam Packet Company* (1908), 1 K.B. 796 at p. 800; *Crawford & Law* v. *Allan Line Steamship Company, Limited* (1912), A.C. 130 at pp. 144 and 147. If we shew unseaworthiness the burden is on appellant to shew the fire was not due to that: see *Joseph Travers & Sons, Limited* v. *Cooper* (1915), 1 K.B. 73. As to repeal of the statutes see *Church-Wardens, &c., of West Ham* v. *Fourth City Mutual Building Society* (1892), 1 Q.B. 654 at pp. 658 and 660; *British Columbia Electric Railway Company, Limited* v. *Stewart* (1913), A.C. 816 at pp. 827-8. On the question of onus see *Dominion Fish Co.* v. *Isbester* (1910), 43 S.C.R. 637; *Lennard's Carrying Company, Limited* v. *Asiatic Petroleum Company, Limited* (1915), A.C. 705 at p. 715; *Ingram & Royle Limited* v. *Services Maritimes du Treport, Limited* (1914), 1 K.B. 541 at p. 559. There is an implied warranty of the fitness of the ship: see *Becker, Gray and Company* v. *London Assurance Corporation* (1918), A.C. 101 at p. 113; *Steel* v. *State Line Steamship Company* (1877), 3 App. Cas. 72 at pp. 76 and 86; *McFadden* v. *Blue Star Line* (1905), 1 K.B. 697. The only conceivable cause of the fire was mixture of lime and water. The learned judge below found the ship was unseaworthy and there is no good cause to reverse him as to this. There is no direct evidence as to how the fire started. The Court will inquire into all the circumstances: see *In re Polemis and Furness, Withy & Co.* (1921), 3 K.B. 560.

McPhillips, in reply.

Cur. adv. vult.

6th June, 1922.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The action was brought to recover the value of 3,000 barrels of lime lost on board the barge "Queen City" by fire. In my view of the case it is unnecessary to consider the point raised as to the plaintiffs' right of action. My opinion is founded upon the fact that while the plaintiffs' have proven the unseaworthiness of the barge, they have not proven that the fire resulted from such unseaworthiness. This is a question of fact upon which a great deal of evidence was

adduced. The learned judge came to the conclusion that the barge was in fact unseaworthy, and I am unable to say that on this issue he was in error. He found also that the burden of proving that the fire did not arise because of this unseaworthiness was upon the defendant. He thought the defendant had not discharged that onus. He states that if he were convinced that this burden was upon the plaintiffs he would find that the plaintiffs had failed to satisfy it.

It was argued for the defendant that ship-owners' exemption from liability for goods on board lost by fire is absolute, and secondly, that if not the onus is on the plaintiffs to prove negligence.

Section 7 of The Water-Carriage of Goods Act, reads as follows:

"The ship, the owner, charterer, agent or master shall not be held liable for loss arising from fire, dangers of the sea or other navigable waters, acts of God or public enemies, or inherent defect, quality or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service, or other reasonable deviation, or from strikes, or for loss arising without their actual fault or privity or without the fault or neglect of their agents, servants or employees."

There is a similar section in the Canadian Merchants Shipping Act. The Imperial Merchants Shipping Act, 1894, Sec. 502, reads differently. It provides that the owner of a British sea-going ship shall not be liable to make good any loss or damage happening without his actual fault or privity in the following, among other circumstances, namely:

"(i.) Where any goods, merchandise, or other things whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship."

Under the English Act it is quite clear that when the goods are destroyed by a cause attributable to the fault or privity of the owner of the ship, the section does not exempt him from liability. The Canadian section does not in the like clear words qualify the several exceptions to liability. By section 7 the exceptions are made without the antecedent qualifications, but at the end of the section and without in terms qualifying the exemptions preceding it, it declares that the ship-owner, his

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servants or agents, shall not be liable for loss arising without their actual fault or privity.

At common law the ship-owner was not liable for the acts of God or public enemies, or for inherent defect, or insufficiency of packing, yet it was held that if the loss was contributed to by the negligence of the ship-owner, he could not claim the benefit of the exception. See Carver's Carriage by Sea, 6th Ed., p. 19. Section 7 merely enacts what was, in respect of many of these exceptions, the law independently of the statute. To construe the section as contended for by the appellant's counsel, would be to give a meaning to these exceptions different to that given to them at common law and to hold that the ship-owner is absolved from responsibility for say, acts of God or the King's enemies, or inherent defect, notwithstanding that the loss was contributed to by his own negligence or that of his servants or agents. I think all these exceptions must be read in accordance with the qualifications to which those which were, prior to the statute, common law exceptions, were subject.

The next question is, where does the burden of proof of negligence rest, is it on the plaintiffs? or is the burden on the defendants to negative actual fault or privity? The cause of the fire is unknown but the plaintiffs rely upon the unseaworthiness of the ship, and contend that the inference to be drawn from that, in the circumstances of this case, is that the fire was the result of such unseaworthiness.

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In *The Europa* (1908), P. 84, it was held that the onus of proving that the damage was caused by the unseaworthiness of the ship was on the plaintiff, and this was approved by the House of Lords in *Kish* v. *Taylor* (1912), A.C. 604. In *The Europa, supra,* Bucknill, J., at pp. 97-8, said:

> "It appears to us, therefore, that whenever a cargo-owner has claimed damages from a ship-owner for loss occasioned to his goods on the voyage, and the ship was in fact unseaworthy at the material time, the cargo-owner has had to prove that the loss was occasioned through or in consequence of the unseaworthiness, and it has not been sufficient to say merely that the ship was unseaworthy, and therefore that he was entitled to recover the loss, although there was no relation between unseaworthiness and the damage."

The learned trial judge appears to have relied upon the language of Lord Dunedin, in *Lennard's Carrying Co.* v. *Asiatic*

Petroleum Co. (1915), 84 L.J., K.B. 1281, as if it were to the contrary. The question there was whether or not the owners of the ship had absolved themselves from fault or privity in relation to the ship's condition. It was contended that there was no actual fault or privity of the owner of the ship apart from that of the servants or agents of the owner. That question does not arise in this case, because of the broader language of our statute. Lord Dunedin, at p. 1285, said:

"It comes out clearly from the facts, and, indeed, eventually was admitted by the appellants' counsel, that the loss which had its final outcome in the fire was really due to a set of defects in the steam power in the boilers, which constituted unseaworthiness."

In other words, it was not disputed in that case that the fire resulted from the unseaworthiness of the ship, but it was contended that the unseaworthiness was not known to the owner and was therefore without his fault or privity. It decides that given an unseaworthy ship, the onus of proving that it was unseaworthy without his actual fault or privity, is on the owner, but that is a very different burden to that of shewing that the fire did not originate because of the unseaworthiness. In the one case it is personal fault which is to be negatived, in the other proximate cause is to be proved by him who alleges it.

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A vigorous argument was made by counsel for the respondents, founded upon a theory that vapors ascending from the bilge water in the hold of the ship, causing dampness in the lime resulted in spontaneous combustion, but I cannot give effect to that argument. That such vapors, if they existed, which was not proven, caused the fire is not an inevitable inference. There must be something more tangible than that to found liability upon.

I agree with the learned trial judge that on the assumption of the onus aforesaid being upon the plaintiffs, they have not discharged it.

The appeal should be allowed.

MARTIN, J.A.: I agree that this appeal should be allowed.

MARTIN, J.A.

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

GALLIHER, J.A.

MCPHILLIPS, J.A.: This appeal has reference to the liability

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which is upon the ship-owner under The Water-Carriage of Goods Act, Can. Stats. 1910, Cap. 61. The action is brought by the consignee, the Pacific Mills Limited, and as well by The Corporation of the Royal Exchange Assurance (of London) entitled to claim by reason of the alleged breach of contract of carriage by way of subrogation, The Corporation of the Royal Exchange Assurance (of London) having insured the goods which were destroyed by fire, being the property of the Pacific Mills Limited. The loss for which damages were claimed and which were allowed in the Court below was occasioned by fire, for which the defendant was responsible in the opinion of the learned trial judge, or as it may be more properly put, the learned trial judge thought that the *onus probandi* was upon the carrier, the defendant, and that that onus was not discharged. If however the *onus probandi* was upon the plaintiffs, then the learned trial judge would not have been satisfied that it was satisfactorily established that there was liability upon the defendant upon the evidence adduced at the trial. The goods contracted to be carried by sea consisted of 3,000 barrels of lime shipped on board the barge Queen City for carriage from Blubber Bay to Ocean Falls, in British Columbia, and in the course of the voyage at Beaver Cove, the barge took fire and the barge and cargo were completely destroyed and the lime was lost to the plaintiff, the Pacific Mills Limited. The insurance upon the lime was paid, *viz.*, $5,891 and this was the amount claimed in the action from the carrier The Kingsley Navigation Company, Limited, the defendant.

The submission put forward at this bar was that in any case quite irrespective of whether there was negligence, which of course was denied, that there was no liability where the loss of the goods arose from fire, and it was pressed strongly that section 7 of The Water-Carriage of Goods Act could only be construed in that way, coupled with section 964 of the Canada Shipping Act (Cap. 113, R.S.C. 1906). The section reads as follows: [already set out in the judgment of MACDONALD, C.J.A.].

Section 964 of the Canada Shipping Act, reads as follows:

"964. Carriers by water shall be liable for the loss of or damage to goods

entrusted to them for conveyance, except that they shall not be liable when such loss or damage happens,—

"(*a*) without their actual fault or privity, or without the fault or neglect of their agents, servants or employees; or,

"(*b*) by reason of fire or the dangers of navigation; or,

"(*c*) from any defect in or from the nature of the goods themselves; or,

"(*d*) from armed robbery or other irresistible force."

The section in the Merchant Shipping Act, 1894 (57 & 58 Vict., c. 60, Imperial) having reference to loss by reason of fire, reads as follows:

"502. The owner of a British sea-going ship, or any share therein, shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity in the following cases; namely,—

"(i.) Where any goods, merchandise, or other things whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship. . . . ."

After full and careful consideration of section 7 of The Water-Carriage of Goods Act, and section 964 of the Canada Shipping Act, I am satisfied that Parliament intended to relieve the carriers from liability for loss by fire, that is, in my opinion the statute law read together as it must be, demonstrates the intention of Parliament to absolve from liability in cases of fire, *i.e.*, an absolute immunity in case of loss by fire. The situation is an intractable one upon the true reading and application of the canons of construction of statute law.

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In this connection and by way of analogy, I would refer to the law of England as it exists today granting exemption from liability for loss or damage by fire where the fire is caused by the unseaworthiness of the ship. In *Virginia Carolina Chemical Co.* v. *Norfolk, &c., Steam Shipping Co.* (1911), 81 L.J., K.B. 129, Kennedy, L.J., says at pp. 138-9: [The learned judge quoted the whole of the second paragraph of the judgment of Kennedy, L.J., and continued].

This case is clear authority as applied to the statute law of England—that the owner of a sea-going ship is relieved from liability for loss by fire on board the ship if the happening is without his actual fault or privity and this is quite irrespective of whether there has been a breach of the warranty of seaworthiness. The state of the statute law of Canada differs. The "actual fault or privity" is not attachable to loss "by reason

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of fire" "arising from fire" (section 964, Cap. 113, R.S.C. 1906, and section 7, Cap. 61, Can. Stats. 1910).

The plaintiffs support the judgment of the Court below upon the ground, and it is submitted that the evidence supports it, that the Queen City was unseaworthy and that there is no statutory exemption for loss by reason of fire or arising from fire, upon the proper reading of the statute law, and that the fire being consequent upon that unseaworthiness there was fault upon the part of the defendant, the carrier, for which it is liable. In this connection section 4, subsection (*b*) of The Water-Carriage of Goods Act is particularly relied upon. The whole section reads as follows: [after quoting the section his Lordship continued].

It is further submitted that seaworthy means seaworthy to carry goods, apart from the dangers of the sea. This may well be, but it still has to be shewn that there is liability upon the defendant because of the fire, and I fail to see that there is any clause in the bill of lading that makes the carrier liable in case of fire or any intention upon the part of the carrier to contract out of the statutory exemption from fire loss (see *Ingram & Royle, Limited* v. *Services Maritimes du Treport, Limited* (1913), 30 T.L.R. 79). If the question of whether the ship was seaworthy is open and available to the plaintiffs, then the further question would arise, was unseaworthiness the proximate cause of the happening, and where lies the onus of proof? This onus would appear to be on the shipper when, as here, it is claimed (but as I consider not proved) that unseaworthiness was the cause of the loss, that is, the cause of the fire which destroyed the lime (*Lindsay* v. *Klein* (1911), A.C. 194). Further, it is a well-known principle in shipping law that a ship is *prima facie* deemed seaworthy (*Parker* v. *Potts* (1815), 3 Dow 23). The facts in the present case are not such as warrant it being said that the burden of proving seaworthiness was shifted upon the ship-owner. The amount of water that entered the barge was really negligible, and in my opinion, neither the water nor any claimed rotteness of timbers had any relation to the happening, *i.e.*, the fire which took place and destroyed the lime (*Watson* v. *Clark* (1813), 1 Dow

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336; *Pickup* v. *Thames Insurance Co.* (1878), 3 Q.B.D. 594; *Parker* v. *Potts, supra; Ajum Goolam Hossen & Co.* v. *Union Marine Insurance Company* (1901), A.C. 362; *Lindsay* v. *Klein, supra*).

Lord Shaw in *Lindsay* v. *Klein, supra,* as reported in 80 L.J., P.C. 161, at p. 165 says:

"In the judgments stress is repeatedly laid upon the fact that the onus of proving unseaworthiness is upon those who allege it. This is, of course, a sound doctrine; and it is none the less sound although the vessel break down or sink shortly after putting to sea. That is the principle of law."

The learned trial judge arrived at the conclusion in the present case, that the allegation of unseaworthiness as put forward in the statement of claim was proved

"that the barge through its unseaworthiness leaked and admitted water which combined with the lime created such a development of heat as to set the fire and cause the loss."

The learned trial judge, of course, as previously stated, proceeded upon the view that the onus of proof as to seaworthiness was upon the defendant, and in his reasons for judgment he further said:

"In my opinion the onus rested upon the defendant Company to satisfy the Court that the fire was not due to the cause thus suggested by the plaintiffs. I am free to admit that were the onus upon the plaintiffs to prove that the fire did occur in the manner alleged, I could not see my way clear to thus find in their favour. If I am right, however, in my opinion that the onus rests upon the defendant Company, then, as I have mentioned, it has failed to satisfy this burden—the result is that not only has the probable cause suggested by the plaintiffs not been met by any other suggested cause on the part of the defendant Company but the defendant Company has failed to obtain relief under section 7 of The Water-Carriage of Goods Act.

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"I find that the defendant Company is liable for the loss that ensued to the goods in question. The amount claimed, for which judgment will be entered, is $5,891."

It is clear that the learned trial judge did not really find as a fact that any of the claimed items of unseaworthiness was the proximate cause of the fire, or more precisely that because of the leakage and presence of water the fire ensued, but in that the defendant had not established any other cause, the cause alleged by the plaintiffs should be accepted. With great respect I cannot agree with the conclusions of the learned trial judge. In the first place, it was error in law to impose the burden of

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proof upon the defendant Company of the unseaworthiness, and even were he right in that it would not follow that there would be liability (and this is leaving out of consideration the absolute statutory immunity that in my opinion exists) unless the unseaworthiness was the effective cause of the fire which occasioned the loss. In *Kish* v. *Taylor* (1912), 81 L.J., K.B. 1027, Lord Atkinson, at pp. 1030-1, says: [his Lordship quoted the fourth paragraph in the second column on p. 1030 and ending on p. 1031, and continued].

Apart from all other questions and upon the point of unseaworthiness alone, even if that were established, the plaintiffs would not be entitled to succeed in the present case with section 964 of the Canada Shipping Act and section 7 of The Water-Carriage of Goods Act in the way (Merchant Shipping Act, 1894, Part VIII., Sec. 502). That was the decision in *Virginia Carolina Chemical Co.* v. *Norfolk, &c., Steam Shipping Co.* (1911), 81 L.J., K.B. 129; (1912), 82 L.J., K.B. 389; (1913), A.C. 52, it being held that a ship-owner is not deprived of the protection of section 502 (and section 964 of the Canada Shipping Act and section 7 of The Water-Carriage of Goods Act, Canada, are in terms analogous, but more extensive in according absolute protection to the ship-owner) merely by reason of the fact that the fire is caused by the unseaworthiness of the ship, and I cannot see, as previously stated, that there is anything in the bill of lading in the present case that prevents the application of the statutory protection to the defendant, the ship-owner. In *Ingram and Royle, Limited* v. *Services Maritimes du Treport, Limited, supra,* Vaughan Williams, L.J., is reported to have said at pp. 80-1: [the learned judge quoted the judgment of Vaughan Williams, L.J., down to "section 502" in the third line of paragraph 2 of column 1 on p. 81, and continued].

Lennard's Carrying Co. v. *Asiatic Petroleum Co.* (1915), 84 L.J., K.B. 1281, would at first sight seem to present some difficulty as to the onus of proof as to unseaworthiness, but in the end possibly not as it is directed rather to the onus of proof of actual fault or privity and that the owner did not know of the unseaworthy condition of the ship (and see Lord Shaw at

p. 165, in *Lindsay* v. *Klein, supra*). What is contended here is that vaporization took place consequent upon the presence of water, and that an inflammable condition of things was produced. The water proved to be in the ship was, as I have previously stated, negligible in amount, never reached the lime and could not be said to be more than would be present in any seaworthy ship, and I fail to see that there is evidence sufficient to warrant the holding that the water or any condition of unseaworthiness was the proximate cause of the fire. The whole case would seem to be met by considering and applying the language of Kennedy, L.J., in *Virginia Carolina Chemical Co.* v. *Norfolk, &c., Steam Shipping Co., supra,* at pp. 138-9:

"I hold, therefore—because on the whole I think it is the better conclusion—that the section is to be read without any qualification that the vessel should be seaworthy at the commencement of the voyage; or, in other words, that where a loss happens by reason of fire on board the ship, which is not proved to have originated and been directly caused by the actual fault or with the privity of the ship-owner, he is exempt from liability under that section [502, Merchant Shipping Act, 1894].

MCPHILLIPS, J.A.

In the present case there is an entire absence of any evidence that the fire originated or was directly caused by the actual fault or with the privity of the defendant, the ship-owner, and that being the situation, it must follow that the defendant is exempt from liability even if the law of Canada can be held to be similar to the law of England today. Upon the whole, I am of the opinion, that the law of Canada extends absolute immunity from loss by reason of fire or arising from fire, and if I am correct in that view that ends the case, but I have taken pains to pursue the matter along the lines of whether in England today there would be liability upon the particular facts of this case, and also to cover the situation, if I should be found to be in error in my construction and application of the statute law of Canada.

Appeal allowed.

Solicitor for appellant: *Ellis & Brown.*
Solicitors for respondents: *Mayers, Stockton & Smith.*

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June 7.

FRASER v. McGREGOR, JOHNSTON & THOMAS LIMITED.

Sale of goods—Conditional sale agreement—Assignment with promissory notes—Holders in due course—Onus of proof.

FRASER v. McGREGOR, JOHNSTON & THOMAS LTD.

The plaintiff purchased a 1916 model motor-truck from the Giant Motor Truck Company under a conditional sale agreement. A cash payment was made on account of the purchase price and 15 promissory notes given for the balance. On the following day the Giant Motor Truck Company assigned the agreement with the notes to the defendant Company for valuable consideration of which the plaintiff had due notice. Two months later the plaintiff found the truck was a 1913 model but continued to use the truck for three months longer. He then brought action for repudiation of the contract, cancellation of the notes and damages and obtained judgment on the trial.

Held, on appeal, reversing the decision of CAYLEY, Co. J., that the defendant was a holder of the notes in due course and discharged any *onus* that may have been thrown upon it for the fraudulent conduct of the Giant Motor Truck Company of which it had no notice.

Statement

APPEAL by defendant from the decision of CAYLEY, Co. J., of the 13th of March, 1922, in an action to set aside and cancel an agreement of the 8th of December, 1920, wherein the plaintiff agreed to purchase from the Giant Motor Truck Company Limited a certain Kelly 1½-ton truck, 1916 model, for commercial purposes in the business of the plaintiff for $1,700. Four hundred and eighty dollars was paid in cash and the balance was to be paid by several promissory notes (15 in all) the first one was $86, and the other 14, $81 each. On the 24th of February, 1921, the plaintiff found that the truck was a 1913 model and not a 1916 model as represented by the seller but the plaintiff continued to use the truck for the following three months. The Giant Motor Truck Company assigned the contract to the defendant McGregor, Johnston & Thomas Limited on the day following the sale to Fraser (December the 9th, 1920), and notice of the assignment was given the plaintiff on the 2nd of March, 1921. The plaintiff brought action on the 16th of July, 1921, for repudiation of the contract on the ground of fraud and cancellation of the notes and for $985 damages.

The defence was that the plaintiff continued to use the car after he knew it was a 1913 model and elected to keep it, also that defendant was a holder of the notes in due course. The trial judge found the defendant not a holder in due course and gave judgment in favour of the plaintiff.

The appeal was argued at Victoria on the 7th of June, 1922, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Craig, K.C., for appellant: The first point is whether the evidence warrants the finding that we were purchasers for value with notice, and secondly they continued to use the truck for three months after they knew it was a 1913 truck and therefore decided to accept it. The assignment to the defendant was in good faith. If the judge wrongly decided that evidence should not be allowed we are entitled to a new trial.

Gillespie, for respondent: The plaintiff discovered the misrepresentation on the 24th of February. On the question of election see *Clough* v. *London and North Western Railway Co.* (1871), L.R. 7 Ex. 26 at p. 35. The burden of proof is shifted when breach is shewn: see *Tatam* v. *Haslar* (1889), 23 Q.B.D. 345 at pp. 347-8; *Jones* v. *Gordon* (1877), 2 App. Cas. 616. On the question of defendant being a holder in due course see *Killoran* v. *The Monticello State Bank* (1921), 61 S.C.R. 528; *First National Bank* v. *Matson* (1909), 11 W.L.R. 663. He did not plead that defendant was a holder in due course. He took the same title as the person from whom he took them: see Halsbury's Laws of England, Vol. 2, p. 509, par. 866.

Argument

Craig in reply.

MACDONALD, C.J.A.: There are two points from which I can view this case: First, there were the promissory notes, which I would hold were in the same position as any promissory notes given in payment of an article, indorsed to the defendant. It is true that at the same time the lien note was also assigned to defendant but there appears to be no connection between the three parties involved in the transaction, such as was said to have existed in *First National Bank* v. *Matson* (1909), 11 W.L.R. 663. Perhaps the most difficult question in the case

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is the one of evidence. I think the onus of proof that McGregor & Co. took the notes without knowledge of the fraud which had been perpetrated upon Fraser was upon themselves: they must have satisfied that onus by evidence that they were innocent holders. The evidence is rather unsatisfactory upon that point. The question was asked by counsel for the defendant, McGregor, Johnston & Thomas Limited, but he was interrupted, and failed to press for an answer. I suppose if the matter had stood there, we should have to come to the conclusion that the defendant had not given proof that it was an innocent holder, and we might then have been called upon to consider the question as to whether or not there ought to be a new trial, in view of all the circumstances of the case. But Mr. *Craig* has referred us to evidence the effect of which is to show *bona fides*. He also refers to other circumstances for evidence that the full amount of money was advanced, apparently in good faith, which one would not expect if there had been knowledge of fraud in the matter. This evidence, I think, is *prima facie* evidence that the appellant was an innocent holder, and if it were intended to displace it, it was the duty of plaintiff's counsel to have brought out the contrary in cross-examination. This is sufficient to dispose of that branch of the case.

MACDONALD, C.J.A.

The second branch which affects the appellant was raised by Mr. *Gillespie,* who submitted that the transaction was all one transaction, that is to say that the agreement and the notes were part of one transaction between the Motor Truck Company and the defendant. Now, as far as any evidence to which we have been referred is concerned, there is no proof of this. It would appear that the Giant Motor Truck Company sold this truck to the plaintiff, took the agreement in the form which undoubtedly had been approved of two years before by McGregor's solicitors, closed the transaction, took the promissory notes, without McGregor, Johnston & Thomas Limited having had any knowledge of the particular transaction. So far as the evidence shews McGregor, Johnston & Thomas Limited had no knowledge that any such transaction was being made, until they were asked to discount the notes. When the sale had been completed, the Giant Motor Truck Company took the agreement and promis-

sory notes to McGregor, Johnston & Thomas Limited and discounted them in the ordinary course of business. This differentiates the case from *First National Bank* v. *Matson.*

I think the appeal should be allowed.

MARTIN, J.A.: I am of the opinion that the pleadings sufficiently raise the question of a holder in due course, and that the defendant, McGregor, Johnston & Thomas Limited has discharged any onus which may have been thrown upon it by the misrepresentations of the Giant Motor Truck Company, and also it had no notice of any fraudulent conduct of the Giant Motor Truck Company, but *bona fide* took the assignment and discounted the notes, in pursuance of the course of its established business arrangement with the Giant Motor Truck Company.

I observe with regret, speaking with all respect, that the learned judge below passed some severe strictures upon McGregor, Johnston & Thomas Limited which were entirely unwarranted.

GALLIHER, J.A.: I agree with the remarks of my brother, the Chief Justice, and my brother MARTIN, including the remarks as to the strictures of the learned judge below.

MCPHILLIPS, J.A.: The appeal should be allowed. I cannot see anything in the evidence which would entitle it to be said that this transaction was other than one in the ordinary course of business. I see nothing to indicate that it was of any other character. The promissory notes would appear to have been indorsed to the appellant, and it became the holder thereof in due course, and the Bills of Exchange Act determines the position. We know the position to be this: that if value be given for a promissory note and it is taken before its maturity, the position then becomes one of being the holder in due course, and the party holding that note is not affected by equities that may exist as between the original parties to the notes.

The appellant is the holder of these promissory notes in due course; that being the case, it was incumbent upon the respondent to displace that position. That is, the *onus probandi* was

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upon the respondent, and in my opinion the onus never was shifted; if though the onus was shifted, then I think the evidence shews that the notes were taken in a manner which would displace any suggestion of dishonesty.

In this connection, I refer to what Lord Blackburn says in *Jones* v. *Gordon* (1877), 2 App. Cas. 616, pp. 627 and 628. There Lord Blackburn says, when dealing with circumstances that would throw some discredit upon the transaction:

"Then, instead of the bill of exchange being *prima facie* good, as it otherwise would be, so that the person holding it is entitled to recover upon it without proof of more, that shifts the burden. That has been decided over and over again. The consequence is that the man who sues has in that case the *onus* upon him to prove that he gave value."

In this particular case that has been established.

"I should be unwilling to say precisely whether it shifts the *onus* upon him to shew that he gave value *bona fide*, so that, although he gave value he must give some affirmative evidence to shew that he was doing it honestly, or whether the *onus* of proving that he is dishonest, or that he had notice of things that were dishonest, remains on the other side, although he is bound to prove value."

And a little later he says:

"I consider it to be fully and thoroughly established that if value be given for a bill of exchange, it is not enough to shew that there was carelessness, negligence, or foolishness in not suspecting that the bill was wrong, when there were circumstances which might have led a man to suspect that."

MCPHILLIPS, J.A.

In this particular case, I see no circumstances that would have called to the attention of the appellant that there was anything in the transaction which imported dishonesty, or that any misrepresentation or fraud had been perpetrated.

Further, if the appellant was called upon to meet the contract itself, the respondent is in this position, that he signed an agreement which said to the world: "I do not hold myself entitled to claim that representations have been made to me that were not true by the vendor." Well now, whatever might be the position between the original vendor and the vendee, and I am not going to say anything about that, certainly the people dealing with a transaction of this kind and finding a provision of that kind in the contract, it could only be reasonably supposed that that was put in there for the purpose of protecting third parties, and all the plaintiff can do under these circumstances is look to his vendor; if he has suffered damage, he still has his

right of action against his vendor. He cannot turn to this appellant and say this appellant is the insurer of this transaction with the Giant Motor Truck Company. That is practically what this case would amount to if you look at it in all its bearings. Fraser makes a contract with the Giant Motor Truck Company, and says he is not holding them responsible for any representations made. But apart altogether from the contract, he (Fraser) signs the negotiable instruments, and these negotiable instruments stand separate and distinct. There is not a word referring to the contract in them. The appellant is entitled to say, I stand upon these bills of exchange, not being in any way a party to the fraud. It has not been shewn that the appellant was a party to the fraud, there is not one scintilla of evidence here to shew that.

MCPHILLIPS, J.A.

EBERTS, J.A.: I agree with the remarks of my brothers and would allow the appeal.

EBERTS, J.A.

Appeal allowed.

Solicitors for appellant: *Craig & Parkes.*
Solicitor for respondent: *W. D. Gillespie.*

MARTIN, LO. J.A.

1921

April 26.

PEERS & ANDERSON v. SHIP "TYNDAREUS."

Shipping—Crib light—Sufficiency.

An ordinary cold-blast lantern with a visibility of about 2½ or 3 miles was held not to be a sufficient crib light, as such would not convey that "reasonable intimation of the true state of affairs" necessary as a matter of good seamanship and safe navigation. A crib light should be at least of the same visibility as a ship's white light.

[Affirmed by the Exchequer Court of Canada.]

PEERS & ANDERSON v. SHIP "TYNDAREUS"

Statement

ACTION for damages for loss of property caused by collision. Tried by MARTIN, Lo. J.A. at Vancouver on the 4th and 7th of February, 1921.

Mayers, and *R. L. Maitland,* for plaintiff.
D. A. McDonald, K.C., and *DesBrisay,* for defendant.

26th April, 1921.

Judgment

MARTIN, Lo. J.A.: This is a collision action to recover damages against the S.S. "Tyndareus" (length 535 feet; tonnage *circ.* 14,000; E. B. Francis, master) for the loss of a crib with shingle bolts off Point Atkinson, which was being towed by the tug "Alcedo" (John A. Seeley, master) towards Prospect Bluff, about one a.m. on August 15th last. The weather was calm and the night was clear but dark and hazy from smoke in places towards the north shore of English Bay, and the tide at the point of collision was nearly slack on the ebb. The crib which was 90 feet long, 40 feet wide, and stood about 15 feet out of water at the top of the shingle bolts, was being towed about 575-600 feet astern of the tug, and it is alleged that while the "Alcedo" was proceeding on a course east magnetic at a rate through the water of one knot an hour, a large ship (the "Tyndareus") suddenly appeared on her port quarter about 25 yards from the crib into which she crashed before anything could be done to avoid the collision. No signals were given by either vessel nor did either of them change her course or speed till after the collision. The "Tyndareus" contends she was on a true west course to clear Point Atkinson,

en route for Union Bay, at a speed of something over 12 knots, and her story in brief is that despite a bright look-out, both forward and from the bridge, she saw nothing to indicate the presence of a vessel in dangerous proximity and there was no light near her except one white light, first noticed about half way between Prospect Bluff and Point Atkinson, about half a point on her port bow which she later took to be the stern light of a small steamer heading in a southerly direction and shewing no other lights, and that this was the apparent state of things for eight minutes before the collision, when suddenly, just before the impact, the vessel ahead swung round till she shewed her port light forward of the port beam of the "Tyndareus" which passed the vessel but ran into the crib beyond her which could not be seen and had no light upon it. It is obvious that if the two accounts of the courses taken are correct there could have been no collision, and the case, apart from the important question of the adequacy of the light on the crib, really comes down to a question of fact upon very conflicting evidence.

It is a strange case and has occasioned me much difficulty because I am satisfied that each vessel had the proper lights displayed and it seems incredible that if they were on the courses alleged they could not have seen one another in ample time to avoid a collision, unless they were temporarily obscured from view by a low-lying cloud bank of smoke coming imperceptibly from the north shore, smoke from that quarter being spoken of by the signal operator at Prospect Bluff from which elevation of 250 feet he could easily see the outstanding high light at Point Atkinson and yet vessels at water level might be concealed from one another by such a smoke cloud as aforesaid.

Judgment

I have no doubt whatever that a bright look-out was kept on the "Tyndareus" to which at least five credible witnesses have testified, nor have I reason to doubt the statement of the mate of the "Alcedo," to the same effect. I am inclined to think, however, that the light on the crib had by some means become extinguished, or dislodged so as to become invisible from the "Tyndareus," very shortly before the collision. The evidence, both positive and negative, of several witnesses on the "Tyndareus" that there was no light on the crib at the time of the

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impact is almost irresistible. But if it had been burning I am not satisfied that it was sufficient for the purpose, having in mind my observations on the point in *Paterson Timber Co.* v. *Steamship British Columbia* (1913), 18 B.C. 86. Here the light was only an ordinary cold-blast lantern with a visibility of "about two and a half or three miles," which I do not think conveys that "reasonable intimation of the true state of affairs" that I held was necessary in the *Paterson* case as a matter of good seamanship and safe navigation apart from any regulation on the subject of boom or crib lights. (I pause here for a moment to express my regret that nothing has yet been done to regulate such lights though the necessity for it was pointed out at p. 90 of the said case, and the present action confirms my observations). In the case at bar I cannot help think that the accident might well have been avoided if there had been a light on the crib of the same visibility, five miles, as that required by Art. 2 (*a*) for "bright white lights" in general: I can see no good reason why a crib light should not be of the same visibility as a ship's white light: indeed, there is more reason why it should be of greater power, if anything, because of its generally lying nearer the water with a consequent reduction in visibility.

Judgment

As to the submission that if the tug is to be considered as an overtaken ship then Art. 24 requires the overtaking vessel to "keep out of the way." I am unable to find that in fact the "Tyndareus" was an overtaking vessel, though she thought she was for a time; and then she did in fact clear the tug but ran into the boom the existence and position of which she was unaware of, for reasons which I am unable to find were negligent on her part. There is in my mind uncertainty about the position of the tug and I am inclined to think she was not where her mate and master had deposed to, but probably drifted laterally with the tide, while going at so slow a speed, in an imperceptible manner. As to the position of the "Tyndareus" I can entertain no doubt in view of the cross-bearings taken just after the collision, *viz.*, one mile south from Point Atkinson.

On the whole case, without attempting to state more than in outline the principal facts which have engaged my prolonged

consideration and reconsideration (having found it indeed one of the most perplexing and difficult in all my experience). I can only come to the conclusion that I am unable to find the "Tyndareus" guilty of negligence and therefore the action against her must be dismissed. In so doing I feel bound to say, in the unusual circumstances, that I do not wish it to be understood that I doubt the integrity of the witnesses on behalf of the "Alcedo"; indeed, I am glad to be able to say that I was much and pleasantly impressed by the evident sincerity and good faith of the witnesses on both sides and I am satisfied that, except as to the boom light, every reasonable precaution was taken that good seamanship suggested, and yet, despite the assistance of able counsel on both sides, who conducted their respective cases exceptionally well, and expeditiously, I am unable to understand how each of these vessels failed to discover the true position of the other in due time, unless it was because of the unsuspected obstruction to the view caused by the low-lying smoke cloud already referred to. It follows therefore that judgment should be entered in favour of the defendant ship and the costs will follow the event as usual.

Judgment

Action dismissed with costs.

COURT OF APPEAL

1922

June 9.

CLARKE v. THE CORPORATION OF CHILLIWACK.

Negligence—Municipal corporation — Sidewalks — Duty to repair — Non-feasance—Nuisance—B.C. Stats. 1914, Cap. 52.

The Municipal Act of 1914, does not impose on a municipal corporation any liability in damages for injury caused to any person through non-repair of roads or sidewalks.

CLARKE v. CORPORATION OF CHILLIWACK

APPEAL by plaintiff from the decision of HOWAY, Co. J. of the 16th of December, 1921, in an action for damages for injuries sustained owing to a sidewalk being out of repair. On the 17th of April, 1921, at about 1:30 in the afternoon the plaintiff and her husband, with their child walking between them, were proceeding along the sidewalk on Young Street within the defendant Municipality when they saw a loose board in front of them that had been taken up and put on top of the adjoining board. As the plaintiff was about to step over the loose board and open space the husband stepped on one end of the loose board causing the other end to flip up. His wife tripped on it and fell on her face, suffering injury. The board in question had been loose and out of place for about three weeks prior to the accident. The learned trial judge dismissed the action.

Statement

The appeal was argued at Victoria on the 9th of June, 1922, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

R. H. Tupper, for appellant: The Municipality built the sidewalk and if not properly constructed there is misfeasance: see the judgment of MARTIN, J. in *Von Mackensen* v. *Corporation of Surrey* (1915), 21 B.C. 198 at p. 208; see also *McPhalen* v. *Vancouver* (1910), 15 B.C. 367; (1911), 45 S.C.R. 194 in which it was held that *Cooksley* v. *Corporation of New Westminster* (1909), 14 B.C. 330 did not apply as the question of negligence to repair was not dealt with. Once the corporation puts down a sidewalk they are not liable to keep it in repair but they must prevent it becoming a nuisance. As to the pleading being sufficient to cover nuisance see *The City*

Argument

of Saint John v. *Christie* (1892), 21 S.C.R. 1. On the question of liability for non-repair of sidewalks see *The City of Saint John* v. *Campbell* (1896), 26 S.C.R. 1; *City of Halifax* v. *Tobin* (1914), 50 S.C.R. 404. The duty was cast on the Municipality to keep the sidewalk it had constructed in such a state as to prevent it being a danger to pedestrians: see *Borough of Bathurst* v. *Macpherson* (1879), 4 App. Cas. 256 at p. 265. The question of nuisance does not arise in the case of *Municipal Council of Sydney* v. *Bourke* (1895), A.C. 433.

Argument

Bowes, for respondent, was not called on.

MACDONALD, C.J.A.: The appeal must be dismissed. I quite sympathize with Mr. *Tupper's* view, that it would be reasonable for the Legislature to impose a duty upon municipalities to keep their streets in repair. But that is, unfortunately for Mr. *Tupper* in this case, not the law of the Province. It is the law in the City of Vancouver, that is in the municipality itself, but it is not the law of those municipalities which are governed by the Municipal Act. The law in this Province in those municipalities governed by the Municipal Act, is that the municipality is not responsible for non-repair of its roads and sidewalks.

MACDONALD, C.J.A.

MARTIN, J.A.: The point is covered by *Von Mackensen* v. *Corporation of Surrey* (1915), 21 B.C. 198, and we cannot restrict the principle there applied to that part of the highway which is reserved for the use of pedestrians only.

This is simply the ordinary case of an ordinary highway in the City of Chilliwack, and it should be governed by ordinary principles.

MARTIN, J.A.

GALLIHER, J.A.: The appeal should be dismissed.

GALLIHER, J.A.

MCPHILLIPS, J.A.: The appeal in my opinion cannot succeed. In this particular case the facts would seem to fit into the authorities and it would look to be a case of non-feasance and not a case of misfeasance.

MCPHILLIPS, J.A.

I would not like it to be understood that in so deciding, that there may not come a time when by the placing upon the high-

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way of artificial work, that there might not be liability; the ordinary surface of the highway is expected to stand or support the traffic, be it vehicular or pedestrian, and liability is confined at present to acts of misfeasance only.

In this particular case the sidewalk seems to have been normal, not constructed at great height or perilous, and all that happened was that at a particular moment a plank flew up owing to disrepair, not false or negligent construction or negligent repair. As I have said, there may come a time when liability might be imposed upon the municipality in the doing of something or the construction of something beyond the ordinary to which the highway is subject, but that is not this case.

I have great pleasure in saying that I have been greatly assisted by the very careful argument of Mr. *Tupper,* the learned counsel for the appellant.

I would dismiss the appeal.

EBERTS, J.A.

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

Appeal dismissed.

Solicitors for appellant: *Tupper, Bull & Tupper.*
Solicitor for respondent: *J. H. Bowes.*

B. W. B. NAVIGATION COMPANY, LIMITED v. THE "KILTUISH." BARNET LIGHTERAGE COMPANY, LIMITED v. THE "KILTUISH."

MARTIN, LO. J.A.

1922

June 22.

B.W.B. NAVIGATION CO. v. THE "KILTUISH"

Admiralty—Collision—Both parties to blame—Equal liability—Costs—Can. Stats. 1914, Cap. 13.
Evidence—Custom.

A tug-boat and its tow came into collision with a steamship, all suffering damage. The Court found that both parties were to blame, the fault on the part of the steamship being its neglect to stop and navigate with caution when the danger became apparent, and that on the part of the tug-boat being the misleading of the steamship by failure to exhibit the regulation lights on the tow and also allowing the tow to drift too far across the channel. It was held that it was a case where the liability should be apportioned equally under The Maritime Conventions Act, 1914, Can. Stats. 1914, Cap. 13, and each delinquent should bear its own costs.

Evidence is not admissible to prove custom where the alleged custom conflicts with statutes or regulations.

CONSOLIDATED action tried by MARTIN, LO. J.A. at Vancouver on the 24th and 25th of February, 1922.

The facts are as follow: At or about 3:15 a.m. on November 1st, 1921, the "Projective," a tug-boat belonging to the plaintiff, the B.W.B. Navigation Company, Limited, having in tow the barge "Pyrites" belonging to the plaintiff, the Barnet Lighterage Company, Limited, whilst on a voyage from Vancouver to James Island came into collision in Active Pass with the steamship "Kiltuish," belonging to the Coastwise Steamship & Barge Company, Limited, the defendant. The "Projective" was carrying the regulation lights but the barge "Pyrites" carried one bright white light at mast-head but no side lights as provided for by Art. 5 of the regulations for preventing collisions at sea, which is as follows:

Statement

"A sailing vessel under way, and any vessel being towed, shall carry the same lights as are prescribed by Art. 2 for a steam vessel under way, with the exception of the white lights mentioned therein, which she shall never carry."

The plaintiffs sued for $1,829.90, damages to the tug-boat "Projective" and the barge "Pyrites," and the defendant

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counterclaimed for $763.60, damages to the steamship "Kiltuish." At the trial the plaintiffs endeavoured to adduce evidence to shew that it was not customary for barges in tow to carry side lights in coastwise waters, but the learned trial judge refused to admit this evidence on the ground that it was not permissible to prove custom where custom conflicted with statutes or regulations.

Symes, and *S. A. Smith,* for plaintiffs.
Mayers, and *W. S. Lane,* for defendant.

22nd June, 1922.

MARTIN, Lo. J.A.: Largely owing to the conflict of evidence the questions raised in this consolidated action have occasioned me much reflection, and after a reconsideration of the whole matter I have reached the conclusion that both parties are to blame for the collision, the fault on the part of the "Kiltuish" being the neglect to stop and navigate with caution when the danger became apparent, and that on the part of the tug and tow being the misleading of the "Kiltuish" by failure to exhibit the regulation lights on the tow and also allowing the tow to drift too far across the channel. In all the circumstances I am of the opinion that this is a case where the liability should be apportioned equally under The Maritime Conventions Act, 1914, Can. Stats. 1914, Cap. 13, and each delinquent should bear its own costs—*Pallen* v. *The "Iroquois"* (1913), 18 B.C. 76; 23 W.L.R. 778.

MARTIN, J.A.

I should perhaps say, to avoid misunderstanding, that in coming to this conclusion I have considered the liability of the tug and tow as being on the facts, inseparable, and that according to my very full notes of the argument, the plaintiffs' counsel did not contest the submission of the defendant's counsel to that effect, but if by chance I am under a misapprehension on this point the matter may be spoken to. If required, there will be the usual reference to the registrar, with merchants, to assess damages.

IN RE J. N. HENDERSON, DECEASED.

COURT OF APPEAL

1922

March 23.

IN RE HENDERSON, DECEASED

Will—Legacies—Codicil—Further gifts to two of the legatees under the will—Whether cumulative or substitutional—Costs.

Where two gifts are made one by the will and one by a codicil they are cumulative gifts unless there be found in the codicil or in the circumstances of the parties evidence of a contrary intention.

APPEAL by Muriel E. Henderson (wife of D. G. M. Fraser) and Evelyn G. Henderson from an order of HUNTER, C.J.B.C. of the 13th of February, 1922, on motion of the Montreal Trust Company acting as executor and trustee under the will of Joseph Henderson who died on the 10th of August, 1920. The will was executed on the 16th of May, 1919, when the estate amounted to about $158,000. The gifts under the will amounted to $94,200 and the residue of the estate was given to a nephew Colin Henderson. Amongst the gifts were $20,000 to Muriel E. Henderson and $10,000 to Evelyn G. Henderson, the daughters of his brother, T. M. Henderson. By codicil dated the 15th of January, 1920, he gave and bequeathed to Muriel E. Henderson $25,000 and Evelyn G. Henderson $25,000 and further stated "I hereby ratify and confirm the said will in every respect save in so far as any part is inconsistent with this codicil." It appeared that after paying the taxes and obligations, if the legacies in the codicil were cumulative, the legatees would only receive about 82 per cent. of their respective legacies. The question was whether the gifts in the codicil were cumulative or substitutional. It was held by HUNTER, C.J.B.C., that said gifts were substitutional.

Statement

The appeal was argued at Vancouver on the 23rd of March, 1922, before MACDONALD, C.J.A., MARTIN and MCPHILLIPS, JJ.A.

O'Brian (*McLorg,* with him), for appellants: If by different instruments two legacies even of the same amount are given they are presumed to be cumulative: see Halsbury's Laws of

Argument

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England, Vol. 28, p. 784, par. 1432. Here the amounts are different and this is in our favour. There are no circumstances here to change the rule: see *Suisse* v. *Lord Lowther* (1843), 2 Hare 424. There is no repetition as it is for a different amount in both cases: see *Rissmuller* v. *Balcom* (1917), 24 B.C. 353; *Wilson* v. *O'Leary* (1872), 7 Chy. App. 448. The only words are "except as inconsistent with the terms of the will." This does not affect the general rule: see *Russell* v. *Dickson* (1853), 4 H.L. Cas. 293; *Pennefather* v. *Lloyd* (1917), 1 I.R. 337; *Follett* v. *Pettman* (1883), 23 Ch. D. 337. As to the meaning of the word "inconsistent" see Murray's Dictionary, Vol. V., p. 173.

Argument

Gibson, for respondent: Every word in a will must have its interpretation: see Beal's Cardinal Rules of Legal Interpretation, 2nd Ed., 516-7; *Wray* v. *Field* (1822), 6 Madd. 300. Very slight evidence would rebut the presumption: see *Russell* v. *Dickson* (1853), 4 H.L. Cas. 293. There is evidence to rebut the presumption. By putting the clause as to inconsistency in the codicil he must have meant it to apply to this as there was nothing else for it to apply to. There is not sufficient to pay all the legatees in full if the gifts are cumulative.

O'Brian, in reply.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I would allow the appeal. The case is a simple one. The difficulties that at one time might have been encountered have been removed by the House of Lords when they declared that where two gifts are made, one by the will and one by a codicil, they are cumulative gifts unless there be found in the codicil or in the circumstances of the parties, evidence of a contrary intention. Now, there is no evidence here of a contrary intention, unless the following words which are relied upon by counsel for the respondent, be taken as such:

> "I hereby ratify and confirm the said will in every respect save in so far as any part is inconsistent with this codicil."

Whether or not legacies given by codicil are cumulative or in substitution, they will necessarily be inconsistent with the will, but wherever the expressions used do not indicate a contrary intention the legacies will be cumulative. In my opinion

we must follow the law as it was laid down there, and hold that the legacies which were given by the codicil were in addition to the legacies given in the will.

The question of succession duty has not been dealt with, and I think the matter should be referred back to the learned judge. The general rule that costs should be paid out of the estate should not be departed from unless there are special reasons. Costs payable out of the estate, party and party, except as to the trustee, the Montreal Trust, solicitor and client.

MACDONALD, C.J.A.

MARTIN, J.A.: I am of the same opinion. It is necessary only to refer to the cases of *Kirkpatrick* v. *Bedford* (1878), 4 App. Cas. 96; *Watson* v. *Reed* (1832), 5 Sim. 431; *Sawrey* v. *Romney* (1852), 5 De G. & Sm. 698.

MARTIN, J.A.

MCPHILLIPS, J.A.: I would dismiss the appeal. In my opinion it is a very clear case indeed. The duty of the Court is to determine what the intention of the testator was and to carry out that intention. It is true there have been built up some rules, some principles of construction, but when you have no doubt about the intention of the testator, there is very little need of any rule, because the rule is built on what you find to be the expressed intention of the testator. It is plain to me that it never was the intention on the part of this testator to, in California, by this codicil, say that notwithstanding he had already given to Muriel Edna Henderson in his will $20,000 he proposed to give her $25,000 more, or that notwithstanding he had already given to Evelyn Gladys Henderson in his will $10,000, he proposed to give her $25,000 more. I cannot say there was any intention on his part to do that. The intention is spread on the codicil (*Allgood* v. *Blake* (1873), L.R. 8 Ex. 160 at p. 162; *Boyes* v. *Cook* (1880), 14 Ch. D. 53 at p. 55). Now, when we look at the codicil we find these words:

MCPHILLIPS, J.A.

"I hereby ratify and confirm the said will in every respect save in so far as any part is inconsistent with this codicil."

Now, to my mind, the inconsistency is that he has already given under his will to these two nieces amounts differing from the amounts in the codicil, and therefore he says that so far as there is any inconsistency, the will is altered. I come to this

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March 23.

conclusion without hesitation, as the plain meaning is that where there is want of harmony there is alteration, that is, the legacies in the codicil are in substitution for the legacies in the will.

IN RE HENDERSON, DECEASED

In my opinion *Russell* v. *Dickson* (1853), 4 H.L. Cas. 293 is really an authority in support of what I am now saying, and to get the proper understanding of *Russell* v. *Dickson* you first have to get the facts. The facts are set out in the head-note which I propose to read:

"A testator gave by his will, 'To my natural or reputed daughter, M. S., 2,000*l.*, for her own sole and separate use, the interest thereof, at five per cent., to be expended on her education'; and intrusted the care and charge of her to his brother. In a codicil, executed five years afterwards, he said, 'I add 3,000*l.* to the 2,000*l.* to which M. S. is entitled under my will, by which she becomes entitled to 5,000*l.*' In about a year afterwards, and about ten days before his death, he made a further codicil, in which he said, 'Not having time to alter my will, and to guard against any risk, I hereby charge the whole of my estates and property in the funds with the sum of 20,000*l.* for my daughter, M. D.,' in this instance giving her his own name, as if she was a legitimate daughter: *Held*, affirming the decree of the Court below, that there were circumstances here to rebut the *prima facie* presumption in favour of the last legacy being treated as additional, and that it was only in substitution for the sums previously given."

MCPHILLIPS, J.A.

Chichester v. *Quatrefages* (1895), P. 186. Now, in this particular case we have no difficulty, no case of doubt, and it is not a case for extrinsic evidence (*In the Estate of Ann Faith Bryan* (1907), P. 125). The testator gives in different sums. He does not give twice. There is no ambiguity here (*Vines* v. *Vines* (1910), P. 147 at p. 150). He really gives in substitutionary sums in the codicil. The duty of the Court is to arrive at the intention of the testator and the testator's intention is to be carried out.

Appeal allowed, McPhillips, J.A. dissenting.

Solicitors for appellants: *O'Brian & McLorg.*

Solicitors for respondent Trust Co.: *McKay, Orr & Vaughan.*

Solicitors for respondent Colin M. Henderson: *Bowser, Reid, Wallbridge, Douglas & Gibson.*

ERIKSEN BROTHERS v. THE "MAPLE LEAF."

MARTIN, LO. J.A.

1922

June 26.

ERIKSEN BROTHERS v. THE "MAPLE LEAF"

Admiralty law—Suit brought against ship "under arrest"—Essentials to give jurisdiction to Admiralty Court.

As soon as a creditor finds a ship "under arrest of the Court," he may bring his action for, and the Admiralty Court acquires immediate and irrevocable jurisdiction over any claim for building, equipping or repairing the ship. That jurisdiction is established without the litigant having to shew that the original action under which the ship was arrested must eventually succeed, and notwithstanding that the arrest was made without particulars being given to prove without doubt the *status* of the plaintiff in that original action.

THIS motion was launched by the defendant to dismiss this action on the ground of want of jurisdiction. Heard by MARTIN, LO. J.A. at Victoria on the 12th of June, 1922.

Henry Eriksen on the 19th of May, 1922, issued a writ *in rem* against the defendant ship endorsed as follows: "The plaintiff as ship's carpenter on board the ship 'Maple Leaf' claims the sum of $97.20 for wages due him and for his costs"; and a warrant for the arrest of the ship was immediately issued. On the next day a writ was issued by the present plaintiffs for $487 for work done at North Vancouver for repairing and equipping the said vessel. The vessel at the time the work was done was lying at North Vancouver and all work done was done at that place. Appearance under protest was entered in both actions and shortly afterwards the action of Henry Eriksen was discontinued.

Statement

According to material in affidavits filed in support of the motion Eriksen Brothers originally presented a bill to the purchasers of the ship before action for $560.77 on April 27th, 1922, and Henry Eriksen did not present and never at any time presented to the purchasers of the ship a bill for work alleged to have been performed as ship's carpenter. When the above-mentioned bill was not paid, however, separate actions were launched as above recited.

It was argued in support of the motion that the first action by Henry Eriksen was really launched for the purpose of getting the ship under arrest so that when the present plaintiffs com-

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menced their action she would be under arrest and therefore the provisions of section 4 of the Admiralty Act, 1861 (24 Vict., Cap. 10), would be complied with and that since Henry Eriksen's claim was under $200 the Admiralty Court had no jurisdiction on the face of it, by virtue of section 191 of the Canada Shipping Act, R.S.C. 1906, Cap. 113, and the whole proceedings were an abuse of the process of the Court.

Argument

Robinson, in support of the motion, cited *The "Evangelistria"* (1876), 3 Asp. M.C. 264; 466 L.J., Adm. 1; *Ex parte Andrews* (1897), 34 N.B.R. 315; and he also referred to *Momsen* v. *The Aurora* (1913), 18 B.C. 353; 25 W.L.R. 241; 15 Ex. C.R. 27.

E. A. Lucas, contra, cited *Letson* v. *Tuladi* (1912), 17 B.C. 170; 21 W.L.R. 570; 15 Ex. C.R. 134; and *Momsen* v. *The Aurora, supra.*

26th June, 1922.

Judgment

MARTIN, LO. J.A.: This is a motion by defendant to dismiss this action for want of jurisdiction.

It appears that on May 19th last one Henry Eriksen issued a writ against the defendant ship endorsed as follows:

"The plaintiff as ship's carpenter on board the ship 'Maple Leaf' claims the sum of $97.20 for wages due to him and for his costs."

And the ship was arrested the same day, and next day a writ was issued by the present plaintiffs for $487, for work done in Vancouver for "repairing and equipping" the said vessel.

An appearance was entered on May 30th to Henry Eriksen's action and it was later discontinued for reasons which do not appear.

It is conceded that unless the ship can legally be said to have been "under arrest," within the meaning of section 191 (*b*) of The Canada Shipping Act, R.S.C. 1906, Cap. 113, in the action of Henry Eriksen there is no jurisdiction to entertain this action. It does not appear that Henry Eriksen is one of the plaintiffs in the present case who are indefinitely styled "Eriksen Brothers."

The defendant's counsel submits that an examination of the proceedings will disclose that this Court really had no jurisdiction to entertain the suit of Henry Eriksen because it was under

the sum of $200 required by said section 191, and that the affidavit upon which the warrant for the arrest issued should have shewn such circumstances as would have brought it within one or more of the exceptions reserved by that section, but it is to be observed that there is nothing in that section which requires the plaintiff to shew at the time the suit is instituted that he is within an exception, and hence it must be assumed that it was intended that he should have the right to prove his *status* at the trial or any prior time, if necessary. Moreover, the warrant for arrest was issued by the registrar, and I have already held in *Letson* v. *The Tuladi* (1912), 17 B.C. 170; 21 W.L.R. 570; 15 Ex. C.R. 134, that, under our rules, even where particulars are prescribed the registrar may dispense with them, and *a fortiori* where particulars are not prescribed it is difficult to see upon what principle they should be insisted upon *ab initio*. In *Momsen* v. *The Aurora* (1913), 18 B.C. 353; 25 W.L.R. 241; 15 Ex. C.R. 27, I held (under the corresponding section 165 of the Imperial Merchant Shipping Act, 1894) that (p. 354):

"As soon as a creditor finds a 'ship or the proceeds thereof are under arrest of the Court' in pursuance of its valid process issued to the marshal in that behalf, then he may without further ado bring his action for, and the Court acquires immediate and irrevocable jurisdiction over any claim for building, equipping or repairing the ship. The burden is not cast upon the litigant to shew to this Court now that the original action under which the ship was arrested must eventually succeed."

Judgment

Here there is nothing before me to warrant me in holding that the arrest under Henry Eriksen's suit was not by valid process. Of course there might be circumstances so strong as would justify the Court in saying that the action under which the arrest was made was only a sham proceeding, and therefore could be disregarded, but the facts here would not justify me in coming to such a conclusion.

There is nothing in *The "Evangelistria"* (1876), 3 Asp. M.C. 264; 46 L.J., Adm. 1, which is contrary to this view, because it merely held that the arrest should be *de jure*, and it is in that light that the arrest in question here must be regarded.

With respect to *Ex parte Andrews* (1897), 34 N.B.R. 315, it is to be observed, (1) that that is a decision on a section of a very different character relating to summary actions in certain

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specified Courts and it would be very unsafe to deduce from it any general principle relating to ordinary actions for wages in this Court; (2) that the statute there required as a condition precedent to the exercise of summary jurisdiction that a complaint on oath should be laid and it is only legally to be expected that such a complaint should *ab initio* disclose all facts necessary to confer jurisdiction, but there is no condition of that kind imposed by the statute in question here; and (3) that the rule for *certiorari* was granted as arising out of the summary proceeding itself and not as an indirect attack in another action as here. That case should obviously be restricted to the statute and facts upon which it was decided.

I am, therefore, of opinion that the motion should be dismissed with costs to the plaintiffs in any event.

Motion dismissed.

MORRISON, J.

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Sept. 9.

CRISPIN & CO. v. EVANS, COLEMAN & EVANS LTD.

CRISPIN & CO. v. EVANS, COLEMAN & EVANS LTD.

Contract—Sale of goods—Failure to deliver—Clause relieving seller under certain conditions—Construction—Ejusdem generis rule—Measure of damages.

A contract by the defendant to sell and deliver salmon of the 1917 run, packed in tins, contained a provision relieving against default in delivery arising from "the packing being interfered with or stopped or falling short through the failure of fishing or through strikes or lockouts of fishermen or workmen or from any cause not under the control of the sellers." The tins used proved defective and before a proper supply could be obtained the run of salmon ceased and the defendants were unable to make delivery.

Held, that the *ejusdem generis* rule applied and the defendant was liable for breach of contract.

In the case of a purchaser under a contract for the sale of goods, entering into another contract for the sale of the same goods to a third person, and through default in delivery being unable to carry out his contract to such third person who took proceedings and recovered damages,

the measure of damages arising from the default under the first contract is (1) the difference between the contract price and market price at the date of the breach; (2) interest on the amount of damages paid to the third party; and (3) the costs paid to the third party on his action.

MORRISON, J.

1922

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CRISPIN & CO. v. EVANS, COLEMAN & EVANS LTD.

ACTION to recover $15,731.29 damages for breach by the defendants of two contracts dated the 5th of December, 1916. By the first the defendants agreed to sell the plaintiffs 2,500 cases of Fraser River pink salmon each containing 96, one-half pound flat tins at $5.75 per case, unlabelled, free on board, export, Vancouver, the salmon to be first 2,500 cases of half-pound flat pinks packed by the B.C. Packers' Association at Acme Cannery, Fraser River, during the season of 1917, and by the second of which contracts the defendants agreed to sell the plaintiffs a like 2,500 cases under the same conditions but packed by the St. Mungo Canning Company Ltd. during the season of 1917. The further necessary facts are set out in the reasons for judgment. Tried by MORRISON, J. at Vancouver on the 19th of June, 1922.

Statement

Craig, K.C., and *Tysoe*, for plaintiffs.
Davis, K.C., and *Hossie*, for defendants.

9th September, 1922.

MORRISON, J.: The plaintiffs are merchants in London, England. The defendants are merchants in Vancouver, B.C. and they, in December, 1916, entered into two contracts whereby the defendants sold to the plaintiffs certain quantities of Fraser River salmon to be packed during the season of 1917 by the B.C. Packers' Association and the St. Mungo Canning Co. Ltd. respectively. The plaintiffs, in turn, on the 16th of May, 1917, sold this pack to M. Lebeaupin, Nantes, France. There were no deliveries pursuant to these contracts and in due course M. Lebeaupin claimed damages against the plaintiffs and by an award made in an arbitration in the form of a special case, the umpire assessed at the sum of $12,500. This award was upheld by McCardie, J. in the King's Bench Division, England, at the rate of exchange ruling upon the date of the breach of the contract, *viz.*, September 30th, 1917. The plaintiffs have

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CRISPIN & CO. v. EVANS, COLEMAN & EVANS LTD.

brought this action against the defendants for damages consequent upon the breach as between them. The point upon which this case turns and which was exactly submitted to me is as to the true construction and meaning of what has been referred to as the "packing" clause of the contracts in question. This clause reads as follows:

"Packing: In the event of the packing being interfered with or stopped, or falling short through the failure of fishing, or through strikes or lock-outs of fishermen or workmen, or from any cause not under the control of the sellers, this contract to be cancelled in respect to any non-delivery or part non-delivery, as the case may be, but sellers to use every endeavour to supply the full quantities specified. Sellers do not guarantee any special period of season for packing this grade and shape."

What apparently happened is compendiously stated in the award by the learned arbitrator and later adopted by the trial judge in *Lebeaupin* v. *Crispin* (1920), 2 K.B. 714:

"The St. Mungo Cannery belongs to the St. Mungo Canning Co. In the season of 1917 there was an excellent run of fish on the Fraser river. The St. Mungo Co. began to pack the salmon into the ½ lb. tins. They then proceeded to prepare the tins as usual by a cooking process, but found that the tins were defective and useless for the desired purpose. Hence they ceased to pack into ½ lb. tins and destroyed the cooking already made. Before they could get a new lot of ½ lb. tins the run of salmon had practically ceased. If they had possessed a sufficient supply of good tins they could have secured fish for 2500 cases of ½ lb. flat pinks. The St. Mungo Co. gave evidence before the umpire to the effect that it was not possible to discover that the tins were defective until pressure was put on them in the process of cooking. Upon this point the umpire says: 'I accept this in the sense that the defects could not be found until the tins were used, and that they had no reason to suspect them until they did use them, but I find that they might have been used and so tested at an earlier date, for example, when they were packing the Toba Inlet fish. There was no evidence of the date or terms of their contract with the American Canning Co., of the date of the delivery of the tins which proved defective. . . . .' Apparently the defective tins had been supplied by the American Canning Co.

Judgment

"The Acme Cannery belongs to the British Columbia Packers' Association. Ample fish existed in the season of 1917 to enable them to pack 2500 cases of ½ lb. flat pinks. They had a full supply of ½ lb. tins. What happened, however, was this. They had a large number of 1 lb. tins. These were getting rusty when the fish began to run. They therefore filled the 1 lb. tins first to the extent of over 3700 cases to avoid the loss of those 1 lb. tins. Then ere they could proceed to fill the ½ lb. tins the run of fish ceased and they were unable to prepare ½ tins at all. The cessation of the run was in no way abnormal. Such are the main facts as to the two contracts."

Are there any words in the above clause which prevents the

application of the *ejusdem generis* rule? No useful purpose can be served by my reviewing the authorities dealing with that rule, but I shall refer only to one case, *viz., Thorman* v. *Dowgate Steamship Company, Limited* (1910), 1 K.B. 410 where Hamilton, J. deals fully with the rule. In that case a ship was chartered to proceed to Alexandra Dock at Hull and there load a cargo of coal in 120 hours on conditions of usual colliery guarantee. The colliery guarantee excepted from the loading time, Sundays, holidays, strikes, frosts or storms, any accidents stopping the working, loading or shipping of the cargo, restrictions or suspensions of labour, lock-outs, delay on the part of the railway company, either in supplying wagons or loading the coal "or any other cause beyond the charterer's control." The ship arrived in the dock and gave notice of her readiness to go but owing to the presence of other vessels, which had arrived previously, and were waiting to load, delay occurred in loading. The owners claimed demurrage against the charterers. It was there held that the words "or any other cause beyond the charterer's control" must be construed as referring to matters *ejusdem generis* with the enumerated exceptions: That the cause of the delay, *viz.,* presence of other ships in the dock was not a matter *ejusdem generis* with those exceptions and that the charterer was not protected by the exceptions and was liable for demurrage. Mr. Justice Hamilton, in dealing with the above clause says (pp. 419-20):

Judgment

"In the form of guarantee, too, which I understand is generally used, at any rate on the Tyne . . . . the word 'whatever' is imported into a clause corresponding with the clause in question in this case. Accordingly I think it is quite reasonable to suppose that the parties entering into this guarantee were fully aware, having the English language at command, that they might carry the matter considerably further if they used the word 'whatever' . . . . and if they had chosen to use the expression 'of what kind soever,' it would pass the wit of man to find language more express or emphatic to indicate the utmost possible generality; but when they confine themselves to words of specific enumeration, like 'any other cause beyond my control,' I see nothing inserted here to derogate from the ordinary canon of construction that those words are subject to a limitation—namely, that of the genus or category which the previous words have indicated."

As some aid, in arriving at what the defendants herein meant, the letters of June 27th, 28th and 30th, 1917, may be

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looked at and although the view expressed in them, as to the scope of the contract, may not be conclusive or binding upon a Court, yet it goes a long way to clear up as to what was in the mind at any rate of the defendants, assuming the writer of the letter was not disingenuous, which motive I do not for a moment ascribe to him. The letter of June 27th, 1917, addressed to the St. Mungo Cannery ends up thus:

"We are relying on you to make us a full delivery of pink halves as we have sold these goods (your first 2500 cases) to a London firm who will unquestionably hold us to our contract."

In that of June 28th, 1917, in reply, Mr. Anderson of the St. Mungo observes:

"I don't for a moment suppose you made a hard and fast contract to deliver goods to your alleged London buyer."

To this the defendants replied on June 30th, 1917:

"Our contract with our London friends covering the sale of your first 2500 cases pink half is 'hard and fast.'"

I find there was a breach of the contracts as claimed. Being bound by authority, I find that the exception clause affords no protection to the defendants. The *ejusdem generis* rule applies.

As to the first item of damages claimed, the calculation of the amount is not difficult.

Judgment

Taking first St. Mungo Contract:		
The contract price was - - - -	$5.50	
The market price at time of breach	9.00	
The difference at $3.50 per case on 2,500 cases - - - - - - - -		$ 8,750.00
Acme:		
Contract price - - - - - -	5.75	
Market price at time of breach - -	9.00	
Difference is $3.25 per case on 2,500 cases - - - - - - - - -		8,125.00

The plaintiffs also claim interest on the amount paid by them to M. Lebeaupin as damages at the rate of 5 per cent. on £2,500, the sum so paid, as from July, 1920, to date. The rate of exchange was, at that time, $4.84. This comes in all to - 985.00

The costs paid by the plaintiffs on the arbitration proceedings, *viz.*, £567/10/3 are also claimed. As to what the rate of exchange then was does not appear from the evidence, but it may be reasonably assumed to have been $4.84. This item, therefore amounts to - - - - - - - - - - - 2,746.00

$20,606.00

As to whether the interest and the costs arose as a consequence of the breach, I think the rule in *Hadley* v. *Baxendale* (1854), 5 Ex. 341 can be invoked and that these are damages which can fairly and reasonably be considered to arise naturally from the breach of the contract and such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. That rule is as follows:

"Where two parties have made a contract, which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, *i.e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it."

Judgment

Applying that test to this case, the interest and costs in question arose and were incurred in respect of the happening of a contingency which might reasonably be expected to follow from the defendants' breach of contract. It would not have been reasonable for Crispin & Co. to have submitted to judgment against them at the instance of Lebeaupin without defending that action. They are entitled to "the fair and honest costs of a fair and honest defence." *Hammond & Co.* v. *Bussey* (1887), 20 Q.B.D. 79, and *Agius* v. *Great Western Colliery Company* (1899), 1 Q.B. 413.

There will be judgment accordingly for the above amount with costs.

Judgment for plaintiffs.

MORRISON, J.

1922

Sept. 12.

SMITH v. UNION STEAMSHIP COMPANY.

Negligence—Steamship company—Loss of trunk—Damages.

SMITH v. UNION STEAMSHIP CO.

The plaintiff left Vancouver on a steamer of the defendant Company for Hardy Bay. On arrival she left her trunk in a baggage-room on the floating wharf and went to shore in a row-boat. Later in the day she sent for her trunk but at about the same time the south bound steamer of the defendant Company arrived at the float and in error included the plaintiff's trunk in the baggage taken aboard. On arriving at Vancouver the trunk was put in the freight room as freight and the purser told the baggage man to send it back. On looking for it later to carry out this order the baggage man found that it had disappeared. In an action for the loss of the trunk:—

Held, that the loss was due to the negligence of the Company's servants and the plaintiff should recover the value of the trunk and contents.

Statement

ACTION to recover the value of a trunk and contents lost by reason of the negligence of the servants of the defendant Company. The facts are set out fully in the head-note and reasons for judgment. Tried by MORRISON, J. at Vancouver on the 15th of June, 1922.

Wood, for plaintiff.
Macrae, for defendant.

12th September, 1922.

Judgment

MORRISON, J.: The plaintiff, Mrs. Mabel Alice Smith, on the 13th of January, 1922, bought a ticket from the defendant Company for a passage from Vancouver to Hardy Bay up the coast on their steamer Venture, which ticket was subject to the usual specified limitations. She, at the same time, checked her trunk. She arrived in due course at Hardy Bay in the late afternoon and was landed with her trunk on a float which was moored some little distance from the beach. On this raft, or float, was a small shed into which baggage and freight of sorts were usually put by the north-bound steamer and it also was used for leaving articles of freight and luggage for the steamer south bound. The only means available for passengers to get ashore was by a row-boat. The plaintiff remained on the float near her trunk

until the Venture sailed. Then she was taken ashore but left her trunk. She went to the hotel of the place and about seven o'clock the hotel man went to fetch the trunk. The S.S. "Camosun" the south-bound steamer of the defendant Company came along about the same time, and took on freight and baggage which they found on the float. What then happened was that the plaintiff's trunk was also taken along to Vancouver, the purser or check clerk assuming that all the things in the shed and on the float were intended to be taken to Vancouver.

Upon the return of the "Camosun" the plaintiff interviewed the purser who acknowledged that the trunk was back in Vancouver and that he would bring it up, presumably the next trip. It not arriving back, she again interviewed the purser who then told her the trunk was lost. Mr. Patterson, the purser, in his evidence, stated that the trunk was taken back by them to Vancouver all right, but that they would have to go to considerable routine to take it back to Hardy Bay, hence the delay. That the trunk was in the Company's freight shed at Vancouver, having come as freight and, therefore, it was not put in their "locked" room where it would have been safe. The purser knew there was an extra trunk on board on the occasion in question and he told the baggage master to send it back. The baggage master went to lunch and when he returned the trunk had disappeared.

Judgment

On this state of facts, I find that the contract of the 13th of January, which is relied upon as a defence herein, was performed upon the arrival of the Venture at Hardy Bay and upon the delivery of the plaintiff's trunk. It follows the contract does not enter further into a consideration of the issues. I find that the plaintiff was not negligent in leaving her trunk for the short period between the departure of one steamer and the arrival of the other, a matter at most of a few hours. The weather was inclement and the landing facilities poor, and she was a stranger in the place. I find the Company were negligent, particularly after the trunk arrived back in Vancouver and after they became aware who the owner was and of the circumstances surrounding its presence there. I think they are solely responsible for its loss.

MORRISON, J.

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SMITH v. UNION STEAMSHIP CO.

There will be judgment for $744.56 the amount sworn to be the value of the contents. I think the item of $126 respecting the title deeds is damage reasonably arising out of the loss sustained by her. There will be costs on the County Court scale.

Judgment for plaintiff.

MACDONALD, J. (At Chambers)

1922

Sept. 21.

IN RE ESTATE OF ROSALIE ST. LOUIS, DECEASED

IN RE ESTATE OF ROSALIE ST. LOUIS, DECEASED.

Administration—Administrator appointed in State of Washington—Money paid into Court in Victoria to credit of estate—Application for payment out—Bond—Security.

The official administrator at Victoria who was appointed at the instigation of the administrator of the estate of deceased appointed in the State of Washington received certain moneys for the estate which he paid into Court in Victoria. On the application of the administrator for Washington State for payment out:—

Held, that an order for payment out be made upon proper security being given to the satisfaction of the registrar.

APPLICATION by the administrator of the estate of the late Rosalie St. Louis appointed in the State of Washington for the payment out to him of the sum of $450, that had been paid into Court at Vancouver to the credit of this estate. The facts are set out in the reasons for judgment. Heard by MACDONALD, J. at Chambers in Victoria on the 7th, 8th and 9th of June, 1922.

Statement

C. L. Harrison, for the Administrator.

21st September, 1922.

MACDONALD, J.: In this matter, the administrator of the estate of the late Rosalie St. Louis, who was appointed in the State of Washington, applies for payment out of Court to him of the sum of $450.

Judgment

It appears that the official administrator at Victoria was appointed, at the instigation of the administrator so appointed

in the State of Washington and he recovered the money referred to. Instead of distributing the same to the parties entitled thereto, he, presumably for protection, paid the amount into Court.

It is contended, that such money should not be paid out of Court without any security being afforded to the Court, that the moneys would be properly dealt with. It is submitted, that the administrator so resident in the State of Washington could have obtained a grant of administration in this Province and *In the Goods of Ferandez* (1879), 4 P.D. 229, is cited as favouring this proposition. A perusal of the case, however, does not give the necessary support. It is only an authority for the statement, that, if an administrator were solely entitled to assets in this Province and could not obtain sureties locally, the Court might allow the bond to be executed by foreigners resident abroad. I do not think the administrator in the State of Washington is entitled, without due protection being afforded to any persons who might have a claim to these moneys, to obtain payment out of Court. Upon proper security being given, to the satisfaction of the registrar, an order for payment may be made.

Judgment

Order accordingly.

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1922

Oct. 3.

FARQUHARSON v. CANADIAN PACIFIC RAILWAY COMPANY.

FARQUHARSON v. CANADIAN PACIFIC RY. CO.

Practice and procedure—Adding party—Costs—Notice to defendant by plaintiff's assignee—Produced by defendant after plaintiff's case in—Plaintiff originally proper party—Application by plaintiff to add assignee as party plaintiff—Terms.

The plaintiff was the proper party to commence action and remained so up to the second day of the trial when at the close of the plaintiff's case the defendant Company produced a notice from the Bank of Commerce to the Company declaring an assignment of the plaintiff's claim to the bank and demanding payment. The defendant then applied to amend its defence which was granted. Three weeks later and while judgment was still reserved plaintiff applied to add the Bank of Commerce as a party plaintiff. This was granted upon the terms that he pay the defendant's costs of the action down to the joining of the bank. The plaintiff would not accept the terms and the action was dismissed.

Held, on appeal, reversing the decision of MURPHY, J., that the plaintiff not having been responsible originally for the non-joinder, is entitled to elect to add the assignee on the terms that he pay the costs of and occasioned by his amendment to add, and the costs incurred by reason of his delay in not applying for the amendment when the notice of assignment was produced.

Held, further, that he was justified in the circumstances in refusing to elect to add the assignee on the severe terms imposed and should now be allowed to elect upon proper terms.

Statement

APPEAL by plaintiff from the decision of MURPHY, J. of the 15th of July, 1921, in an action for damages for breach of contract for the supplying by the defendant to the plaintiff of certain railway cars and for refusing to carry the plaintiff's goods by railway. The plaintiff in January, 1918, contracted to sell to the Baker Lumber Company Limited of Waldo, B.C., 1,500,000 feet of logs and deliver at Baker Siding at $11 per thousand feet. In March, 1918, the defendant through its agent, Joseph Austin, of Fernie, agreed to supply the plaintiff with 16 cars in service and to carry said sawlogs from Cokato, B.C., and Morrissey, B.C., to Baker Siding (near Waldo, B.C.), cars to be equipped with special log-carrying equipment as such cars should from time to time be required by

the plaintiff at $1.65 per thousand feet. The defendant did not supply the cars as provided and the plaintiff suffered damage by delay and additional cost of using cars without equipment, and lost 52,000 feet of logs out of the 600,000 odd that they did move. The trial commenced on the 26th of May, 1921, and on the second day after the plaintiff had put in his case, the defendant produced a notice of an assignment of the plaintiff's assets to the Canadian Bank of Commerce and the defendant then applied to amend its defence. On the 17th of June following, the plaintiff moved to add the Bank of Commerce as a party plaintiff. The learned judge agreed to allow the motion but only on terms of plaintiff paying the costs up to the time of the bank being added a party. The plaintiff refused to accept the terms and on the 15th of July judgment was delivered dismissing the action.

Statement

The appeal was argued at Victoria on the 10th, 11th and 12th of July, 1922, before MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Fisher, K.C., for appellant: The assignment by the plaintiff to the Bank of Commerce was not put in until we had closed our case. The bank consented to be added a party plaintiff but the learned judge insisted we should pay the costs of the action which would be about $1,000. The Court has jurisdiction to order the substitution of the proper party and the costs should not be imposed: see *Hughes* v. *Pump House Hotel Company (No. 2)* (1902), 2 K.B. 485; *Biggs* v. *Freehold Loan and Saving Co.* (1899), 26 A.R. 232 at p. 248.

McMullen, for respondent: Leave to amend should not have been given at that stage: see *Cropper* v. *Smith* (1884), 26 Ch. D. 700; *Attorney-General and Spalding Rural Council* v. *Garner* (1907), 2 K.B. 480 at p. 487. As to the costs of the application being granted see *Attorney-General* v. *Pontypridd Waterworks Company* (1908), 1 Ch. 388. Farquharson had transferred his right to sue: see *May* v. *Lane* (1894), 64 L.J., Q.B. 236 at p. 238. As to right to bring action see *Tolhurst* v. *Associated Portland Cement Manufacturers* (1900) (1903), A.C. 414; *Tailby* v. *Official Receiver* (1888), 13 App. Cas. 523.

Argument

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Argument

As to items that are too remote and do not fall within the contract see *In re Clarke. Coombe* v. *Carter* (1887), 36 Ch. D. 348 at p. 355. As to measure of damages see *Irvine* v. *Midland Gt. Western Railway (Ireland) Company* (1880), 6 L.R. Ir. 55. On the question of the assignment and assignor's right to sue see *Corringe* v. *Irwell India Rubber and Gutta Percha Works* (1886), 34 Ch. D. 128 at p. 132. On application to amend see *Ruston* v. *Tobin* (1880), 49 L.J., Ch. 262 at p. 264. There was no breach of contract. As to its termination see Schouler's Bailments and Carriers, p. 124, par. 417.

Fisher, in reply.

Cur. adv. vult.

On the 3rd of October, 1922, the judgment of the Court was delivered by

Judgment

MARTIN, J.A.: After a careful consideration of the unfortunate situation into which these proceedings have fallen, we have come to the conclusion that the plaintiff-appellant's submission that the terms of the amendment imposed upon him when he applied (on June 17th, 1921) after the hearing, but while judgment was still reserved, to add the Canadian Bank of Commerce as a plaintiff, are of such severity as to costs that they cannot on the facts herein, be supported by authority. It appears that the primary and all-important distinction in the facts between the cases relied upon by the defendant and those before the learned judge was not drawn to his attention, which distinction is, that in all of those cases there had been at the time of the beginning of the action a failure to join a necessary party, whereas in the case at bar, under the peculiar terms of the assignment, and no notice thereof having been given, the plaintiff was the proper and only party to begin the action and remained in that position when the trial was in progress and up to the morning of the second day thereof, *viz.*, on May 27th, 1921, when at the close of the plaintiff's case the defendant at last produced and filed the notice to it from the bank (giving notice of the assignment and demanding payment) and tardily made the formal and successful application to amend its defence

which it should have made the previous day. It thus appears that, with all due respect, a wrong principle has been applied in treating the plaintiff as though he had been responsible originally for the non-joinder and in that mistaken view requiring him to pay in any event the defendant's costs of the action down to the joining of the bank, which onerous terms could, upon the authorities, be only imposed (even if the judge chose to go to that length in his discretion) where the plaintiff had been responsible for the non-joinder: see *e.g., Attorney-General* v. *Pontypridd Waterworks Company* (1908), 1 Ch. 388 at p. 400; 77 L.J., Ch. 237; and *White* v. *London General Omnibus Co.* (1914), 58 Sol. Jo. 339; but we note that milder terms were imposed in similar circumstances in *E. M. Bowden's Patents Syndicate, Limited* v. *Herbert Smith & Co.* (1904), 2 Ch. 86 at pp. 92 and 122; 73 L.J., Ch. 522 and 776.

In other respects, we think the terms as to the reopening of the trial, with the accompanying opportunity for discovery, are not in conflict with any principle, and as there were materials before the learned judge for the exercise of that discretion, it should not be interfered with. But as to the costs, we are of opinion that the proper terms for the learned judge to have imposed on the facts before him would have been to require the plaintiff to pay all costs of and occasioned by his amendment to add the bank and by his delay in applying for that amendment till after judgment had been reserved, *i.e.*, for the period between and including May 27th and June 17th, because that application should have been made immediately upon the granting of the defendant's application to amend its defence on May 27th, so as to avoid the expense of continuing proceedings which would become useless or abortive if the amendment were made later.

Judgment

The strict legal position of the plaintiff, therefore, is that he was called upon to make his election to amend upon terms which were inappropriate to his case, and hence he was justified in refusing them, and it follows that he is entitled now, as he was entitled then, to the opportunity to make his election upon those proper terms which should have been offered to him, as we have indicated them. Therefore the order that ought to

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be made at this state of the matter is that the plaintiff may elect within two weeks to accept or refuse the said terms. If he elects to accept them the trial will be reopened and such consequential proceedings had and taken by way of discovery or the introduction of fresh evidence or otherwise as may be necessary in the usual way. In such case the appeal will be allowed and the judgment vacated, because that judgment, based on the imposition of wrong terms (which the defendant has persisted in supporting) cannot stand as a barrier in the plaintiff's path to justice, and since he was forced to appeal to us to assert his right to election upon appropriate terms and has been successful in setting aside the judgment which stands in his way, the costs will follow the event.

Judgment

But if the plaintiff elects to refuse the said terms, then it will be necessary to pass upon the issues as the record now stands, which matters we reserve for further consideration till after the plaintiff makes his election known to us in Court or through the registrar, within said specified time.

Appeal allowed.

Solicitors for appellant: *Lawe & Fisher.*
Solicitor for respondent: *J. E. McMullen.*

WINTERBURN v. ANDERNACH.

Bond—Given in replevin action—Action against surety—Evidence.

In an action against one of the sureties on a replevin bond it was found the sheriff made the seizure of the article to be replevied but did not hand it over to the claimant.

Held, not to be a defence to the action where it does not appear that the claimant asked for delivery.

Where two officers of the Court contradict one another on a question of fact and there is no reason for disbelieving either, the burden is on the one who propounds the affirmative to prove his assertion.

ACTION against the defendant as a surety under a replevin bond, tried by MURPHY, J. at Victoria on the 28th of September, 1922. One Kohse brought action in April, 1920, in replevin against Winterburn, claiming the return of a gasoline-launch and for damages for its detention, and he put up the usual replevin bond with two sureties, the defendant in this action being one of the sureties. The sheriff seized the launch but did not hand it over to Kohse owing to some alleged defect in the bond, and the launch was tied to a pile in Victoria harbour in the sheriff's custody for some considerable time, Winterburn claiming it deteriorated and was damaged owing to want of proper care. Kohse's action was dismissed and judgment given in favour of the defendant (Winterburn) for $2,040 and $925.70 costs. These sums not being paid by Kohse the bond was, by order of the Court, assigned by the sheriff to the plaintiff in this action, who brought action against the surety for $2,200. Statement

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

9th October, 1922.

MURPHY, J.: It is objected the Court had no jurisdiction to make the order directing the sheriff to assign the bond. I cannot see why. The sheriff is an officer of the Court. He declined to assign the bond because he claimed certain costs were payable to him. The Court found against him and there- Judgment

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upon made the order. If I am wrong in this, the order stands until set aside by a Court of competent jurisdiction: *Brigman* v. *McKenzie* (1897), 6 B.C. 56. Then it is said the bond is invalid because the plaintiff was never put in possession by the sheriff of the replevied property. But I find nothing in the Replevin Act to justify this contention. The position is, the plaintiff sues on a bond duly assigned to him. He has proved that the conditions which would have avoided the bond have not been fulfilled.

It is urged that the sheriff never replevied the boat, that he, therefore, could not sue on the bond, and that plaintiff being his assignee is in no better position. To this, I think, there are two answers: 1st, the sheriff did replevy the boat. He took it out of the possession of plaintiff and held it so that it was available if the claimant succeeded at the trial. True he did not hand it over to claimant, but it does not appear that the claimant ever asked for delivery. In connection with this point, I hold the contention that the plaintiff, or his solicitor, refused to accept the bond not proven. I have here two officers of the Court contradicting one another on a question of fact. I see no reason to disbelieve either and therefore hold the one who propounds the affirmative to have failed to prove his assertion. Such unfortunate issues would not arise if officers of the Court would transact all official business in writing. I accept the evidence of the plaintiff that he never personally refused to accept the bond.

Judgment

Next, the bond is, I think, given in replevin actions not primarily for the possession of the article replevied by the plaintiff but to ensure that the property or its value will be available when judgment is given in the proceedings that it may be disposed of as directed by such judgment. As the defendant does not question the *quantum* of damages in his pleadings further than to simply put plaintiff to proof of the reference and the result, I hold plaintiff entitled to judgment as claimed, with costs.

Judgment for plaintiff.

BELMONT INVESTMENT COMPANY, LIMITED v. MOODY.

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BELMONT INVESTMENT CO. v. MOODY

Practice—Security for costs—Where plaintiff company appears unable to pay costs—Order for security made—Appeal—B.C. Stats. 1921, Cap. 10, Sec. 264.

Section 264 of the Companies Act, 1921, provides that "if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant" then security may be ordered.

Held, that when it appears from the evidence that the plaintiff company is not in debt and owns at least three pieces of property admittedly of value more than sufficient to pay costs if judgment were to go against it, an order under said section should be refused.

APPEAL by plaintiff from the order of McDONALD, J., of the 26th of June, 1922, whereby he directed that the plaintiff furnish the defendant with security for costs in the sum of $150. The application was made by the defendant under section 264 of the Companies Act, 1921. Statement

The appeal was argued at Vancouver on the 9th of October, 1922, before MACDONALD, C.J.A., MARTIN, McPHILLIPS and EBERTS, JJ.A.

Mayers, for appellant: The order was made under section 264 of the Companies Act, 1921. The facts disclosed do not bring the case within the section. The Company has no debts and owns property sufficient to pay any costs it might have to pay: see *Northampton Coal, Iron, and Waggon Company* v. *Midland Waggon Company* (1878), 7 Ch. D. 501 at p. 503. Argument

W. J. Baird, for respondent, referred to *Reaume* v. *Leavitt* (1873), 6 Pr. 70.

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

It seems to me clear enough that the learned Chamber judge had not sufficient material on which to exercise his discretion. The statute is this: "If it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant," then security may be ordered. MACDONALD, C.J.A.

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Now, Mr. *Baird's* affidavit makes out a *prima facie* case. He swears to his belief that the plaintiff Company will be unable to pay any costs he might obtain; but the Company comes forward with what seems to me to be a complete answer, shews that it is not in debt to the extent of one dollar, and has at least three pieces of property of some value, admittedly more than sufficient to pay costs if judgment were to go against it. In the circumstances I cannot conceive of an order of this kind being allowed to stand. There may have been extraneous matters introduced in Chambers from which the learned judge formed an impression, but when it comes before us we have to decide on evidence before us, and on the evidence before us there can, in my opinion, be only one result—the order ought to be set aside.

MARTIN, J.A.

MARTIN, J.A.: I agree. I do not want to interfere with the discretion of the learned Chamber judge, but he was acting on the basis of assuming apparently that the plaintiff was in financial difficulties, whereas the plaintiff is shewn to be one without any debts owing. In such a case, in order to establish a *prima facie* case against the plaintiff, something pretty clear would have to be shewn.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: In my opinion the appeal should be allowed. The section which deals with the matter is section 264 of the Companies Act, 1921, and the enactment is "That there is reason to believe that the company will be unable to pay the costs of the defendant," if successful in her defence. What is the evidence here or the reason to believe that the Company will be unable to pay the costs? It is common ground, admitted fact, without reference to the other two properties, that the house property on Fullerton Avenue is worth $2,000 or $2,200, and that is the property of the Company. Now, if the Company have property of the value of $2,000 or $2,200 and no debts, can it be said that there is reason to believe that the Company will be unable to pay the costs of the defendant, if successful? It seems to me there can be only one answer, and that answer is that that requirement of the enactment has not been made out. The inquiry,

if I may say so, was all in error when it went into extraneous matters before the learned judge in Chambers. The one matter was to determine if there was reason to believe the Company would be unable to pay the costs of the defendant if successful in his defence; and the evidence is clear and precise that this was not established. There can be only one result, and that is, the order should be set aside and the appeal allowed.

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

Appeal allowed.

Solicitor for appellant: *J. R. Green.*
Solicitor for respondent: *W. J. Baird.*

KELOWNA GROWERS EXCHANGE AND OKANAGAN UNITED GROWERS v. DE CAGUERAY.

Contract—Fruit-grower and marketing associations—Marketing of whole crop—Separate agreement with each grower—Mere contract of agency—Not enforcible by injunction.

Where a contract between a fruit-grower and certain associations for the marketing of the grower's whole crop is held to be merely a contract of agency, it cannot be enforced by injunction or receivership. When a number of fruit-growers each has his own separate contract with the marketing associations and the growers are not parties to any agreement among themselves, there cannot be held to be a co-operative arrangement between the growers and the associations.

APPLICATION by plaintiffs for an *interim* injunction restraining the defendant from disposing of his 1922 fruit crop to any person other than the plaintiffs or in the alternative for the appointment of a receiver. The action is founded on an agreement that the defendant was to market the whole of his crop through the plaintiff Companies. Heard by MCDONALD, J., at Chambers in Vancouver on the 2nd of October, 1922.

Statement

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KELOWNA GROWERS EXCHANGE v. DE CAGUERAY

Gibson, for the motion.
R. M. Macdonald, contra.

11th October, 1922.

McDONALD, J.: Application by the plaintiffs for an *interim* injunction restraining the defendant from disposing of his 1922 fruit crop to any person other than the plaintiffs and in the alternative for the appointment of a receiver. The plaintiffs sue upon an agreement dated the 1st of March, 1921, made between the defendant (therein called the Grower), The Kelowna Growers' Exchange (therein called the District Association) and The Okanagan United Growers Ltd. (therein called the Central Association). "The grower agrees 'to market' through the central association all the fruit grown by him on certain lands during the year 1921 and every year thereafter continually." Provision is made for cancellation on the 1st of March in any year by notice in writing. "The grower agrees to cultivate and harvest his crop and to deliver the same at the warehouse of the district association." It is agreed that the fruit shall be 'marketed" by the central association, which shall make returns to the district association, which, in turn, after deducting the expenses incurred in handling and selling, shall render an account of the sales to the grower and pay him any net balance due. It is contended by the defendant that the contract was cancelled and that, in any event, it is a contract which is uneforcible as being in restraint of trade.

Judgment

The conclusion which I have reached on the construction of the contract makes it unnecessary that I should decide these questions on the present application. It is conceded by the plaintiffs that if this is a contract made between the grower, as principal, and the plaintiffs, as his agents, such an agreement ought not to be specifically enforced, and admittedly the effect of granting an injunction or appointing a receiver would, to all intents and purposes, be the same as if specific performance were ordered. In my opinion the contract amounts to nothing more than an agreement by which the plaintiffs shall act as agents for "marketing," *i.e.,* selling the defendant's crop.

It was strenuously argued that inasmuch as plaintiffs have entered into similar agreements with many other growers in

the same district, the agreement is not one of agency but a co-operative arrangement between all the growers and the association. This contention, in my opinion, cannot prevail, as each grower has his own separate agreement with the associations and the growers are not parties to any agreement as between themselves. It follows that the application must be refused, with costs to the defendant in any event.

Application dismissed.

IN RE WHITFIELD (AN INFANT).

Infant — Custody of — Taken by foster parents — Father agrees not to reclaim—Father applies for custody after six years—Agreement not binding—Welfare of child to be considered.

On the death of his wife the father under force of circumstances was forced to leave his young child in an institution. Some months later the child was taken by another man and his wife to their house under a verbal agreement with the father that he would not at any time afterwards claim her. On the application of the father six years later for the custody of the child:—

Held, that although the agreement was not binding on the father, the child being settled in a comfortable and happy home where she wanted to stay and the father's offer of a home being one that was likely to prove of a temporary nature the Court was of opinion it would be hazardous to the child's welfare to remove her and the application was refused.

APPLICATION by a father for the custody of his child. The facts are set out in the head-note and reasons for judgment. Heard by MCDONALD, J., at Chambers in Vancouver on the 9th of October, 1922. Statement

J. S. McKay, for the application.
J. A. Russell, contra.

11th October, 1922.

MCDONALD, J.: This is an application by the father to Judgment

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obtain possession of his daughter, 11 years old, who has, since the death of his wife, some six years ago, resided with Mr. and Mrs. Smyth at Ladysmith in this Province. When the mother died, the father was unable through force of circumstances to provide a home for the child, and she was placed in the Alexandra Orphanage in the City of Vancouver. She remained there for some months and was thence taken by the Smyths, under a verbal agreement, as I find upon the evidence, made with the father that he would not at any time afterwards claim her. The law appears to be clear that such an agreement is not binding upon the parent (*Re Porter* (1910), 15 B.C. 454), but it is equally clear, as stated in the judgment in that case, that if such an agreement be

> "acted upon for such a length of time and under such circumstances as to bring about a condition of things which would make it hazardous to the child's welfare to remove [her] from the custody of those who have, in fact, had charge of [her] upbringing, the Court will not, as of course, order [her] restoration to the parent."

The case has caused me much reflection and the best conclusion I have been able to reach is that it is one coming within what may be called the above exception. All the parties concerned, including the child, appeared before me. The child expressed a great affection for her foster father and mother and a great unwillingness to leave them. Mr. Smyth is a contracting painter living at Ladysmith, where the child attends school and where she will later be able to attend the High School. The Smyths have no other children and are, in my opinion, able to maintain and educate her suitably according to her station in life. The father is a teamster residing in Vancouver. He has no home and boards with a widow, a Mrs. Scranton, who also appeared before me and expressed her willingness that the child should come to her house and live with the father. The child has an older sister, married and living in Seattle. This sister also appeared and expressed a great desire that the child should come to live with the father. She stated that she was employed by a telephone company in Seattle and that her husband is an accountant. Their joint earnings amount to about $275 per month, and she stated that she would be willing to contribute towards the maintenance of her sister,

Judgment

if the infant should come to live with her father. It appears clear, from the evidence, that it was this older sister who first induced the father to endeavour to obtain possession of the child, as the letters written by the father to the Smyths in May and September of this year shew that it was at the married sister's instigation that he sought possession of the child.

The situation being, therefore, that the child is now settled in a comfortable and happy home, and that the only home offered her by her father is one that on its face is more than likely to prove of a temporary nature, it would, in my opinion, be hazardous to her welfare to remove her from the custody of those with whom she now resides.

Judgment

The application is, therefore, refused, but I feel confident that, under all the unhappy circumstances, costs will not be asked.

Application refused.

NEWLANDS SAWMILLS LIMITED v. BATEMAN AND BATEMAN.

Conveyance—Husband to wife—Husband about to enter into hazardous contract—Financial loss—Right of creditors to set aside conveyance—Application under Fraudulent Preferences Act—Right of appeal—R.S.B.C. 1911, Cap. 94, Sec. 7.

An objection to the jurisdiction of the Court of Appeal on appeal from a decision of the Supreme Court on an application to set aside a conveyance under section 7 of the Fraudulent Preferences Act, was overruled.

The plaintiff made a voluntary conveyance of a farm to his wife shortly after entering into a contract to cut and log merchantable timber in a certain area it being a venture involving risk of financial loss. An application to set aside the conveyance under the Fraudulent Preferences Act was dismissed.

Held, on appeal, reversing the decision of MACDONALD, J. (MCPHILLIPS, J.A. dissenting), that the conveyance was a fraud upon persons who subsequently became his creditors and should be set aside.

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Per MARTIN, J.A.: The result is the same whether the business or undertaking is hazardous or not. The principle is based on the contemplated entry into a trading or other venture which might lead to indebtedness.

NEWLANDS SAWMILLS LTD. *v.* BATEMAN

APPEAL by plaintiff from the decision of MACDONALD, J. of the 19th of November, 1921, in an action to set aside a conveyance made by the defendant to his wife. In 1911, the defendant pre-empted certain lands in the Cariboo district. He borrowed $1,500 from the Land Settlement Board and gave a mortgage on the land as security therefor. On the 28th of April, 1920, he entered into an agreement with the plaintiff Company to cut and log all merchantable timber on district lot 7940 in the Cariboo district, and on the 27th of May following conveyed his lands to his wife, the conveyance being registered on the 27th of December, 1920, and immediately after the conveyance he obtained from his wife a power of attorney to deal with the property. In July, 1920, Bateman had trouble in carrying out his log contract, cheques issued by him not being paid, and on the 31st of August, 1920, the Company cancelled the logging contract. Bateman then brought action against the Company for an accounting and obtained judgment for $1,066.83, but on appeal the judgment below was reversed and the Company was held entitled to $650.78 and $2,400 costs. On the trial this action was dismissed with costs. The plaintiff Company appealed on the grounds (a) that the conveyance should have been held as fraudulent; (b) that it was the defendant's duty to retain all his assets in his own name; and (c) that when carrying on a logging contract of this nature a conveyance to his wife without consideration must be held to be for the purpose of defeating and defrauding his creditors.

Statement

The appeal was argued at Victoria on the 12th of June, 1922, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Mayers, for appellant.

Griffin, for respondents, raised the preliminary objection that there was no appeal. This is an action in a summary way under the Fraudulent Preferences Act to set aside a conveyance and does not come under the general right to appeal.

Argument

There is no appeal unless given in express terms by the Act: see Craies's Statute Law, 2nd Ed., 127; *The Attorney-General* v. *Sillem* (1864), 10 H.L. Cas. 704; *Johnson* v. *Miller* (1899), 7 B.C. 46. If the Court proceeds summarily there is no appeal. *Groenvelt* v. *Burwell* (1698), 1 Salk. 263; *Jaques* v. *Cesar* (1670), 2 Saund. 97*c*. at p. 101 (note); Archbold's Q.B. Practice, 10th Ed., Vol. 2, p. 1277, note (*l*); *Harris* v. *Harris* (1901), 8 B.C. 307; *Eade* v. *Winser* (1878), 47 L.J., Q.B. 584; *Harbottle* v. *Roberts* (1905), 1 K.B. 572; *Sale* v. *Lake Erie and Detroit R.W. Co.* (1900), 32 Ont. 159; *Campbell* v. *Strong* (1832), 4 Fed. Cas. 1186; *Ex parte County Council of Kent and Council of Dover* (1891), 1 Q.B. 725 at p. 727. Argument

Mayers, contra: There is a special statute in England preventing appeals in summary matters: see 23 & 24 Vict., Cap. 126, Sec. 17; see also *National Telephone Company, Limited* v. *Postmaster-General* (1913), A.C. 546.

The judgment of the Court was delivered by

MACDONALD, C.J.A.: We think the preliminary objection should be overruled. My reading of the statute is that the Legislature never intended to take away the right of appeal in a case like this, but to simplify the procedure only. The question to be decided by the judge is precisely the same whether it arise in an action or in a summary proceeding. The objection is overruled. The costs of the motion should be to the appellant. Judgment

Mayers, on the merits: The question is whether this transaction can be supported when on the eve of going into a hazardous business transaction. There was a finding of fact that the conveyance was voluntary. The learned judge misdirected himself: see *McGuire* v. *Ottawa Wine Vaults Co.* (1913), 48 S.C.R. 44; *Mackay* v. *Douglas* (1872), L.R. 14 Eq. 106; *Ex parte Russell* (1882), 19 Ch. D. 588 at pp. 598 and 601; *In re Ridler* (1882), 22 Ch. D. 74 at p. 82; *Lai Hop* v. *Jackson* (1895), 4 B.C. 168 at p. 170; *The Sun Life Assurance Company of Canada* v. *Elliott* (1900), 31 S.C.R. 91. Argument

Griffin: He was not in difficulties until the end of August: see *Adams and Burns* v. *Bank of Montreal* (1899), 8 B.C.

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314; (1901), 32 S.C.R. 719; *Alton* v. *Harrison* (1869), 38 L.J., Ch. 669. He could not get the property back: May on Fraudulent and Voluntary Dispositions of Property, 3rd Ed., pp. 9, 10, and 31. The Act does not enable any attack to be made except in the case of an act between two creditors of a common debtor.

Mayers, in reply.

Cur. adv. vult.

3rd October, 1922.

MACDONALD, C.J.A.: This action was brought to set aside a conveyance by James Edward Bateman to his wife, Minnie Bateman, of a farm, being the principal item of the assets of the grantor, on the ground that the same was made to defeat the plaintiff, which subsequently became the creditor of Bateman.

Just previous to the date of the conveyance Bateman had entered into a contract with the plaintiff to cut and boom logs. The contract was rather an extensive one, considering the financial position of the defendant Bateman, and was, in my opinion, a hazardous one within the meaning of that term as used in cases of this kind. It is to be noted that the contract calls for the commencement of logging operations on the 10th of May, 1920, and that the conveyance in question in this action was made on the 22nd of May of the same year.

MACDONALD, C.J.A.

The submission of counsel for the defendants was that as Bateman had no creditors at the time he entered into the contract he was entitled to make a voluntary conveyance to his wife of the property in question. The authorities to which we were referred do not sustain this contention. It is a question to be decided upon the proper inference to be drawn from the facts and circumstances of the particular case as to whether there was an intention to defeat creditors or not, and if there was the intention to defeat creditors, then it does not matter whether it was to defeat present or future creditors. See the observations of Lord Hardwicke in *Lord Townshend* v. *Windham* (1750), 2 Ves. Sen. 1, where he says (p. 11):

"But if any mark of fraud, collusion or intent to deceive subsequent creditors appears, they will make it void."

In *Mackay* v. *Douglas* (1872), L.R. 14 Eq. 106, the facts

there were that the transfer of the property was made at a time when the transferor had no creditors but was about to engage in the bakery business. The transfer was set aside.

In *The Sun Life Insurance Company of Canada* v. *Elliott* (1900), 31 S.C.R. 91, the facts were very similar as bearing upon the point at issue to those in this case. Counsel sought to distinguish that case because the grantor had conveyed away his entire property, while here it is said that the defendant Bateman had some property, consisting of chattels, left after conveying the farm to his wife. I do not think, however, that that decision was founded upon that circumstance, but rather upon the inference to be drawn from the whole transaction that the intent was to put the assets out of the reach of creditors.

The latest case to which we have been referred is *McGuire* v. *Ottawa Wine Vaults Co.* (1913), 48 S.C.R. 44. That case to my mind is indistinguishable in principle from the case at bar. I am bound by it, but apart from this the decision is consistent with the authorities to which I have referred above.

In this view of the case it is unnecessary to consider that portion of the argument which dealt with the effect of the Land Registry Act upon the transaction. I think the conveyance was fraudulent.

I would allow the appeal.

MARTIN, J.A.: On April 28th, 1920, the male defendant entered into a contract with the plaintiff Company to cut, log and boom all the merchantable timber on a certain lot, but differences having arisen between the parties in the execution of the contract, the Company on August 31st gave notice of cancellation thereof and on September 18th of the same year the said defendant began an action for damages against the Company, with the ultimate result, upon appeal, that he not only lost it but the Company recovered judgment on its counterclaim against him for money overpaid for $650.78, with $2,400 costs, and registered its judgment on November 4th, 1921. On May 22nd, after the making of the said contract, said defendant executed a conveyance of his farm homestead (preempted in 1911) to his wife, subject to a mortgage of $1,500 to the Land Settlement Board, which conveyance was not regis-

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tered till December 27th thereafter; at the time of the said conveyance, it is admitted, that the said defendant did not owe the Company; on the contrary, the Company probably owed him.

The first question to be decided is whether or no the conveyance is to be regarded as a voluntary one, and, to satisfy myself in this distressing case, I have read all the evidence in addition to that to which we were referred, with the result that, in my opinion, the learned judge below correctly reached the conclusion that it was voluntary, being a gift to the wife. The further question then arises, Can the gift be supported in the circumstances? It appears that the said defendant had been engaged in logging and farming on the Skeena River before he moved to his said pre-emption on Eaglet Lake, near Giscome, in 1911, since which time he has been solely engaged in farming it till he entered into the said logging contract. At the time he did so his wife objected on two grounds: That it was dangerous to him personally owing to the locality being a "very rough piece of ground, all hills and ledges and a dangerous place to work," and also that "I did not favour him going logging and leaving the farm on my shoulders." At the time of the trial the judgment on which is appealed from (November, 1921), the husband was 60 years old and the wife 56. Naturally the husband expected to make money out of the contract or

MARTIN, J.A.

he would not have entered into it, but it was apparent to him that there was considerable personal risk at least in its execution, especially at his time of life, for he admits that his wife thought "I was liable to be killed any day," and hence he gave her the conveyance. This personal hazard it is impossible to distinguish from the business hazard of such a venture as this, because the personal supervision, experience and activity of the contracting party would inevitably be the decisive factors in success or failure, and if he were incapacitated only failure would result. But in addition to this there is the evidence of the witness Bogue, that

> "in logging contracts as a rule they are more or less of a hazardous nature and it is customary with mill companies making contracts to hold back a certain percentage for fulfilment of the contract so that they won't take off a piece or do part of the work and necessarily it costs more money to remove the balance if it is left. . . . ."

Moreover, there is the fact that the defendant was leaving his farm work, after being engaged in it for nine years, to take up again another kind of work which he had long discontinued. It is impossible therefore, in my opinion, to regard this new venture as being otherwise than of a hazardous nature, however difficult it may be to give a definition to that expression, depending as it does upon the circumstances of each case, and it is clear to me at least that the conveyance was made to protect his wife and himself from his future creditors in case of failure. The farm so conveyed admittedly comprised the bulk of his property; two witnesses deposed (without contradiction) that he stated to the representative of the plaintiff Company during the negotiations preceding the contract, that it was worth $10,000, and all his remaining property was valued at only $1,500 in the bill of sale of it which he gave to his wife a little more than three months later, on August 2nd.

The leading cases in Canada on the subject are *Sun Life* v. *Elliott* (1900), 7 B.C. 189; 31 S.C.R. 91; and *McGuire* v. *Ottawa Wine Vaults Co.* (1912), 27 O.L.R. 319; (1913), 48 S.C.R. 44; in the former, the donor denuded himself of all his property while he had mortgages outstanding which were in arrear (p. 94), so it differs considerably from the case at bar; in the latter the facts much more closely approach those before us, the only material difference being that the conveyance was not made till three months after the new venture was embarked upon, but the grantor at that time was found to be still in a solvent position, nevertheless the conveyance was set aside as a fraud upon subsequent creditors because, as Mr. Justice Anglin puts it, p. 55:

MARTIN, J.A.

"This conveyance was made with the intent of protecting the property transferred from the claims of possible, if not probable, future creditors of the hazardous business in which the defendant John L. McGuire had shortly before embarked. . . . . I agree with the Court of Appeal that this case is governed by the principles on which *Mackay* v. *Douglas* [(1872)], L.R. 14 Eq. 106, approved by the Court of Appeal in *Ex parte Russell* [(1882)], 19 Ch. D. 588, was decided."

And Mr. Justice Duff said, p. 54:

"The burden was consequently upon the plaintiffs at the outset to shew that the conveyance was made by the debtor with a view to protecting himself or his family against the consequences of failure in the business into which he had a short time before entered. I think the fact that

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a collapse did come within a few months after the execution of the conveyance was sufficient to shift the burden to the appellants of shewing that such was not the intent of the transaction. I do not think that burden has been discharged."

The case of *Mackay* v. *Douglas,* to which we must look for the governing principle on a voluntary settlement, is reported in four reports, *viz.,* L.R. 14 Eq. 106; 41 L.J., Ch. 539; 26 L.T. 721; 20 W.R. 652, and, as a whole, the best report of the judgment is to be found in the Law Times, but in essentials it is identical with that in the Law Journal and the head-note is the same: the head-note in the Law Reports is incorrect, as will be noted later. In that case the voluntary conveyance was made before engaging in the trade in question, and so it is on all fours with the case at bar. The question involved is stated by Vice Chancellor Malins at the beginning of his judgment, p. 541 (41 L.J., Ch.), thus:

"Can a man who contemplates trade—or who, in point of fact, whether he contemplated it at the precise moment when he executed the voluntary settlement or not, does, very soon after executing a voluntary settlement, enter into trade, thereby incurring liabilities which end in a disastrous state of affairs—make a voluntary settlement which shall be good against the creditors who become so in the course of his trade? I am not aware of any case upon the exact point, and very few of the cases cited have any immediate bearing upon it. But is the statute of Elizabeth so very short in its effect that it will not cover a case where a man, on the very eve of entering into trade, takes the bulk of his property and puts it into a voluntary settlement, and then becomes insolvent a few months afterwards? Is it to be said that that settlement cannot be reached by any principle of law? My opinion is, that the law is in a totally different condition, and that when a man gets into difficulties shortly after the execution of a voluntary settlement the practice of the Court is clear."

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And this "clear practice" he thus sums up on pp. 542-3, in adopting

"The rule laid down by Lord Hardwicke in *Stileman* v. *Ashdown* [(1742)], 2 Atk. 477, is one which commends itself to one's judgment, and I read it thus, that if a man executes a voluntary settlement with a view to a state of things when he may become indebted, that makes it fraudulent just as if he were indebted at the time. In the present case Mr. Douglas made the settlement, I am perfectly satisfied, with the view that he was going into partnership; that in that partnership he might become bankrupt or insolvent, might be utterly ruined; he did it with the view that he might be indebted, and therefore in that view the settlement, in my opinion, was fraudulent and void against creditors. The conclusion which I arrive at in this case proceeds upon the broad ground that a man who contemplates going into trade cannot, on the eve of doing so, take the bulk of his property out of the reach of those who

may become his creditors in his trading operations. His doing so, as Lord Hardwicke said, with a view to his becoming indebted, would be as fraudulent as if he owed the debts at the very time. In the present case, if Douglas had been at the time a member of the partnership which became insolvent, no question could have been raised, and I regard the settlement as having been made for the purpose of avoiding the consequences of that insolvency, and in my opinion, therefore, it is equally fraudulent."

And to make his application of the rule beyond doubt he had already stated conditions in which the settlement could have been supported, thus (p. 542):

"If Mr. Douglas had not gone into trade, and had not contemplated trade at the time, but some years afterwards, under a totally new state of things, had made up his mind to go into trade, I should have had no hesitation in coming to the conclusion that, in as much as he was solvent at the time, and had not entered into or contemplated any contract which could lead to insolvency, his subsequent insolvency could have had no effect in invalidating the settlement which he had made upon his wife and family."

And he concludes his observations with a reiteration of the broad ground upon which he bases his decision.

The expression "trade" is not, of course, used in a narrow sense but includes any business venture, as *e.g.*, the hotel business in *McGuire's* case, *supra*.

It thus becomes apparent that the principle is based upon the contemplated entry into a trading or other venture which "might" lead to indebtedness, and it is not necessary that the business should be of a hazardous nature, and the use of that expression in the head-note in the Law Reports and the consequent restriction of the principle to the special class of hazardous undertakings is not justified by anything in the judgment when it is closely examined, though it is true that the firm in which Douglas became a partner had been to his knowledge, and continued to be engaged in speculations in jute which made the business of a "rather reckless nature" as the Vice-Chancellor said at p. 120 of the Law Reports; nevertheless, the result would have been the same upon the "broad ground" clearly laid down if insolvency had resulted as one of the ordinary risks of the partnership's business operations, quite apart from the jute speculations. The head-notes in the other three reports properly omit this restriction and simply place the principle upon the broad ground of a voluntary settlement executed on the eve of going into trade. It is desirable to notice this error because the

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Law Report's head-note was adopted by Mr. Justice Garrow in the Court of Appeal for Ontario in *McGuire's* case, *supra* (27 O.L.R. at p. 322) without reference to the other reports which are of equal authority; indeed the Law Journal, because of its great seniority and high reputation, may well claim precedence. In this Province the case of *Lai Hop* v. *Jackson* (1895), 4 B.C. 168, is also based upon *Mackay* v. *Douglas, supra,* and it was one in which it was found (p. 171) that the settler was not only carrying on a hazardous business but was open to an offer to extend it; he had in fact, while carrying on a saloon business, been engaged in opium smuggling "the profits of which were large and the risk great" (p. 169), and while the saloon business was running behind he made the impeached voluntary conveyance to his wife, so on no ground could it have been supported. The latest case on the subject is *Jeffrey* v. *Aagaard* (1922), 2 W.W.R. 1201, where again the erroneous head-note in *Mackay* v. *Douglas* is adopted (p. 1206), though in any event it was well said that what the defendant had done was hazardous in handing over the management of his restaurant business to a young and inexperienced son under a new partnership agreement, and then leaving the country: Cameron and Dennistoun, JJ.A. went the length of saying (p. 1206) that "the restaurant business is a hazardous business inasmuch as it depends very largely upon the character of the management." With all due deference, if that is the test what business or undertaking is not hazardous? If there is no capable "head" at the top the bottom will fall out of any enterprise.

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In *Ex parte Russell. In re Butterworth* (1882), 19 Ch. D. 588; 51 L.J., Ch. 521, the Court of Appeal approved *Mackay* v. *Douglas,* Lindley, L.J. saying, at p. 601, that it is "one of the most valuable decisions we have on the statute of Elizabeth." There the settlor was a thriving baker but he decided to go into the business of a grocer about which he knew nothing, and as Lindley, L.J. puts it:

> "He was perfectly aware that entering upon a business to which he had not been brought up was a risky thing, and, therefore, he made a settlement, settling substantially the whole of his property upon his wife and children. What was that for? Obviously, not simply to benefit his wife and children, but to screen and protect them against the unknown risks of the new adventure."

Applying these authorities to the case at bar I can only reach the conclusion that the conveyance in question must be deemed fraudulent whether the "new adventure" of the logging contract be regarded as "hazardous" or not, though in my opinion it was so: I have drawn attention to the true extent of the decision in *Mackay* v. *Douglas* in case the contrary view should be taken: it is to be noted in *McGuire's* case that neither Idington, J. nor Duff J. bases his judgment upon hazard.

It only remains to be said that I have no doubt that section 7 of the Fraudulent Preferences Act, Cap. 94, R.S.B.C. 1911, authorizes these proceedings.

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The appeal, therefore, should be allowed.

GALLIHER, J.A.: The learned trial judge has found as a fact that Mrs. Bateman was not a creditor of her husband, and that the deed to her was a voluntary conveyance. I am not prepared to say he was clearly wrong in that conclusion. Assuming then that there was a voluntary conveyance, the point seems to me to be covered by *Mackay* v. *Douglas* (1872), L.R. 14 Eq. 106, approved of in *Ex parte Russell* (1882), 19 Ch. D. 588.

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The matter also came up in the Supreme Court of Canada in *McGuire* v. *Ottawa Wine Vaults Co.* (1913), 48 S.C.R. 44. In each of these cases the transaction was held to be a fraud upon creditors, and I see nothing in the facts of this case to take it out of the principles there laid down.

The appeal should be allowed.

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

I agree with the result arrived at by the learned trial judge, that is, that the conveyance to the wife effectively passed the title and that that title being subsequently registered is unaffected by the certificate of judgment. The conveyance of the husband to the wife though, was, in my opinion, upon the evidence, a conveyance for valuable consideration and is supportable upon that ground. The evidence is ample that advances of money were made by the wife to the husband and repeated requests were made for the transfer of the farm to her. The case would

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be an exceedingly hard one if it should be found to be intractable law that this transaction must be set aside. In my opinion there is no such compulsion upon the facts of this case with the greatest respect to all contrary opinion. I am satisfied that the title of the wife is unassailable. The basis of attack that the conveyance was executed coincident with the entry into a hazardous contract, is not open or available in view of the proceedings had and taken and hearing had in a summary way. It was deemed to be a lucrative contract. I cannot view it that the case is one which comes within the *ratio decidendi* of the decided cases upon this phase of the matter. If this point was open there was no attack upon the ground of fraudulent preference.

I would dismiss the appeal.

EBERTS, J.A.

EBERTS, J.A. would allow the appeal.

Appeal allowed, McPhillips, J.A., dissenting.

Solicitor for appellant: *W. P. Ogilvie.*
Solicitors for respondents: *Young & Ogston.*

MARSHALL v. THE CANADIAN PACIFIC LUMBER COMPANY LIMITED, THE TRUSTEES CORPORATION LIMITED, AND THE DOMINION BANK.

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Courts—Order—Jurisdiction of judge who has made an order to vary it.

A judge who has made a Court order may re-open and vary it on the application of a person who is added as a party to the action after the order was made.

City of Greenwood v. *Canadian Mortgage Investment Co.* (1921), 30 B.C. 72 followed.

MACDONALD, C.J.A. took the view that since the Judicature Act no judge had power to review his own order after the same had been duly entered as decided in *In re St. Nazaire Company* (1879), 12 Ch. D. 88, but that as the majority of the Court followed *City of Greenwood* v. *Canadian Mortgage Investment Co., supra,* he would not dissent.

APPEAL by plaintiff from an order of MORRISON, J., of the 11th of January, 1922, varying an order he had made on the 22nd of April, 1921. The Dominion Bank was added a party defendant after the order of the 22nd of April, 1921, was made, and it was on the application of the Bank that the order of the 11th of January, 1922, varying the former order was made. Statement

The appeal was argued at Vancouver on the 14th of March, and at Victoria on the 10th of July, 1922, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Davis, K.C. (*Ghent Davis,* with him), for appellant: The order of the 22nd of April, 1921, was for payment out of certain moneys. The money was paid out in accordance with that order, and this order of the 11th of June, 1922, against which we are appealing, is fruitless. The moneys were advanced for the purchase of coupons, and they rank with the bondholders. Argument

Mayers (*Tiffin,* with him), for respondent Dominion Bank: There is nothing to shew the debenture-holders assented to the arrangement. It was a loan to the Company for the purpose of paying the first half-year's interest.

Davis, in reply: As to the bondholders' consent see *Standard*

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Marine Insurance Co. Ltd. v. *Whalen Pulp & Paper Mills Ltd.* (1922), 31 B.C. 1.

Cur. adv. vult.

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MACDONALD, C.J.A.: In April, 1921, Mr. Justice MORRISON made an order providing for the distribution of certain moneys in the hands of the receiver for bondholders of the Canadian Pacific Lumber Company. Later the Dominion Bank, which was not a party to the order or to the proceedings, applied and was added as a party defendant. In January, 1922, the Bank obtained from the same learned judge an order striking out two sub-paragraphs of the order of April, and this appeal is from that order. Both were Court orders.

The point was taken in the notice of appeal that the learned judge had no power to review the first order. Mr. *Davis,* counsel for the appellant, neither admitted nor disputed in argument the jurisdiction of the learned judge. As the question is one of jurisdiction which cannot be given by consent, the Court is bound to consider it. The question is one in regard to which I entertain a very strong opinion.

I thought it had been decided that since the Judicature Act, no judge had power to review his own order after the same had been duly entered. The point is dealt with by the Court of Appeal in *In re St. Nazaire Company* (1879), 12 Ch. D. 88, the head-note of which is as follows:

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"Under the system of procedure established by the Judicature Acts no Judge of the High Court has any jurisdiction to rehear an order, whether made by himself or by any other Judge, the power to rehear being part of the appellate jurisdiction which is transferred by the Acts to the Court of Appeal."

The same principle was averted to in *Oxley* v. *Link* (1914), 2 K.B. 734, where Vaughan Williams, L.J., at p. 738, said:

"A judge had no right, since the Judicature Act, to rehear an application in any form."

And again in *Hession* v. *Jones,* in the same volume, at p. 421, where the principle of *In re St. Nazaire Company, supra,* was followed.

Mr. *Mayers* referred us to *Watson* v. *Cave* (1881), 17 Ch. D. 19, but that case merely decided that a person not a party to

the action in which the order was made cannot appeal from it to the Court of Appeal. There are, it is true, some expressions of the learned judges in that case which suggest that relief might have been obtained in the Court below, but its character is not indicated. No doubt relief might have been applied for in the Court below, as for instance, to add the applicant as a party defendant, whereupon he might, if the facts warranted it, apply to the proper Court for an extension of the time for appeal. Moreover, the applicant not being a party to the proceedings, enjoyed his legal rights unimpaired by the order to which he was not a party.

The question raised is a most important one, affecting as it does the right to review judgments once formally entered. Sir George Jessel, M.R., as well as the other judges in that case, points this out in *In re St. Nazaire Company, supra,* and while the facts of them are somewhat different to those at bar, the principle was the same. The only thing that embarrasses me is the decision of this Court in *City of Greenwood* v. *Canadian Mortgage Investment Co.* (1921), [30 B.C. 72]; 2 W.W.R. 746, in which the Court sustained an order similar to the one appealed from. The question of jurisdiction was there distinctly raised, though it would not appear from the report that any authorities had been cited, but on consulting with my brother GALLIHER, who gave reasons for his decision on the point of jurisdiction, I find that the *St. Nazaire* case was referred to by counsel. This Court on more than one occasion has intimated that the rule of *stare decisis* is not an inflexible one, that where a decision had been given contrary to a distinct line of authorities which had not been cited, the Court might reconsider the matter. Mr. Justice GALLIHER in his reasons does not appear to dispute the proposition above laid down, where the appellant was a party, but sees a distinction, in favour of jurisdiction, in the circumstance that the party applying for review has, since the order complained of, been made a party to the action and had no opportunity at the time the order was made of appealing from it. That is the whole point in this case. The Court has now been called upon, after re-argument, to decide the point again. At the close of the argument upon

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the statement of counsel that the point was covered by the *Greenwood* case, the Court stated that it would follow that decision, but as judgment was reserved on the merits, I have since had time to consider the matter in the light of the authorities to which I have referred above, as I may do when the judgment has not yet been drawn up and entered. In fact, it is my duty if I have doubts, to resolve those doubts before parting with the case.

It did appear to me hardly in accordance with sound reason and authority that a party not a party to an action should upon becoming one be entitled to attack before the Court which made it any order theretofore made in the cause.

In the above observations I have expressed my opinion and given my reasons therefor, but nevertheless in view of the fact that the majority of the Court are for re-affirming their former decision, I shall not dissent.

MACDONALD, C.J.A.

On the merits I hold that the moneys advanced were not by way of loan but were advanced for the purchase of coupons, and that the holders of the coupons are in the same position as other bondholders in respect of the distribution of the assets of the Company. One of the paragraphs struck out was not complained of, as I understand the matter, but the other, dealing with the distribution of the moneys by the receiver should be restored with this variation, that the Dominion Bank is not to be made liable with respect to interest and costs. The order, therefore, should be drawn up to protect the Bank in this respect, as contended for by Mr. *Mayers*.

Appeal allowed accordingly.

MARTIN, J.A.: After this appeal was argued in March last some doubt arose as to our jurisdiction to entertain it and so counsel for all parties were requested to speak to that point and it came up for argument before us on July 10th last, and at the end of the argument the following unanimous judgment was delivered by the Chief Justice on our behalf, as appears by this trascript from the notes of the official stenographer:

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"MACDONALD, C.J.A.: We will give judgment a little later, perhaps during the present sitting. The *Greenwood* case (1921), [30 B.C. 72];

2 W.W.R. 746, of course decides that we have jurisdiction; then we have to decide the matter on its merits."

This confirms exactly my own note of our judgment and so the matter of our jurisdiction having thus been finally disposed of, it would be neither proper nor profitable to discuss it or to seek to blow upon this decision or upon our preceding one upon which it was founded. Moreover, how could we in fairness to the litigants now reverse our decision and put them out of this Court without giving them an opportunity to be heard after solemnly declaring nearly three months ago that they were lawfully in it? Consequently I shall now confine myself to the only question properly left open for our consideration, *viz.*, the merits of the case. And as to them my view is, briefly, that the transaction cannot be regarded as a straight loan but as one whereby, so as to avoid a winding up, the coupons were to be purchased by Williamson, Murray & Co., and kept alive with the object that they, as the "lenders," should also have the benefit and protection of the trust deed; and they were in fact so purchased on the "condition" set out in the agreement. So far as the claim of the Dominion Bank as to certain interest on the coupons is concerned, I understood that Mr. *Davis* admitted it, but if by any chance I am mistaken in this, I should like the point to be further spoken to. Subject to this the appeal, I think, should be allowed.

MARTIN, J.A.

GALLIHER, J.A., concurred in allowing the appeal.

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MCPHILLIPS, J.A.: I am of the same opinion as my brother MARTIN. The appeal should be allowed with a variation in the judgment relative to the admitted right to interest.

MCPHILLIPS, J.A.

Appeal allowed.

Solicitors for appellant: *Davis & Co.*

Solicitors for respondent: *Tiffin & Alexander.*

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REX v. CASKIE

REX *EX REL.* FRY v. CASKIE AND SPARK.

Criminal law—Intoxicating liquor—Sale of beer—Punishment—In excess of penalty—Court of Appeal—Power to amend—Costs—R.S.B.C. 1911, Caps. 51 and 61—B.C. Stats. 1921, Cap. 30, Secs. 26, 42, 62 and 63; 1921 (Second Session), Cap. 28, Sec. 4.

On appeal to the Court of Appeal from a County Court judge dismissing an appeal from a conviction where the accused was punished for an offence under the Government Liquor Act in excess of the penalty clause in the Act, the Court has power to amend the conviction and impose the proper penalty.

Where an appeal by accused is allowed as in this case, the costs of appeal come within the provisions of the Crown Costs Act and no costs can be given.

In re Estate of Sir William Van Horne, Deceased (1919), 27 B.C. 372 followed.

APPEAL by accused from the decision of LAMPMAN, Co. J., dismissing an appeal from a conviction by a police magistrate on a charge of unlawfully selling liquor contrary to the Government Liquor Act. The two defendants were found selling beer over a bar on the premises of the Grand Army of United Veterans in Victoria. There were five barrels of beer in the bar and twelve in a store-room. An analysis of a bottle in the bar shewed 3.82 per cent. alcohol and a bottle from the store-room 3.94 per cent. alcohol.

Statement

The appeal was argued at Victoria on the 28th of June, 1922, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Robertson, K.C., for appellants: The offence is not under section 26 but under section 46 of the Act: see *Rex* v. *Fleming* (1921), 3 W.W.R. 629; *Regina* v. *Rose* (1896), 27 Ont. 195. If the case comes within the special section the general one does not apply.

Argument

C. L. Harrison, for respondent: It is partly a question of fact and section 46 is a different offence altogether and has no reference to the alcoholic quality at all.

Robertson, in reply.

Cur. adv. vult.

3rd October, 1922.

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

MARTIN, J.A.: According to our decision at the close of the argument the penalty for selling beer under section 46 of the Government Liquor Act, Cap. 30, 1921, is prescribed by section 63, and for a first offence it is "a penalty of not less than fifty dollars nor more than one hundred dollars . . . . ." But the accused being first offenders were wrongly sentenced to imprisonment under section 62 and the question is, have we the power to impose the proper penalty and amend the conviction accordingly? By sections 77 and 80 of the Summary Convictions Act, Cap 59, 1915, the County Court properly appealed to under section 75 had that power, and the proceedings are a retrial *de novo* "as well of the facts as of the law in respect to such conviction," and upon fresh evidence, if desired (section 78). By our Court of Appeal Act, R.S.B.C. 1911, Cap. 51, Sec. 6 (*f*): "an appeal shall lie [to us] . . . . from any point of law taken or raised on an appeal to the County Court under the Summary Convictions Act."

The imposition of the proper penalty is clearly a point of law, and counsel for the Crown submits that as this appeal to us is one in the exercise of our ordinary appellate jurisdiction we should exercise the power conferred upon us by r. 868 and "give [the] judgment and make [the] order" which the judge below "ought to have made" in this respect, as was done by the County Court judge in *Rex* v. *Fleming* (1921), 3 W.W.R. 629. This submission is, in my opinion, correct and is in accordance with the principle of our decision in *In re Alexander, Weaver Estate, and Vancouver Harbour Commissioners* (1922), [*ante* p. 11]; 1 W.W.R. 1254; and with my views at least in *Canadian Credit Men's Trust Association* v. *Jang Bow Kee* (1922), [*ante* p. 40]; 2 W.W.R. 229, 911.

MARTIN, J.A.

In *Rex* v. *Sally,* 28 B.C. 268; (1920), 2 W.W.R. 953; 33 Can. Cr. Cas. 350, where it was conceded (as it must be here after our decision) that a wrong penalty was imposed, we reduced the sentence to the proper term though that was not an appeal from a County Court but from a judge of the Supreme

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Court refusing *certiorari* to quash a conviction, and we have at least as much power herein, and so I think the penalty should be $50, and in default imprisonment for two months with hard labour, and the conviction should be amended accordingly.

As to the costs: The present successful appellant paid them below to the informant, the Victoria chief of police, pursuant to the order of the County Court judge appealed from, who had complete and express discretion over them, and as against "either party," conferred by said sections 77 and 80, and I see no reason to alter this direction because the conviction was good though the penalty was bad. As to the costs of this appeal, they stand on a different footing and I do not see how we can order the Crown to pay them, though unsuccessful, in the light of our decision in *In re Estate of Sir William Van Horne, Deceased,* 27 B.C. 372; (1919), 3 W.W.R. 598, wherein we held that though a discretion in the Court below was there, as here, "expressly authorized" by section 2 of the Crown Costs Act, R.S.B.C. 1911, Cap. 61, yet that express authorization could not "be expanded to cover appeals in general" to this Court.

MARTIN, J.A.

GALLIHER, J.A.: The appellants were convicted by police magistrate Jay on a charge of selling liquor contrary to the Government Liquor Act, and sentenced to six months' imprisonment. An appeal was taken to LAMPMAN, Co. J., who dismissed the same. Appeal was then taken to this Court.

At the hearing it was decided that the appeal should be allowed as the punishment imposed was for an offence committed under section 26 of Cap. 30, B.C. Stats. 1921, whereas it should have been under section 46 of said statute and was in excess of what should have been awarded, subject to the consideration as to whether this Court had power to affirm the conviction and impose the proper penalty.

GALLIHER, J.A.

Section 80 (1) of the Summary Convictions Act, B.C. Stats. 1915, Cap. 59, is as follows:

"80. (1.) In every case of appeal from any summary conviction or order had or made before any Justice, the Court to which such appeal is made shall, notwithstanding any defect in such conviction or order, and notwithstanding that the punishment imposed or the order made may be

in excess of that which might lawfully have been imposed or made, hear and determine the charge or complaint on which such conviction or order has been had or made, upon the merits, and may confirm, reverse, or modify the decision of such Justice, or may make such other conviction or order in the matter as the Court thinks just; and may by such order exercise any power which the Justice whose decision is appealed from might have exercised, and may make such order as to costs to be paid by either party as it thinks fit."

Under this section there seems to be no doubt that the County Court judge below could (had he come to the same conclusion as this Court) have so modified the conviction and this Court on appeal can make the order which the judge below could have made.

The conviction, therefore, stands varied to this extent: that the penalty imposed shall be payment of the sum of $50 and in default of immediate payment to imprisonment for 30 days, with hard labour. To this extent the appeal is allowed.

GALLIHER, J.A.

With regard to the costs below the special statute gives the Court below discretion to award costs to either party, and these are not intereferd with.

As to the costs of appeal, this Court has already decided in the *Van Horne* case (1919), 27 B.C. 372, that they come within the provisions of the Crown Costs Act, and no costs can be given either party.

McPHILLIPS and EBERTS, JJ.A. concurred in allowing the appeal.

MCPHILLIPS J.A.

EBERTS, J.A.

Appeal allowed.

Solicitors for appellants: *Moresby, O'Reilly & Lowe.*

Solicitor for respondent: *C. L. Harrison.*

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DISTRICT OF NORTH VANCOUVER v. CARLISLE

THE CORPORATION OF THE DISTRICT OF NORTH VANCOUVER v. CARLISLE.

Mortgage—Foreclosure—Legal estate in mortgagee—Service of process for final order—B.C. Stats. 1921, Cap. 26, Sec. 2(1)—Marginal rules 62 and 1015.

The Land Registry Act, B.C. Stats. 1921, Cap. 26, does not affect the law that a mortgage transfers the legal estate in the mortgaged property to the mortgagee subject to an equity of redemption in the mortgagor.

Statement

APPEAL by defendant from the decision of MACDONALD, J., of the 4th of May, 1921, dismissing a motion to set aside an order absolute in a mortgage action. The writ was served on the defendant (mortgagor) who lived on the property in question. The defendant did not enter appearance. On being served with notice the defendant by his counsel appeared when an order *nisi* was made and the rent to be paid by the mortgagor while in possession was fixed. Then without further notice being served on him or his solicitor or any of the material upon which the final order was made, he was served with a final order for foreclosure. An application to set aside the final order was dismissed.

The appeal was argued at Victoria on the 16th of June, 1922, before MACDONALD, C.J.A., GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Argument

Bray, for appellant: We were only $200 in default when proceedings were taken. The procedure must be in order and they did not file a proper affidavit of service or indorse the writ as provided in marginal rule 62 (see *Hamp-Adams* v. *Hall* (1911), 2 K.B. 942 at p. 943), and there was no address or occupation in compliance with marginal rule 528. The legal estate no longer passes to the mortgagee: see section 2 (1) of the Land Registry Act, and the plaintiff cannot proceed under the amending rule (B.C. Gazette, 1917, Vol. 1, p. 721 and 23 B.C. Reports). They must proceed in a proper way to obtain the legal estate.

Burns, for respondent: The order *nisi* is the judgment of the Court. The order absolute is an order of course. As to the legal estate passing to the mortgagee this is not changed by the new Act: see *Farmer & Co.* v. *Inland Revenue Commissioners* (1898), 2 Q.B. 141 at p. 146; Hogg on Registration of Title to Land, 111.

Bray, in reply.

Cur. adv. vult.

3rd October, 1922.

MACDONALD, C.J.A.: When the appeal was argued I had no doubt about its disposition except upon one point. It was contended by Mr. *Bray* that there had not been due service of the process on his client the defendant. It was conceded that the practice as laid down by Order LXVII., r. 4, had not been complied with, but Mr. *Burns* pointed out that the service was governed by the amendment made to that rule on 27th March, 1917, which amendment is to be found in B.C. Gazette, 1917, Vol. I. p. 721, and 23 B.C. Reports. Mr. *Bray's* answer was that the action was not a foreclosure action; he contended that under our Land Registry Act a mortgage does not transfer the legal estate to the mortgagee, but merely creates a charge upon it in his favour. Without deciding the question of whether or not it is necessary to convey the legal estate to the mortgagee when creating a mortgage, it is enough to say that the mortgage in question does convey it to the mortgagee, and hence the action was one for foreclosure and falls within the said amended rule.

MACDONALD, C.J.A.

The appeal should be dismissed.

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

Mr. *Bray's* contention is that under subsection (1) of section 2 of the Land Registry Act, B.C. Stats. 1921, Cap 26, that the legal estate no longer passes to the mortgagee under a mortgage, and cites the definition of charge in the interpretation clause above referred to and also sections 33, 34, 27, 40 and 53 of the Act. It does not seem to me that any of these sections tend to that construction. The language used would have to be much

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plainer to even contend that such was the intention of the Legislature.

By the Trust Property Act of 1862, New South Wales (26 Vict., No. 12), Sec. 25, it was declared:

"All mortgages of real or personal estate shall hereafter be deemed at law, as now in equity, pledges only of the property thereby mortgaged;" etc.

And the construction placed upon that section by the Courts of New South Wales, *Re Fergusson* (1882), 3 N.S.W.L.R. 43, was that as regards title in devolution, the section of the New South Wales Act had not made any difference. I cite from the judgment of Wright, J., with whom Phillimore, J. agreed, in *Farmer & Co.* v. *Inland Revenue Commissioners* (1898), 2 Q.B. 141 at p. 146 (the New South Wales Reports not being in the Library).

GALLIHER, J.A.

In my opinion the law remains as it was unaffected by our Land Registry Act, that by mortgage the legal title passes to the mortgagee subject to an equity of redemption in the mortgagor.

MCPHILLIPS, J.A.

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

EBERTS, J.A.

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

Appeal dismissed.

Solicitor for appellant: *H. R. Bray.*
Solicitors for respondent: *Burns & Walkem.*

GRANT v. MATSUBAYASHI AND TANABE.

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Debtor and creditor—Appropriation of payments—Partnership—Dissolution—Continuation of account—Knowledge of dissolution—Items paid subsequent to dissolution—Claim against former partners.

Where a creditor is found to be aware of the dissolution of a partnership that is his debtor on open account for goods supplied, and he continues to supply goods to the business as carried on after the dissolution he has no claim for payment for the goods so supplied as against the former partners.

Where a creditor has rendered no account shewing debits and credits in an unbroken line in a continuing account, and the debtor in making payments has not appropriated such payments to any particular item or part of the account, the creditor has a right of election to appropriate and may do so by action or in any way that makes his intention clear.

APPEAL by defendants from the decision of RUGGLES, Co. J., of the 22nd of May, 1922, in an action for the balance due on a running account for goods supplied by the plaintiff to a business known as the "Sun Company" on Powell Street, Vancouver. The defendants and one Fukunaga carried on business in partnership under the name of "Sun Company." The plaintiff supplied the Company with goods commencing on the 1st of April, 1920. Matsubayashi paid $2,026.90 towards the partnership and Tanabe $1,589.55. Fukunaga had full charge of the business, the defendants not taking any active part, being engaged in business away from the Company's premises. On the 26th of December, 1920, a fire did considerable damage to the store and the three members of the partnership then decided on dissolution to take effect on the 12th of February, 1921. At this time the assets were $7,028.30, and liabilities $2,180.36, and on the settlement Fukunga continued the business and took over the assets and assumed the liabilities, and gave the defendants promissory notes at one year for the respective amounts advanced by them to the business. The plaintiff continued to supply goods to the "Sun Company," saying that he knew nothing about a dissolution having taken place. On the 4th of October, 1921, the

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plaintiff and the defendants received notice of Fukunaga's assignment for the benefit of his creditors. Defendants filed their respective claims with the authorized trustee, and five months later the plaintiff commenced this action.

The appeal was argued at Victoria on the 16th and 19th of June, 1922, before MACDONALD, C.J.A., GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Saunders, for appellants: Grant did business with Fukunaga before he knew the two defendants were his partners, and when the partnership was dissolved only $579.56 was owing the plaintiff. There was a creditors' meeting on the 12th of October, 1921. On the question of notice they rely on section 39 of the Partnership Act; see also Lindley on Partnership, 8th Ed., 268; *Jenkins* v. *Blizard* (1816), 1 Stark. 418; Halsbury's Laws of England, Vol. 22, p. 96. As to use of the firm's name after dissolution, see Lindley on Partnership, 8th Ed., 77. Complying with the statute only protects against new customers. As to appropriation of payments made by Fukunaga see *Hooper* v. *Keay* (1875), 1 Q.B.D. 178; *Clayton's Case* (1816), 1 Mer. 572 at pp. 605-8; Lindley on Partnership, 8th Ed., pp. 272 and 277.

Argument

Thomas E. Wilson, for respondent: The finding of the judge is in our favour, which is important here owing to conflicting evidence. On the question of overruling on a question of fact see *Chong* v. *Gin Wing Sig et al.* (1917), 2 W.W.R. 183; *Dominion Trust Co.* v. *New York Insurance Co.* (1918), 88 L.J., P.C. 30; 3 W.W.R. 850; (1919), A.C. 254. The creditor is not bound by an appropriation: see *London and Westminster Bank* v. *Button* (1907), 51 Sol. Jo. 466. We are entitled to make the appropriation after action is brought: see Lindley on Partnership, 8th Ed., 281.

Saunders, in reply.

Cur. adv. vult.

3rd October, 1922.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I agree with the result arrived at by my brother GALLIHER (without adopting his reasons) on the question of the appropriation of the several payments made after the defendants retired from the firm of Sun & Co.

I observe that these payments were made by cheque and were signed not in the style of the old firm, "Sun & Co.," but "The Sun Co." In other words, the goods bought after the dissolution of the 12th of February were bought by "The Sun Co." and paid for by that Company's cheques. Such payments would, I think, be in themselves appropriations to "The Sun Company's" indebtedness.

I would therefore allow the appeal in part.

GALLIHER, J.A.: The learned trial judge has given no reasons for judgment, but we must assume that he has found as a fact that the plaintiff had no knowledge of the dissolution of partnership between the defendants on 12th February, 1921. With every respect, I do not think he was justified in coming to that conclusion. The defendants, Tanabe and the other partners, Fukunaga and Matsubayashi, have all given evidence, giving time and place where they swear to having notified Grant of the dissolution. There is also the clerk Teramoto, who gives evidence as to time, place and conversations. The plaintiff does not deny that conversations took place with these respective parties at the time and place stated, but does deny the nature of such conversations in some instances and in others varies it. These circumstances are all summarized in examination of plaintiff in rebuttal. Outside of such denial and variance there is nothing to indicate that the defendants and the clerk were not telling the truth, while on the other hand there are some facts and circumstances which I feel should be taken into consideration in weighing the testimony of the plaintiff. In the first place, when he started doing business with the Sun Company (composed of Fukunaga, Matsubayashi and Tanabe), he found Fukunaga in charge and did not know or concern himself as to who or whether there were other partners, as he puts it himself, he saw some $5,000 worth of stock on the premises and he was doing business with the Company on the strength of that and not on who the partners might be. Later he discovered who the partners were and, according to his own admission, was aware that for some time before dissolution that there was dissension among the partners. Further, at the time of the

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dissolution, there was in stock some $7,000 worth of goods, with liabilities of about $2,000, a better standing than when he gave credit on the strength of the goods in stock in the first instance, when he did not know these men were partners. Moreover, when he says he did find out they had dissolved, he did not take the matter up with any of the partners and made no demand for payment on the retiring partners. Of course, this latter would not alter his rights against them, but it is a circumstance.

Again, the first cheque issued in his favour after dissolution, dated 23rd February, 1921, was signed "The Sun Co. S. Fukunaga," whereas prior to that they were signed "Sun & Co. S. Fukunaga." This might not have been noticed by him, but one would expect a wholesale business man to note the change, and no notice was taken of it. I am only putting these forward as circumstances upon which I conclude that the story of the Japanese is, as I view it, the correct one.

As to time and place, they are confirmed by the plaintiff himself (or rather their statements as to this are not denied) and it is only when we come to the conversations that we find any variance. With nothing to throw discredit on these witnesses, it does not seem likely that they all could have been mistaken as to what took place.

GALLIHER, J.A.

This disposes of anything supplied after dissolution and leaves only the question of $579.56, which was admittedly due plaintiff by the old firm at the time of dissolution. Whether this has been wiped out by subsequent payments will have to be determined as a question of law dependent on the rule governing appropriation of payments. Sufficient having been paid since by the remaining partner to liquidate the debt.

The creditor kept the old account on and continued it as a running account giving credits thereon for payments made. No appropriation was made of these payments at the time of payment by either debtor or creditor. Subsequently, some months after the dissolution, *viz.*, in April or May, the creditor says he applied the subsequent payments to the later debt—he must have done this in his mind for the accounts rendered do not shew anything but a general credit on account, nor did he notify the

partners of this. He did, however, in the particulars rendered, after writ issued, state that he had so applied them.

In *The "Mecca"* (1897), A.C. 286 at p. 294, Lord Macnaghten says:

"But it has long been held and it is now quite settled that the creditor has the right of election 'up to the very last moment,' and he is not bound to declare his election in express terms. He may declare it by bringing an action or in any other way that makes his meaning and intention plain."

I think we must hold that he was entitled to make the appropriations when he did. In the case of *Hooper* v. *Keay* (1875), 1 Q.B.D. 178, the facts, except in one important particular, are very similar to the facts here. I can find nothing in the evidence to shew that before action any account was rendered to any of the partners or to the new firm after dissolution, which shews a debit and credit account, and my recollection is that it was so stated at the argument before us.

In the *Keay* case, *supra,* where such account had been rendered and where the statement shewed debit and credit in one continuing account, as the books here do, it was held that appropriation should be made to the earlier and not the later items of the account. Blackburn, J., at p. 181:

"Had this account been only in the plaintiffs' ledger, it would not have bound them, but they sent the copy to Keay."

And further:

"In the present case the plaintiffs have blended the two accounts, and sent it in to Keay, striking a balance on the whole; consequently the subsequent payments . . . . which were made by the defendant Keay without appropriation by him, should be applied to the different items on the debit side of the account in order of date."

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Quain, J., at pp. 181-2:

"The two accounts have been blended by the plaintiffs, and this was communicated to the defendant Keay, consequently the general principle applies that the payments are to be appropriated in order of date to the items of credit, in order of date."

And in discussing the rule in *Clayton's Case* (1816), 1 Mer. 572 at p. 605, he continues:

"'In [that case] there had been a change of parties and the account was apparently continued as if no alteration had happened; and it was, under the circumstances of [that case], reasonable to hold that the earlier items of debit were extinguished by the earlier items of credit.' In the present case the old and new accounts were made one by the plaintiffs to the knowledge of the defendant Keay, on the 23rd of October, 1874, and the subsequent payments must follow the same appropriation."

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Field, J., at p. 182:

"The facts of the present case are very clear; there was no appropriation by the payer, and the plaintiffs who received the payments appropriated them to the general account in their ledger. But not only did they do that, they also sent a copy of the account thus treated as one to Keay, so that the account became one by the consent of both parties; and there is no further room for any question as to the appropriation, because the law says that in such a case the payments or credits must be appropriated to the items of debt in order of date."

Had the account been rendered here as in the *Keay* case it would, I think, be a direct authority, but I deduce from that case that no account having been rendered here it was still open to the plaintiff to appropriate when he did. See also *London and Westminster Bank* v. *Button* (1907), 51 Sol. Jo. 466.

GALLIHER, J.A.

In my opinion the plaintiff is not estopped by filing his claim in bankruptcy. In the result I would allow the appeal and reduce the judgment below to $579.56.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I agree in the proposed disposition of this appeal.

EBERTS, J.A.

EBERTS, J.A.: I agree.

Appeal allowed in part.

Solicitors for appellants: *Saunders & Young.*
Solicitors for respondent: *Wilson & Drost.*

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BRITISH COLUMBIA THOROUGHBRED ASSOCIATION v. BRIGHOUSE

THE BRITISH COLUMBIA THOROUGHBRED ASSOCIATION LIMITED v. BRIGHOUSE AND BRIGHOUSE PARK LIMITED.

Landlord and tenant—Company lessee—Default in rent and taxes—Company struck off register—Subsequently restored—Re-entry by lessor—Relief from forfeiture—Delay—R.S.B.C. 1911, Cap. 39, Sec. 268—B.C. Stats. 1913, Cap. 10, Sec. 21; 1914, Cap. 12, Sec. 22.

The plaintiff Company obtained a 50-year lease of certain lands in 1909 mainly for the purpose of constructing a race-course and carrying on race meetings. Large sums of money were expended and races were held with financial success until 1914, when owing to financial depression and the great war race meetings were suspended, rent and taxes were not paid and the directors having scattered very little interest was taken in the leased premises, which resulted in the Company being struck off the register and dissolved in April, 1918, under section 298 of the Companies Act and amendments thereto. The lessor died in 1913, and his devisee re-entered and took possession of the leased land prior to the Company being struck off the register. The Company was restored to the register on a judge's order in September, 1920, and brought action for a declaration that the restoration had the effect of reviving its rights under the lease and that there was no legal re-entry as it occurred during dissolution. The action was dismissed.

Held, on appeal, affirming the decision of GREGORY, J. (MCPHILLIPS, J.A. dissenting), that there was a legal re-entry that took place prior to dissolution and the restoration of the Company to the register did not revest the lease in the Company.

Held, further, that the circumstances did not warrant the granting of relief from forfeiture.

Per GALLIHER, J.A.: Even if the re-entry occurred during the period of dissolution the restoration did not revive the Company's rights under the lease as the Act does not mean that companies may be restored to their original position without regard to the rights of others that may intervene.

A mortgagor in possession may make a lease of his equitable estate and may stipulate for right of re-entry to that estate in the same way as an owner of a legal estate may stipulate for right of re-entry to the legal estate.

Statement

APPEAL by plaintiff from the decision of GREGORY, J., of the 4th of January, 1922, in an action for a declaration that a lease dated the 1st of July, 1909, between Sam Brighouse as lessor and the plaintiff Company as lessee is a good, valid and

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subsisting lease. The ground included in the lease was to be used by the plaintiff as a race-track and they were to pay $2,500 per annum rent, also the taxes. About $118,000 was spent in improvements by the plaintiff and the rent and taxes were paid until September, 1914. Races were held in 1914, but owing to the general conditions at that time they were not patronized. More races were held than the statute allowed and the Company was prosecuted and its effects were seized and taken. The Company then appeared to have lost all interest, neither rent nor taxes being paid and no races were held, the result being that on the 29th of April, 1918, the Company was struck off the register under the Companies Act and dissolved. On the 14th of September, 1920, by an order of MORRISON, J. this Company was restored to the register. In 1913, Sam Brighouse died and his successor, Michael Brighouse, re-entered the premises by reason of default of payment of rent and taxes in March, 1918, and on the 23rd of June, 1919, obtained cancellation of the plaintiff's lease. He then sold four acres of the property to the Municipality of Richmond, the purchasers obtaining indefeasible title on the 2nd of October, 1919. He also rented small portions to other persons and on the 23rd of November, 1921, leased the race-course to the defendant Brighouse Park Company for three years from the 28th of May, 1920. On the 23rd of June, 1919, he obtained a certificate of indefeasible title to the lands subject to the conveyance to the Municipality of Richmond. The defendant Company had race meetings in 1920 and 1921, the profits amounting to $80,000, of which Michael Brighouse obtained $32,000. He also received $3,000 in rents from the other small leaseholders. When action was commenced the plaintiff Company owed about $20,000 in rent and $2,400 in taxes. The learned trial judge dismissed the action.

The appeal was argued at Victoria on the 6th, 7th and 10th of July, 1922, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Argument

Mayers (*Tiffin*, with him), for appellant: The lease was dated the 1st of July, 1909, and was for 50 years. Rent and taxes were paid until 1914, when owing to the war the races

were not patronized, and in 1917 an order was made prohibiting racing. The Company was struck off the register in June, 1918, and restored in September, 1920. This had the effect of placing matters in the same position as when it was struck off, and secondly, when the circumstances render it impossible to carry out the agreement the Court will relieve: see *Re Conrad Hall & Co. (Lim.)* (1916), 60 Sol. Jo. 666; Buckley's Joint-stock Companies, 9th Ed., 525; *In re Brown Bayley's Steel Works (Limited)* (1905), 21 T.L.R. 374. They rely on the principles set out in *Hastings Corporation* v. *Letton* (1908), 1 K.B. 378. On the effect of dissolution see *In re Higginson & Dean* (1899), 1 Q.B. 325 at p. 331. When a company is restored it comes to life again and assumes its rights and obligations: see *Rex* v. *Pasmore* (1789), 3 Term Rep. 199 at p. 241; *Colchester Corporation* v. *Seaber* (1766), 3 Burr. 1866 at pp. 1871-3; *In re Spottiswoode, Dixon & Hunting, Limited* (1912), 1 Ch. 410 at p. 414; *Leask Cattle Co., Ltd.* v. *Drabble* (1922), 2 W.W.R. 674 at p. 679. They have made a profit in 1920-21 of about $80,000. We contend the cancellation of registration was not legal as the land was under mortgage. The legal estate was in the mortgagee and Brighouse cannot re-enter. He is the assignee by will and until the 31st of May, 1919, he had no registered interest: see *Matthews* v. *Usher* (1900), 2 Q.B. 535. As to service when the company is struck off see *Sloman* v. *Government of New Zealand* (1876), 1 C.P.D. 563 at p. 565; *In re Anglo-American Exploration and Development Company* (1898), 1 Ch. 100 at p. 102; Brighouse Park Limited is just Brighouse, but it runs out in May, 1923, and does not affect us. We spent $118,000 on the property and it is now worth $134,000.

Argument

W. J. Taylor, K.C., for respondent Brighouse Park Company: We took a lease that expires next year. The rule is that a prior document of a registerable nature that is not registered cannot convey a good title against a subsequent registered document: see *White* v. *Neaylon* (1886), 11 App. Cas. 171. The Company has a legal existence and the Court does not deal with or consider the objects of those who brought it into existence: see *Salomon* v. *Salomon & Co.* (1897), A.C. 22 at pp. 30-1. Under the lease we say we hold the property unencumbered.

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Davis, K.C., for respondent Brighouse: As regards the Registry Act the following dates must be kept in mind. Brighouse re-entered on account of default in March, 1918, the plaintiff Company was struck off the register in June, 1918, the lease was cancelled in April, 1918, a certificate of indefeasible title was issued to Brighouse in June, 1919, the plaintiff Company was restored in September, 1920, and the action started in December, 1920. Re-entry took place before the Company was struck off and this was sufficient to avoid the lease: see *Baylis* v. *Le Gros* (1858), 4 C.B. (N.S.) 537. One who has an indefeasible title is owner subject to charges: see Hogg's Registration of Title to Land Throughout the Empire, 276. The mortgage was given nine years before the lease in this case. The mortgagor is owner subject to encumbrances: see *Cuthbertson* v. *Irving* (1860), 6 H. & N. 135; *Turner* v. *Walsh* (1909), 2 K.B. 484 at p. 495. Assuming we re-entered they are not entitled to relief as interests of other parties have intervened. Brighouse has only 40 per cent. of the new Company's stock and $20,000 has been spent in renovating the course: see *Stanhope* v. *Haworth* (1886), 3 T.L.R. 34; *Newbolt* v. *Bingham* (1895), 72 L.T. 852 at pp. 853-4; *Howard* v. *Fanshawe* (1895), 64 L.J., Ch. 666 at p. 670; *Barrow* v. *Isaacs & Son* (1891), 1 Q.B. 417. It must be shewn that the lease was improperly cancelled. If properly cancelled they have no standing; if the lease was not properly cancelled it is the registrar's fault: see *Creelman* v. *Hudson Bay Insurance Co.* (1919), 88 L.J., P.C. 197.

Argument

Mayers, in reply: As to relief from forfeiture see *Warner* v. *Linahan* (1919), 2 W.W.R. 94; *Royal Trust Co.* v. *Bell* (1909), 12 W.L.R. 546 at p. 550. On the position of the Brighouse Park Co. see *Chapman* v. *Edwards, Clark and Benson* (1911), 16 B.C. 334. As to the title see *Bailey* v. *City of Victoria* (1920), 60 S.C.R. 38 at p. 52; *Saunders* v. *Merryweather* (1865), 3 H. & C. 902. As to the position of the mortgagor see *Robbins* v. *Whyte* (1905), 75 L.J., K.B. 38.

Cur. adv. vult.

3rd October, 1922.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: One S. Brighouse, since deceased,

being the owner of the land in question herein, mortgaged it to the Municipality of Richmond. Subsequently, in 1909, being the mortgagor in possession he leased the land to the appellant, plaintiff in the action, who took possession and paid rent for some years. The appellant was an incorporated horse-racing association. During the Great War horse racing declined; the directors were scattered, the rent and taxes became in arrears, and finally the Company was officially dissolved pursuant to a statute. Afterwards it was revived under the statute which is more fully referred to in the judgment of the learned trial judge.

One question raised is as to whether, upon the reinstatement of the Company, its former rights under the lease in question were revived? Before the action was brought S. Brighouse had died, leaving a will by which he devised the lands in question to the defendant, M. W. Brighouse. The defendant Brighouse, it is contended, re-entered before the dissolution of the said Company, and I think this has been proved, and I am not therefore concerned with what would be the effect of re-entry during dissolution. Mr. *Mayers* argued that the taking of possession was pursuant to a licence of one of the directors, and was not nor was it intended to be a re-entry under the lease, but I think that this is not borne out by the evidence.

In my opinion the order reinstating the Company did not have the effect, nor has the statute the effect, of revesting the lease in the appellant. I agree with the learned trial judge on this point.

Mr. *Mayers* argued that the defendant Brighouse had no *status* to make a re-entry, the right of re-entry being limited, he contended, to a legal assignee, which defendant Brighouse was not. *Matthews* v. *Usher* (1900), 2 Q.B. 535; and *Robbins* v. *Whyte* (1906), 1 K.B. 125, are, in my opinion, not in point. In the first of these the lease was prior in date to the mortgage and therefore on the giving of the mortgage the legal estate, with the right of re-entry, became vested in the mortgagee. The second case depends upon the Conveyance and Real Property Act, 1881, of which we have no counterpart in

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our legislation in this Province. The argument was two-fold, firstly, that only the owner of the legal estate could take advantage of a proviso for re-entry, and, secondly, that if an equitable owner may do so the right will not pass to his devisee. There are many conflicting opinions on the subject, but *Cuthbertson* v. *Irving* (1860), 6 H. & N. 135, is more nearly in point than any other I have been able to find. On principle I can see no reason why a mortgagor in possession may not make a lease of his equity of redemption, giving the lessee possession, on like terms and with like remedies for breach of the covenants as in the common case of leases where the lessor is the owner of the legal estate. When the lease is subsequent in time, as it was here, to the mortgage the mortgagee is not affected or bound by it. When, therefore, the lessor of the equitable estate stipulates for the right to retake the possession, which until default under the mortgage and subject to the lease is his, what obstacle can there be in the way of his so doing? In the eye of the law the lessee is the lessor's bailiff, and so long as this contract does not affect others, why should it not be given effect to in full? When the mortgage is subsequent to the lease the case is, I think, quite different. That case is fully dealt with in *Matthews* v. *Usher, supra. Cuthbertson* v. *Irving, supra,* is a case the *ratio decidendi* of which is, I think, applicable to this appeal, though I do not see the necessity for invoking the fiction. The controlling fact in each was that the lease was subsequent in date to the mortgage. The Court there held that the defendant was estopped from denying that his lessor had the legal title and on the same principle the title of the assignee of the lessor was sustained.

It was further argued that the appellant had abandoned its lease. I think the facts sustain that contention, and as they were referred to at some length by the learned trial judge, I will not go over them again. The abandonment was of an equitable right, not of a legal one, and therefore less conducive proof of the abandonment was necessary.

But there is still another defence urged, that afforded by section 22 of the Land Registry Act. The defendant Brighouse, after the dissolution of the Company, procured in good

faith, the cancellation of the registration of the lease, in the Land Registry office, and obtained for himself a certificate of indefeasible title, subject to the mortgage. That is a good defence *inter partes*, and the only interest of third parties is in the lease to the Brighouse Park Limited, and the appellant claims only subject to that lease which will soon expire. Whether or not this section is of importance depends on the date of re-entry, which I have already dealt with in favour of the respondents. The facts do not, in my opinion, call for relief from the forfeiture.

MARTIN, J.A.: I agree in dismissing the appeal and think it necessary to say only that the evidence warrants a finding that there was a re-entry before the Company was struck off the register, and that such re-entry was lawful. I also agree that the case is not one for relief against forfeiture.

MARTIN, J.A.

GALLIHER, J.A.: In my opinion subsection (4) of section 21 of the Companies Act, 1913, Cap. 10, does not, where it says in the case of companies restored to the register that "thereupon the company, being an incorporated company . . . . shall be deemed to have continued in existence . . . . as if [its] name . . . . had not been struck off," mean that such companies shall be restored to their original position without regard to rights of others that may intervene. This view is supported by the later words in the section:

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"For placing the company and all other persons in the same position," etc.

It could not be the intention of the Legislature and we should not so regard it, unless expressed in apt words, that rights revived which had become forfeited and which in consequence had been acquired by others.

In the next place, my view is that there was a proper re-entry under the lease and at a time prior to the Company being struck off the register.

Several other points were raised, but I think these two findings substantially dispose of the appeal, except as to relief against forfeiture. On this branch it is not, in my view, a case in which we should grant such relief. That the original

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owners, or those claiming through them, have suffered no loss by reason of the Company lapse, is not sufficient in itself. That they have not suffered any loss, and we will assume on the contrary that they have made a profit, may be due to better and more efficient management, in other words, is the fruits of their own toil, if I may so term it.

The result might have been otherwise, and when we consider that nothing was done to revive this Company until the undertaking had proved a success, I am unable to see why it should be taken out of the hands of those who had made a success of it and turned over to those who lay by and abandoned the enterprise.

I would dismiss the appeal.

MCPHILLIPS, J.A.

McPHILLIPS, J.A.: This appeal raises a somewhat difficult point of law, when all the surrounding facts and circumstances are given careful attention. The appellant, a company incorporated under the Companies Act (R.S.B.C. 1911), Cap. 39), was granted a lease of the property in question under date the 1st of July, 1909, by one Sam Brighouse, now deceased, the term of the demise being 50 years. The respondent Brighouse is the devisee under the will of the late Sam Brighouse. The respondent, the Brighouse Park Limited, is a lessee under a demise from the respondent Brighouse of the same property for the term of three years from the 28th of May, 1920, at a rental of $1 a year. The area of land was known for a considerable time as Minoru Park, later known as Brighouse Park. The demised premises were greatly improved by the appellant and there was established thereon a modern race-track, to be used for horse-racing and other suitable purposes, and the appellant would appear to have expended thereon a sum in the neighbourhood of $150,000. The rent was duly paid up to the 1st of September, 1913, but after that date no rent has been paid, and at the time of the trial of the action a sum approximating $25,000 was due in respect of rent and taxes. In the year 1913 British Columbia entered upon a period of depression, the real estate boom was at an end and then the Great War ensued in 1914, rendering it impossible to at all profitably carry on race meetings. Previous thereto the appellant Com-

pany had met with success in its operations. The appellant Company, following upon the changed condition of things, became disorganized and little, if any, interest, owing to the stress of the times, was taken in the demised premises. Most of the directors resigned and some of the shareholders went to the war, leaving but two directors in office (Springer and Suckling), Springer being the managing director, and later again Springer went abroad but, as it will be seen later, continued to interest himself in the property. It was impossible, though, to meet the rent and taxes. On the 29th of April, 1918, the appellant Company was, under the provisions of the Companies Act, struck off the register and dissolved. The section of the Companies Act, being amendments thereto, which particularly requires consideration reads as follows: [The learned judge here set out section 268, subsections (1), (2), (3) and (4), and continued].

The appellant Company was, however, restored to the register on the 29th of September, 1920, by the order of Mr. Justice MORRISON. The learned trial judge, Mr. Justice GREGORY, held that during the dissolution of the appellant Company the respondent Brighouse re-entered and took possession of the demised premises, sold a portion of the land and rented other small portions of the land, and in 1920, as we have seen, leased the race-course, stables, etc., to the respondent the Brighouse Park Limited. Further, during the period of dissolution of the appellant Company, in pursuance of the provisions of the Land Registry Act, the respondent Brighouse obtained cancellation of the lease of the appellant Company and obtained a certificate of indefeasible title to the lands in question. In June, 1917, horse-racing was prohibited by the Government of Canada, an order in council, in pursuance of the existent statute law, having been passed to that effect, but such prohibition was removed in December, 1919, as and from the 12th of January, 1920. The respondent Company, the Brighouse Park Limited, in which the respondent Brighouse is a large shareholder, holding 40 per cent. of the capital stock, held race-meetings on the race-course in 1920 and 1921, and the race-meetings were very remunerative, although it is true

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some $20,000 had been previously expended in the way of betterments and improvements. Now the question is, what was the result of the statutory dissolution, coupled with the statutory revival (section 268 (4)), the language is "shall be deemed to have continued in existence," that is when the order has been made by the Court restoring the Company to the register? The contention at this bar was that whilst the appellant Company had been restored to the register, yet it no longer was entitled to the demised premises, that the lease was cancelled, that, in fact, the restoration was ineffective to reclothe the appellant Company with any right or title to the demised premises. This argument in the abstract extends to saying that a Company, although restored to the register, may find itself stript of all its assets through steps taken during the time of dissolution. Can this be reasonably said to be the effect of the enactment? I am strongly impelled to come to a contrary conclusion. It may well be that, in respect to innocent third parties, the law should protect them, and it was conceded at this bar that the intervening lease would be operative, and it might be equally well said that, if a lease had been made extending to the full period of the demise to the appellant Company, that also would have been an effective demise and would have displaced any rights of the appellant Company, but such is not the situation. The lease granted during the dissolution will expire on the 28th of May, 1923, which would leave 36 years of the 50 years' term of the lease to the appellant Company still to run, unless it be that that lease is now non-existent because of the dissolution of the Company and the claimed re-entry during the dissolution. It has been argued here that the order of restoration should not have been obtained *ex parte*. In my opinion, this objection is without force (see *Re Conrad Hall & Co. (Lim.)* (1916), 60 Sol. Jo. 666, Astbury, J. decided upon analogous statute law; also see *In re Brown Bayley's Steel Works (Limited)* (1905), 21 T.L.R. 374). In *Hastings Corporation* v. *Letton* (1908), 1 K.B. 378, Phillimore, J. (now Lord Phillimore) said, at p. 387:

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> "So if property is given to a corporation for a term of years the term endures so long as the corporation is in existence to enjoy it; the reversion is accelerated if the corporation ceases to exist. Therefore the lease in this case ceased to exist when the lessees ceased to exist."

Then at a later point in his judgment (p. 387), Phillimore, J. said:

"A corporation has no personal representatives, and when it is dissolved its lands revert to the grantors."

It is to be observed though that when the appellant Company was restored to the register the apt words of the statute that must be given effect to "shall be deemed to have continued in existence." This must result in reclothing the appellant Company with all its assets, subject only to the recognition of all rights acquired in the *interim* of time and as between the original parties, *i.e.*, as between the lessor and the lessee the demise revives or more properly must be deemed never to have reverted, save in the way of the preservation of existing equities, as it is not reasonable to assume that the Legislature intended to affect innocent third parties. In this connection it is instructive to observe what Mr. Justice Wright said in *In re Higginson & Dean. Ex parte Attorney-General* (1899), 1 Q.B. 325 at p. 331:

"In the 17th and 18th centuries corporations aggregate, constituted by charter or letters patent, were numerous, and questions frequently occurred as to the effect upon their rights and obligations of dissolution, revival, and reincorporation, with or without change of name or constitution. Many references to such cases will be found in Anderson's Reports and in *Rex* v. *Pasmore* (1789), 3 Term Rep. 199. I cannot find that in any case the rights or obligations of a corporation were held to be affected by a technical dissolution. Nor, on the other hand, can I find a case in which such a question has been decided, where the corporation had not been revived, or some provision made by statute or charter with reference to its obligations. In *Mayor, &c. of Colchester* v. *Seaber* (1766), 3 Burr. 1866 the revived corporation sued in its own name on a bond given to the dissolved corporation, and succeeded. Sir Fletcher Norton, for the plaintiff corporation, argued that the goods and chattels of the old corporation, including its choses in action such as the bond, had on its dissolution passed to the Crown, and that the Crown in granting a charter of revival had regranted them to the revived corporation. Mr. Dunning, on the other side, neither admitted nor denied this, and the Court is not reported to have expressed any opinion on this point, it being held that there was only a qualified dissolution, and no absolute break of continuity."

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It is to be noted that Mr. Justice Wright says: "not affected by technical dissolution." Unquestionably this form of striking off the register under the Companies Act is nothing more than a "technical dissolution." This is made plain when the restoration of the Company is by the enactment made so simple

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of accomplishment. This is further accentuated when the Legislature used the words "shall be deemed to have continued in existence." This can only mean that the restoration is curative and being the language of Parliament, supreme in regard to property and civil rights, it, in effect, might displace any changed titles acquired during the period of dissolution. In the present case, however, no interests, as affecting third parties, come in question, as the learned counsel for the appellant Company at this bar stated that there was no intention to question the outstanding lease, which will expire in 1923. Then we have Lord Kenyon, Ch. J. in *Rex* v. *Pasmore* (1789), 3 Term Rep. 199, saying at pp. 241-2: [His lordship quoted from the 23rd line on p. 241 to the end of the judgment on p. 242, and continued].

In *Colchester Corporation* v. *Seaber* (1766), 3 Burr. 1866, Lord Mansfield (p. 1871):

"So it stands upon general reason. And *Sir James Smith's Case* [(1691)], in 1 Shower 274 and in 4 Mod. 52, is in point, 'That the corporation is not dissolved by the judgment.' Notwithstanding this judgment of ouster, a right may remain, so as to be capable of being again raised and revived. The corporation can not act without legal magistrates: but their rights may be revived, and put in action again, by a new charter from the Crown, giving them legal magistrates.

"I am clear, upon principles of law, that the old corporation was not absolutely dissolved and annihilated, though they had lost their magistrates; and by virtue of the new charter, they are so revived as to be entitled to the credits, and liable to the debts of the old corporation."

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And at p. 1873, in this same case, Aston, J. said:

"As to the statute of 11 G. 1, c. 4,—The intent of it was not to consider such corporations as dissolved, and to grant them new powers, or, as it were, new charters, as bodies dissolved; but to revive their activity, and to put them again in motion.

"Though a new charter should grant new rights, or a new name, yet the acceptance of it does not destroy the former rights privileges or franchises of the corporation; but the corporation may use and enjoy them, as they did before. This is expressly laid down in *Haddock's Case* [(1681)], Raym. 439."

In view of the contention put forward in argument at this bar, that although the appellant Company has been restored to the register, it stands restored in an emasculated state so far as its property and assets are concerned, I would refer to what Neville, J. said at pp. 414-15, in the *Spottiswoode* case (1912), 1 Ch. 410, when discussing provisions of the Companies (Con-

solidation) Act, 1908, relative to dissolution and declaring dissolution void. The British Columbia Companies Act is analogous legislation, in fact, generally speaking, is in all its principal provisions the same as the English Act.

"The result of course is that the liability of the old company never passed to the new company and disappeared, to the great advantage of the new company (as no doubt it would be to the great advantage of other reconstructed companies), who thus were freed from an obligation which they had undertaken by their contract. If that is allowed by the law, and if the arm of the law is so short that it cannot interfere with such a transaction, then, speaking from this place, I have nothing to say about the action of the new company: they have discovered a way in which a liability can be got rid of by a solvent company without discharging it, and they are entitled to the benefit of their discovery. But s. 223 of the same Act, which provides for the dissolution of the company under the circumstances that I have referred to, gives the Court power upon the application of any persons interested to declare the dissolution to have been void. Terms may be inserted if necessary, but the order simply declaring the dissolution to have been void would put matters back into the position in which they were when the proceedings were taken by the liquidator which resulted in the statutory dissolution of the company."

In *Leask Cattle Co. Ltd.* v. *Drabble* (1922), 2 W.W.R. 674, Mackenzie, J. when considering similar legislation to that we are now considering, at p. 679 said:

"Counsel for the defendants argued, however, that even granting that such proof of restoration to the register could now be made, it could not give the plaintiff company a *status* to bring this action, which it did not possess at the commencement thereof. I cannot agree with this argument. It is to be noted that the words of the statute regarding the effect of the publication of the notice of restoration are: 'and thereupon the company shall be deemed to have continued in existence as if the name of the company had never been struck off.' To my mind the intention of the Legislature in passing this provision was to make it as remedial as possible. It must therefore be held to be retrospective as well as prospective in its operation. See 27 *Halsbury*, p. 159, par. 305, and *Quilter* v. *Mapleson* (1882), 9 Q.B.D. 672, 52 L.J., Q.B. 44, therein cited. Accepting this as the law applicable to this statutory provision it cannot matter that notices of dissolution under subsecs. (2) and (3) of above sec. 31 were published before the commencement of this litigation, for once the Court is satisfied that notice of this restoration has been subsequently published, it must treat it as if its corporate existence had continued without cessation since its incorporation."

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I am satisfied, upon the evidence, that no re-entry ever took place of the demised premises as against the appellant Company. The respondents contended that there was a re-entry before the dissolution and, alternatively, if not before, after the

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dissolution of the appellant Company. Upon this point the learned trial judge held that the re-entry was after the dissolution. There is no cross-appeal, so that all that the appellant Company has to meet is the finding that there was a re-entry after dissolution. In arriving at the conclusion that there was no re-entry, I rely greatly upon the letter of Springer, the managing director, written to the respondent Brighouse, of date October 17th, 1917, the surrounding facts and the course of conduct, after the receipt of that letter, all going to shew that everything that was later done was relative to the terms of that letter and the understanding come to, to bridge over the time of financial and business depression.

The dissolution of the appellant Company did not occur until about six months after the receipt of the Springer letter by the respondent Brighouse, and the claimed re-entry was in March, 1918. It is clear that all that was done by the appellant Brighouse was done in pursuance of the licence given, and for that reason it is incumbent upon the appellant Company to recognize, as it does, the lease expiring in 1923, but there was no authority whatever or right in the appellant Brighouse to cancel the lease of the appellant Company or proceed to get an indefeasible title to the land freed of the lease; further, there is evidence of a claim made for rent after the time it was claimed that a re-entry had been effected. The re-entry is stated to have taken place at several different times, namely, in March, May or June, 1918, and some time in 1919. In truth, the evidence upon the point of re-entry is so unsatisfactory that credence cannot be given to it. The evidence establishes that a profit of $80,000 was made by the respondents in two years of operation of the demised premises from race-meetings, and the appellant Brighouse thereout received the sum of $35,764. Suckling, one of the directors of the appellant Company, was in Vancouver all the time, and it is significant that as late as 1919 the respondent Brighouse in conversation with Suckling spoke of leasing some of the property and treated Suckling as being one who was interested in the land as a director of the appellant Company. It is true that the appellant Company was then dissolved, but upon the cases dissolution does not

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mean annihilation and there was the right to restoration, which actually took place, as we have seen, on the 29th of September, 1920. I cannot say that I feel at all impressed with the evidence of the respondent Brighouse upon the question of re-entry or the steps taken to cancel the lease to the appellant Company. As late as the year 1919, in conversations with Suckling, he stated that he had received no rent or taxes and that it was still due and running on and increasing, and yet it is claimed that long prior to this a re-entry had occurred. The evidence is so contradictory and inconsistent throughout that no reliance can be placed upon it. If any conclusion can be come to at all about the situation of matters as the respondent Brighouse speaks of it, his idea was that until the cancellation of the lease, under the provisions of the Land Registry Act, the lease to the appellant Company was still outstanding and in effect with rent accruing throughout and up to the time of cancellation. The application for the cancellation of the lease was made on the 11th of March, 1919. Rents and profits were received from the demised land by the respondents and besides the $80,000 of profit made in the years 1920 and 1921, and in addition to this $80,000 other revenue came in from the property by way of rent, notably one Chinaman paid $800 a year rent, and the taxes were only $600 a year, some $3,000 was received from this one Chinaman, the lease being made to him in the spring of 1918 and rent was paid in 1918, 1919, 1920, and 1921. It is to be observed that the lease held by the appellant Company is not under seal and the contention advanced upon the part of the appellant Company is that there was no right of re-entry after the death of the lessor in the devisee, the demised premises being subject to a mortgage (*Matthews* v. *Usher* (1900), 2 Q.B. 535), and it was further contended that the mortgagee only could re-enter and no such election is shewn upon the part of the mortgagee (*In Robbins* v. *Whyte* (1906), 75 L.J., K.B. 38, Warrington, J. at p. 40, 2nd column).

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The cancellation of the lease under the provisions of the Land Registry Act (Cap. 127, Sec. 150, R.S.B.C. 1911) was really a void proceeding. The provisions of the statute did not

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admit of cancellation upon the facts of the present case. There was no person to serve, the appellant Company being then dissolved, and where effectual personal service could not be made the Court will not order substituted service to be made (*Sloman* v. *Government of New Zealand* (1876), 1 C.P.D. 563; *In re Anglo-American Exploration and Development Company* (1898), 1 Ch. 100 at p. 102).

The cancellation of the lease of the appellant Company was a futile proceeding, and, as previously stated, in my opinion, was a void proceeding and cannot be allowed to prevail (*Chapman* v. *Edwards, Clark and Benson* (1911), 16 B.C. 334).

The certificate of indefeasible title obtained by the respondent Brighouse unquestionably protects all acquired interests upon the faith thereof, but it is not permissible to the respondent Brighouse to maintain this title as against the appellant Company. The appellant Company is entitled to a declaration

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that the cancellation of its lease was ineffective, null and void, and is entitled to a declaration of its title and right to the possession of the demised premises, subject only to the lease to the Brighouse Park Limited. There should be a declaration that the respondent Brighouse is the registered owner of the land comprised in the lease subject to the terms and provisions of the lease to the appellant Company and the certificate of title should be delivered up for correction, and all proper rectification of the register in the Land Registry office should be made (with the right to an accounting of all the rents and profits received in respect of the demised premises by the respondent Brighouse (*Howard* v. *Miller* (1915), A.C. 318).

The appeal, therefore, in my opinion, should be allowed.

EBERTS, J.A.

EBERTS, J.A. would dismiss the appeal.

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitors for appellants: *Tiffin & Alexander.*

Solicitors for respondent Brighouse: *Davis & Co.*

Solicitor for respondent Brighouse Park Limited: *T. J. Baillie.*

IN RE GULF SAWMILLS LIMITED.

MCDONALD, J. (At Chambers)

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IN RE GULF SAWMILLS LIMITED

Bankruptcy—Crown's claim for royalties—Lien—Seizure—Trustee's sale of property—Not sufficient realized to pay both Crown and trustee's expenses—Priority of Crown's claim—B.C. Stats. 1912, Cap. 17; 1917, Cap. 36, Sec. 9—Can. Stats. 1919, Cap. 36, Sec. 6.

Where the Crown, having a statutory lien over property for royalties has made a seizure, and the owner later became bankrupt and the trustee sells the property but realizes insufficient to pay both expenses of administration as well as the Crown's claim for royalties, the Crown's claim has priority.

It is the duty of a trustee before taking a trusteeship, to guard against the contingency of being placed in the position of having to bear the expenses of administration himself.

APPLICATION by a trustee in bankruptcy for an order declaring that the receiving order made herein take precedence over any attachment or seizure alleged to have been made or taken as against the property of the debtor by the Crown under the provisions of the Forest Act. Heard by MCDONALD, J. at Chambers in Vancouver on the 11th of November, 1922.

Statement

J. A. MacInnes, for the trustee.
Creagh, for the Crown.

13th November, 1922.

MCDONALD, J.: On the 31st of October, 1921, the Gulf Sawmills being insolvent, a receiving order was made against it and a trustee appointed. Some months prior to this the Crown, exercising the right given by section 60 of the Forest Act as amended in 1917, by chapter 36 of the statutes of that year, had made a seizure of certain machinery and fixtures belonging to the company. The above section provided that:

Judgment

"The Crown shall have a lien for the amount of any royalty or tax payable under this Act . . . . upon all sawmills or other factories . . . . and all furnaces or machinery in or for which any timber or wood upon which a royalty . . . . is reserved or payable . . . . has been or is being manufactured . . . . or which belong to the person or company from whom such royalty or tax is due."

The material seized really consisted of the wreck of a mill which had been burned down. After the trustee had been

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appointed, notice of the Crown's claim was given, but no affidavit of claim was filed, nor has the Crown ever valued its security. Some months after the receiving order was made the trustee succeeded in selling the property which had been so seized, but did not realize enough to pay the expenses of the administration as well as the Crown's claim for royalty, and the trustee now applies for directions, claiming that the costs of the administration ought to be paid in priority to the Crown's claim.

It is argued for the trustee that the lien given by section 60 of the Forest Act is not such a security as is preserved by section 6 of the Bankruptcy Act, it being contended that the securities which are thereby protected consist of securities created by contract, and not those created by statutes. This argument I am unable to follow; and in fact the contrary has been held (*In re Rockland, etc., Co.* (1921), 1 C.B.R. 452).

Judgment

It is further contended that in any event, it would be inequitable that the trustee should have taken all this trouble to realize on these assets of such doubtful value, and should then be compelled to pay the Crown's claim in priority to his own expenses. Here again the law seems to be quite clear as laid down by Orde, J. in *In re Auto Experts Ltd.* (1921), 1 C.B.R. 418 at p. 422, that it is the duty of a trustee before taking a trusteeship, to guard against the contingency of his being placed "in the uncomfortable position of having to bear those expenses himself."

An order will go in accordance with the above findings.

Order accordingly.

CALLOW v. HICK: LIQUOR CONTROL BOARD, GARNISHEE.

MCDONALD, J. (At Chambers)

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Nov. 9.

CALLOW v. HICK

Garnishment—Liquor Control Board—Attachment of moneys owing for salary—Board a corporation — R.S.B.C. 1911, Cap. 14 — B.C. Stats. 1921, Cap. 30.

The Liquor Control Board being created under the Government Liquor Act is by implication created a corporation, and moneys owing by the Board for salary to an employee may be attached under the Attachment of Debts Act.

[Reversed by Court of Appeal].

APPLICATION by the Liquor Control Board to set aside a garnishing order granted by MORRISON, J. to the judgment creditor, in the above action, heard by MCDONALD, J. at Chambers in Victoria on the 8th of November, 1922.

Statement

Carter, D.A.-G., for the application, submitted that the Liquor Control Board was not a person within the meaning of the Attachment of Debts Act; that it was not created a corporation by statute; that it was simply a department of the Government, and as such was not subject to attachment proceedings as the Attachment of Debts Act does not bind the Crown.

P. R. Leighton, contra: Salaries due from the Crown may be attached by way of equitable execution: see *Picton* v. *Cullen* (1900), 2 I.R. 612. A garnishing order is a process of execution against the judgment debtor, not a proceeding against the garnishee (*In re Combined Weighing and Advertising Machine Company* (1889), 43 Ch. D. 99), and section 4 of the Attachment of Debts Act, 1903, which makes garnishment proceedings applicable wherever a receiving order could have been obtained, thereby explicitly authorizes garnishment proceedings against salaries due from the Crown. Alternatively, it is submitted that the Liquor Control Board is created a corporation by implication; that the salaries of its employees are by the statute payable by the Board, not by the Crown, and that although the Liquor Control Board might be the agent of the

Argument

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Crown it can sue and be sued in its corporate capacity without fiat.

9th November, 1922.

McDONALD, J.: Application by the Liquor Control Board, garnishee, to set aside an attachment order by which the salary of one of its employees (a travelling auditor) was attached. The garnishee takes the ground that the Liquor Control Board is not a person within the meaning of the Attachment for Debts Act, R.S.B.C. 1911, Cap. 14, which provides under section 3 for the attachment "of all debts, obligations, and liabilities owing, payable, or accruing due from such third person to the defendant or judgment debtor." The garnishor contends that the Liquor Control Board is by implication created a corporation by sections 92 and 93 of the Government Liquor Act, Cap. 30, B.C. Stats. 1921.

Judgment

If it is a corporation it is, of course, a person: see the Interpretation Act, Sec. 26 (19). With gravest doubts I have come to the conclusion that the Board was by implication created a corporation: see *Ex parte The Newport Marsh Trustees* (1848), 16 Sim. 346; *The Conservators of the River Tone* v. *Ash* (1829), 10 B. & C. 349.

It is further argued for the applicant that the Attachment of Debts Act does not apply to the Crown inasmuch as section 27 of the Interpretation Act provides that—

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

It does not seem to me that the "rights of His Majesty" are in any way affected by the attachment proceedings taken herein.

It follows from the above that the application is refused with costs.

Application refused.

CLAUSEN *ET AL.* v. CANADA TIMBER AND LANDS LIMITED AND NORTON.

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CLAUSEN v. CANADA TIMBER AND LANDS LTD.

Contract—Sale of timber—Clause prohibiting assignment of interest without seller's consent—Purchaser's interest vested in receiver of partnership—Seller's notice to cancel contract—Form of—Repudiation—Acceptance by purchasers—Damages—R.S.B.C. 1911, Cap. 175, Sec. 41.

A contract for the sale of timber included a clause prohibiting the purchasers from disposing of their interest under the contract without the seller's consent, and if they did so it further provided for cancellation by the seller upon notice. The purchasers were working under a partnership agreement but the partnership later dissolved and a receiver appointed who took over the partnership assets. The sellers then gave notice of intention to cancel the contract at the expiration of 20 days because of default which the notice alleged consisted in the dissolution of the partnership and the transfer to the receiver of the purchaser's interest under the contract. The purchasers denied a partnership in relation to the purchase of the timber and the vesting of their interests in the receiver, and accepting the notice as a repudiation of the contract by the sellers, brought action for damages for breach of contract. The sellers by their pleadings withdrew the notice of cancellation without admitting that they were not entitled to insist on the notice and alleged failure of performance and abandonment on the part of the purchasers and counterclaimed for a declaration that they were no longer bound by the contract. The plaintiffs obtained judgment on the trial.

Held, on appeal, reversing the decision of MURPHY, J. (MARTIN, J.A. dissenting), that the property was a partnership property, the notice was a repudiation of the contract by the sellers but they were entitled to give the notice and the fact that it was afterwards withdrawn does not affect the plaintiff's case, which should be dismissed.

Per MCPHILLIPS, J.A.: The notice was in pursuance of the terms of the contract and was not a repudiation. It was a notification that if there was a continuance of default for twenty days after notice the intention was to cancel. The purchasers continuing in default cannot achieve a right of action built upon their own default. Their duty after notice was to proceed to carry out the terms of the contract. Moreover it was reasonable for the sellers to treat the contract as abandoned and as being no longer binding upon them. There was a complete breakdown and apparent inability of the purchasers to carry on the logging operations and perform their part of the contract.

Statement

APPEAL by defendant Company from the decision of MURPHY, J. of the 29th of May, 1922 (reported *ante* p. 174),

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in an action for damages for breach of contract. The facts are that on the 12th of May, 1921, the seven plaintiffs and the defendant Norton entered into a partnership agreement for the purpose of logging a timber area owned by the defendant Company, and on the 15th of June, 1921, they entered into a written contract with the Company for the sale of the timber on the properties in question. The plaintiffs and Norton carried on logging operations on the property from the 15th of May, 1921, until some time in December, 1921, when they ceased operations on account of disputes which resulted in an action being brought for dissolution of the partnership and for a receiver. On the 25th of January, 1922, an *interim* receiver was appointed and on the 27th of February, 1922, the said partnership was declared dissolved. On the 20th of February, 1922, the defendant wrote the receiver as to the dissolution, in which it stated that the proceedings amounted to an abandonment of the contract of the 15th of June, 1921, and negotiations then went on between the two factions separately and the defendant Company for a similar contract to that of the 15th of June, 1921. On the 13th of March the defendant Company gave notice that in 27 days they would cancel the agreement as there was default owing to assignment of the assets, they being vested in the receiver. In answer to this the plaintiffs' solicitors wrote a letter stating the notice was accepted as a repudiation of the contract, and they then brought this action for damages. The trial judge found in favour of the plaintiffs.

Statement

The appeal was argued at Victoria on the 20th of June, 1922, before MACDONALD, C.J.A., MARTIN, MCPHILLIPS and EBERTS, JJ.A.

Davis, K.C., for appellant: The notice given by the defendant's solicitors on the 13th of March, 1922, was not a repudiation of the contract. As to what amounts to repudiation see *Hochster* v. *De La Tour* (1853), 2 El. & Bl. 678 at p. 688; *Mersey Steel and Iron Co.* v. *Naylor* (1884), 53 L.J., Q.B. 497. The appointment of a receiver is not an assignment within the agreement, and within the 20 days we withdrew the notice: see *Moore* v. *Ullcoats Mining Co.* (1907), 77 L.J., Ch. 282 at

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p. 288; *Doe d. Murrell* v. *Milward* (1838), 3 M. & W. 328. Repudiation is a question of intention: see *Cornwall* v. *Henson* (1900), 2 Ch. 298 at p. 303; *Lee Dye & Lee Kow* v. *Eliot* (1920), 29 B.C. 103 at p. 118. The property acquired is the substratum of the partnership: see *Dale* v. *Hamilton* (1846), 16 L.J., Ch. 126 at p. 132. The logging area was got by the partnership. That the receiver cannot assign without leave see *Cohen* v. *Popular Restaurants, Limited* (1917), 1 K.B. 480.

Mayers, for respondent: It is immaterial whether they are partners or not. It has nothing to do with the defendant Company as long as the terms binding on the plaintiffs are fulfilled: see *McClean* v. *Kennard* (1874), 9 Chy. App. 336; *Butchart* v. *Dresser* (1853), 10 Hare 453; 4 De G. M. & G. 542 at p. 544; *French* v. *Styring* (1857), 2 C.B. (N.S.) 357; *Helme* v. *Smith* (1831), 7 Bing. 709; *Green* v. *Briggs* (1847), 6 Hare 395; *Lyon* v. *Knowles* (1863), 3 B. & S. 556; *Steward* v. *Blakeway* (1868), L.R. 6 Eq. 479; (1869), 4 Chy. App. 603. As to notice and what language amounts to repudiation see *Hochster* v. *De La Tour* (1853), 2 El. & Bl. 678; *Frost* v. *Knight* (1872), L.R. 7 Ex. 111; *Varrelmann* v. *Phœnix* (1894), 3 B.C. 135; *Brown* v. *Muller* (1872), L.R. 7 Ex. 319; *Danube & Black Sea Railway &c., Co.* v. *Xenos* (1863), 13 C.B. (N.S.) 824; *Roper* v. *Johnson* (1873), L.R. 8 C. P. 167; *Payzu, Ld.* v. *Saunders* (1919), 2 K.B. 581; *Taylor* v. *Oakes, Roncoroni and Co.* (1922), 38 T.L.R. 349. As to damages we should be in the same position as if the contract had been performed: see *Wertheim* v. *Chicoutimi Pulp Company* (1911), A.C. 301 at p. 307; *Watts, Watts and Company, Limited* v. *Mitsui and Company, Limited* (1917), A.C. 227 at p. 241; *Urquhart Lindsay & Co.* v. *Eastern Bank, Ld.* (1922), 1 K.B. 318 at p. 325. The evidence is here and the judge should have determined the amount.

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Davis, in reply: As to a declaratory judgment see *Guaranty Trust Company of New York* v. *Hannay & Company* (1915), 2 K.B. 536. The question of notice of default being a repudiation is dealt with in *Lee Dye & Lee Kow* v. *Eliot* (1920), 29 B.C. 103 at p. 118. The difference is that in this case we did not repudiate. We could waive default any time before the

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expiration of 27 days. As to the difference between co-owner and partner see Halsbury's Laws of England, Vol. 22, par. 7, p. 6.

Cur. adv. vult.

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MACDONALD, C.J.A.: The action is one for damages for alleged breach of a contract entered into by the plaintiffs and the defendant Norton of the one part, and the defendant Company of the other part. The contract is one for the purchase of timber on terms set out in the agreement. It contains a term in effect prohibiting the purchasers or any of them, from parting with their or his interest under the contract without the consent of the defendant Company. Should a transfer take place without consent, the Company was by the agreement entitled to cancel the contract upon notice as therein specified. Several months after the making of the contract the defendant Company gave such notice of cancellation, based upon the ground that the purchasers, whom the defendants allege were partners, had caused their partnership to be dissolved and a receiver to be appointed of the partnership assets, which included the contract in question or the assets acquired under it.

The action for dissolution of the partnership was brought by the plaintiffs against the defendant Norton, so that if the defendant Company is right in claiming that there was a transfer of interest to the receiver, that transfer was brought about by the plaintiffs. The agreement to purchase above referred to does not purport on its face to be made with the purchasers as partners. It was signed by the plaintiffs and defendant Norton on the 12th of May, 1921; it bears date the 15th of June of the same year, but this is accounted for by the circumstances that the agreement had to be sent to Toronto for execution by the Company, and it bears the date of the Company's signature to it. The evidence shews that the purchase was negotiated some days before the 12th of May. On the 12th of May the plaintiffs and defendant Norton signed partnership articles, thus forming a partnership, styled "The Toba River Logging Company." Thereupon the purchasers took possession of the timber lands and commenced

their operations. The contention of the plaintiffs is that they did not purchase for or on behalf of their partnership, but were independent contractors.

As the learned judge has said in his judgment, there was nothing to prevent these eight purchasers from employing the partnership, of which they were the sole members, to carry out their purchase agreement, and if they had done so the Toba River Logging Company would have been the mere agents of the purchasers to log off the lands for them. If this were the case the dissolution of the partnership would in no way affect their *status* under the purchase contract. Such a state of affairs might have been created by the parties, but there is no evidence that that was what actually occurred.

The plaintiff Clausen, who was the principal man of business of his party, frequently speaks of the partnership in terms which, I think, imports that it was the partnership which had purchased the logs and were conducting the logging operations. There is no evidence of more than one partnership, and I think his evidence is inconsistent with the present claim of the plaintiffs, that the eight men were not partners in the purchase of the logs. If, technically, the purchase was by the eight men as individuals and not by the Toba River Logging Company, composed of these eight men in partnership, then the inference to be drawn from the evidence of Clausen, and in fact from all the evidence in the case, is that there was in effect and in fact an equitable assignment of the purchase agreement to the partnership, and that the partners were operating it entirely for the benefit of the partnership, and not upon an agency, but I am of the opinion that from the beginning the contract, though not so in terms, was partnership property. This inference is to be drawn from the fact that there is not a word in the evidence consistent with any other hypothesis. When the plaintiffs and Norton disagreed in January, 1922, it was proposed by the plaintiffs to incorporate a joint-stock company to take over the contract and complete it. At that time, according to the evidence of Clausen, the partnership, as he calls it, having cut 5,500,000 feet of the logs, there is no suggestion that these logs were not the logs of the partnership

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of which he speaks, which could only be the Toba River Logging Company or the eight partners under a separate unwritten partnership, but, as I say, there is no suggestion of any second partnership, and the only partnership to which the witness could refer was the one created by the articles.

The proposal which the plaintiffs made to the defendant Company is set forth in a letter written by their solicitors to the solicitors of the defendant Company. The plaintiffs' solicitors say in that letter:

"The Company [the new joint-stock Company] will purchase from the receiver of the Toba River Logging Company, all the logs now felled and bucked and the logs now in the river in the boom at Toba River, and all other assets of the partnership, including whatever rights the partnership may have under the old contract."

That apparently was the understanding of the plaintiffs who were the incorporators, with two others, of the new company. Whether technically that letter was written on behalf of the new company or on behalf of the plaintiffs, I think, makes very little difference. The fact is that the plaintiffs recognized at that time that the logs cut under the contract did in fact belong to the Toba River Logging Company, and that the receiver was entitled to them. In other words, by some means which are not explained, and which are only to be inferred from the evidence, an interest in the purchase contract had passed to the partnership known as The Toba River Logging Company, and by the act of the plaintiffs in putting the Court in motion, the right to receive these logs was recognized by the plaintiffs themselves as being in the receiver. Mr. *Cosgrove,* the plaintiffs' solicitor in these transactions, giving evidence at the trial, of an interview with Mr. *Burns,* solicitor for the defendant Company, said:

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"So we discussed at that time how the contract was to be turned over and I suggested that it should be sold by the receiver."

It is quite true that the defendant Company have by their pleadings withdrawn the notice of cancellation, but there is no admission that they were not entitled to insist upon the notice. If, as a matter of fact, anything had happened which entitled the defendant Company to serve the notice, then clearly the Company could not be charged with repudiation by serving it, and the withdrawal afterwards of the notice could not assist

the plaintiffs in an action for breach of contract. It was strongly urged by counsel for the defendant Company that in any case the notice did not amount to a repudiation but only the expression of an intention to put an end to the contract at the expiration of the time therein mentioned. I, however, think that the notice amounts to a declaration of the intention of the defendant Company not to perform the agreement. The Company in effect said:

"At the end of twenty days, we shall treat this contract as at an end."

That was a declaration that the defendants would not longer be bound by the contract. Moreover, it was not withdrawn until after the expiry of the time named in it. The answer, it seems to me, to the plaintiffs' action is, that the defendant Company was entitled to give the notice and it does not help the plaintiffs now to say that it was afterwards withdrawn.

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There was also an issue raised of collusion between the defendant Company and Norton, but as I read the evidence, it was not established and has nothing to do with the question in issue.

I think the appeal should be allowed.

MARTIN, J.A.: In my opinion the learned judge has reached the right conclusion, and I only add to his reasons that even if the contract should be regarded as a partnership undertaking between the eight adventurers, still that is not a matter which concerns the defendant Company, because in addition to other considerations each of the eight is, under clause 26 of the contract with the defendant Company, severally as well as jointly liable and might alone, or conjointly with one or more of his co-adventurers, have carried out all the terms thereof had not the defendant repudiated it, and the legal proceedings resulting in a receivership would have been no bar, because if the interest in the uncut timber be regarded as a partnership one there is nothing to prevent the receiver from, *e.g.*, selling that interest to such of the adventurers as might wish to carry out the contract, or otherwise co-operating with them by leave of the Court; until there was a breach the defendant could not complain or precipitate matters, as it unfortunately undertook to do.

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As to the assessment of damages: I am of opinion that, with

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all due respect, the learned trial judge should have acceded to the request of the plaintiffs' counsel and continued the trial so as to assess them in the ordinary way, without putting the parties to the unnecessary delay and expense of a reference to the registrar, a course of procedure which has become too common of late and is an expensive innovation which ought to be discouraged. The plaintiff was ready with his witnesses to prove his damages in the usual manner, but the defendant's counsel wrongly objected to that proper course being adopted, and therefore I think the case should be remitted to the Court below to continue the trial and assess the damages.

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MCPHILLIPS, J.A.: This appeal has relation to a contract whereby the appellant agreed to sell and the respondents agreed to purchase the logs to be cut by the respondents upon a very large area of Crown timber lands held by the appellant—a most valuable tract of timber lands—and it is clear that the contract was one calling for expedition in the logging operations, possession being given to the respondents, the agreement being that the logging operations should be carried on continuously, subject to any excessive snow conditions, and the respondents were to put in the river or on the river bank at least five million feet, board measure, of logs during the year 1921, and at least fifteen million feet during each successive year until the whole of the moneys constituting the purchase price should be paid, with a provision for cessation of logging operations when the market price of logs fell below the sum of $12 per thousand feet, board measure. Certain logging plant of the appellant was turned over to the respondents to be used in the operations. As is usual in all commercial contracts, it was stipulated that time should be of the essence of the contract. The provision governing in case of default reads as follows:

"21. If default shall be made on the part of the purchasers in any of the terms, provisions, conditions, or stipulations of this agreement, and if such default shall continue for 20 days after notice shall be given to the purchasers by or on behalf of the vendor of its intention to cancel this agreement, then at the expiration of such 20 days this agreement shall be void and of no effect and the vendor shall be at liberty to re-enter the said lands and premises or any part thereof in the name of the whole and shall retain all sums of money paid to the vendor by the purchasers under the terms of this agreement as and by way of liquidated damages

for breach of this agreement and not as a penalty, and thereupon and upon such re-entry the purchasers shall deliver up the possession of the said lands and premises and all thereof and the said logging plant and equipment to the vendor, and the purchasers shall have no claim against the vendor whatsoever for or by reason of such cancellation or retainer of said moneys. The procedure provided in this paragraph for the cancellation of the rights of the purchasers under this agreement shall be concurrent with and in addition and without prejudice to and not in lieu of or substitution for any other right or remedy at law or in equity which the vendor may have for the enforcement of its rights under this agreement or its remedies for any default of the purchasers in the conditions herein."

Now the respondents, previous to entering into the contract for the purchase and cribbing of the logs, entered into a partnership, the articles of partnership being entered into on the 12th of May, 1921, and the contract was entered into later, namely, on the 15th of June, 1921, and it is to be noted that the partnership name adopted was "Toba River Logging Company," and the timber limits, to which the contract has reference, were in the vicinity of Toba River, and the business of the partnership was that of general loggers, and it is clear that the contract was treated as partnership property and a contract which enured to the advantage of the partnership. In truth, it was a contract of the partnership, although not executed in the partnership's name, and later, as we shall see, was treated as a partnership asset. The timber limits carry a very heavy stand of timber, approximately 150 million feet, board measure, and it would take some five or ten years to wholly log off the timber. The contract, in its obligations upon the respondents, was both joint and several. The respondents, immediately after the execution of the contract, took possession of the limits and the logging plant and commenced operations, the work being prosecuted until the month of December, about six months of work being carried on. Then dissensions amongst the respondents took place, and the respondents, save as to one of their number, came down to Vancouver later, resulting in seven of the eight members of the partnership (the members of the partnership and the purchasers under the contract being the same) bringing an action for the dissolution of the partnership and a receiver was appointed and provision made for the sale of the partnership assets. The situation appearing to be hope-

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less and long delay having ensued, with cessation of logging operations, it was reasonable for the appellant to treat the contract as abandoned or that the situation was such that the appellant could not reasonably be further held on its part to the terms of the contract, and on the 13th of March, the appellant gave the following notice to the respondents:

"Take notice that default on the part of the purchasers under that agreement dated the 15th day of June, 1921, and made between Canada Timber & Lands Limited as vendor and J. C. Clausen, W. T. Norton, R. Buttorff, P. D. Cain, A. Brossman, W. J. Blundell, Charles Clausen and Andrew Clausen, as purchasers, has been made in respect of the condition or stipulation contained in paragraph No. 25 of the said agreement to the effect that no purchaser shall be entitled to assign the said agreement nor any part thereof nor his interest therein except upon the written consent of the vendor previously obtained, such default consisting in the dissolution of the partnership of the purchasers and the vesting of the assets of the partnership in the receiver thereof.

"And take notice that the vendor intends to cancel the said agreement, as well as the second agreement made the said 15th day of June, 1921, by reason of such default at the expiration of twenty days after seven days from the mailing of this notice, in accordance with paragraphs 21 and 23 of the said agreement.

"And take notice that this notice is given without prejudice to the position taken by the vendor under said agreement that the said agreement has been determined and abandoned by the purchasers by reason of such dissolution and appointment of receiver."

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This notice was followed by a letter from the solicitors for the plaintiffs under date the 17th of March, 1922, in the words and figures following:

"Mr. J. C. Clausen and his associates in the Toba River Logging Company have handed to us your letter containing the 20-day notice of cancellation of the contracts between the Canada Timber & Lands Limited of the one part and J. C. Clausen and others of the other part dated the 15th day of June, 1921.

"On behalf of the said Julius C. Clausen, Rex Buttorff, Charles Clausen, Andrew Clausen, Alexander Brossman, Philip Cain and William John Blundell, we beg to advise you that we deny absolutely that any assignment or vesting of interest has occurred as alleged in the said notice or any abandonment as suggested in the said notice. We consider the said notice as unjustified and without any foundation in fact.

"The notice clearly evinces the determination of the Canada Timber & Lands Limited not to be bound by the terms of the said contracts and we are instructed by the above-mentioned parties to accept the said notice as a complete repudiation by the said Canada Timber & Lands Limited of the said contracts dated the 15th of June last. You will please therefore regard this letter as an acceptance by the above-named parties Julius C. Clausen, etc., of the said notice as a repudiation of the said contracts.

The said parties will forthwith proceed to enforce their rights under the said contracts."

It is evident that the respondents eagerly adopted the course of treating the notice of the solicitors for the appellant as amounting to an unjustifiable repudiation of the contract. It is to be observed that the notice given was given by and in behalf of the appellant in the way of implementing the special terms of the contract, and was procedure permissible to the appellant under the provisions of the contract, namely, paragraphs 21 and 23 thereof. The learned trial judge treated the notice as constituting repudiation and that the action was well founded, and that the respondents were entitled to damages for the wrongful breach thereof. The appellant, in its pleadings, withdrew the notice as given and relied upon the contention that the facts and circumstances demonstrated that in effect there had been abandonment of the contract and that the appellant was entitled to contend that it should no longer be held to the terms thereof. In any case the notice, as previously stated, was in pursuance of the terms of the contract, and it was not in its nature a repudiation—it was a notification that if there was a continuance of default for 20 days after notice the intention was to cancel; that is, there would be cancellation only in case of continuance of default and the respondents cannot achieve a right of action and damages built upon their own default. It cannot be said that the notice given on behalf of the appellant was an absolute and unequivocal intention of renouncing and repudiating the contract, and it was not in such terms as entitled the respondents to accept the same as renunciation of the contract upon the part of the appellant, the course the respondents wrongfully pursued. The respondents' duty and obligation, following the notice, was not continuance of default but to proceed to carry out the terms of the contract and proceed with expedition in accordance with the declared terms of the contract, time being of the essence of the contract (*Jones* v. *Gibbons* (1853), 22 L.J., Ex. 347; *Mersey Steel and Iron Co.* v. *Naylor* (1884), 53 L.J., Q.B. 497 at pp. 499, 501; *Cornwall* v. *Henson* (1900), 69 L.J., Ch. 581; *Borrowman* v. *Free* (1878), 48 L.J., Q.B. 65; *Johnstone* v. *Milling* (1886), 55 L.J., Q.B. 162 at p. 167).

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I had occasion to consider the question that arises in this case in *Meadow Creek Lumber Co.* v. *Adolph Lumber Co.* (1918), [25 B.C. 298]; 2 W.W.R. 466, my judgment then being a dissenting judgment, but later the majority opinion of this Court was reversed by the Supreme Court of Canada—(1919), 58 S.C.R. 306. I adhere to the view then expressed and consider the reasoning applicable to the present case.

Here there was default and a complete breakdown and apparent inability to carry on the logging operations or comply at all with the terms of the contract, and it is not to be wondered at that the respondents seized upon the opportunity, as they thought, of accepting what they were pleased to treat as a repudiation of the contract upon the part of the appellant, and out of the debacle the respondents appear as the injured parties, with a claim of damages against the appellant, estimated generally at one million dollars, and this contention has been given effect to by the learned trial judge, a view with which, with great respect to the learned trial judge, I cannot agree. In the *Meadow Creek Lumber Co.* case (58 S.C.R. 306) Mr. Justice Anglin at p. 308, said:

> "I would allow this appeal and restore the judgment of the learned trial judge substantially for the reasons assigned by him and by McPHILLIPS, J.A. I incline to think that, having regard to the circumstances known to both parties necessitating punctuality in deliveries, there was such substantial default by the plaintiff as entitled the defendant to cancel the contract between them."

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In *Lee Dye & Lee Kow* v. *Eliot* (1920), 29 B.C. 103, I also had to consider the question of whether there was "wrongful repudiation" at p. 118.

Similarly in the present case there was no "wrongful repudiation"—it was merely the notification of intention to insist upon the terms of the contract, and it was for the respondents to come forward and carry out the contract. They did nothing of the kind, and did not even ask for any extension of time or express the intention of complying with the terms of the contract, but elected to treat this justifiable notice as a "wrongful repudiation" of the contract, a perfectly untenable position in my opinion. Here, at the most, there was only notice of intention at the expiration of 20 days to cancel, and that was following the terms of the contract, and how could it be said to constitute

repudiation? The curative power resided in the respondents. All that they needed to do was to carry out the contract and there could be no cancellation, but there was no intention upon the part of the respondents to carry out the contract. In truth, there was absolute inability upon their part to carry out the contract, but notwithstanding that that was the position, the respondents rush in and treat the notice as a repudiation of the contract upon the part of the appellant, and the contention is that the appellant was thereby guilty of a breach of contract, and that contention has been given effect to by the judgment under appeal. In *Moore* v. *Ullcoats Mining Co.* (1907), 77 L.J., Ch. 282, Mr. Justice Warrington is dealing with the wording of a condition in a lease, and at p. 288 said:

"I do not see how it is possible, on any construction of this proviso for re-entry, to say that the lessor has re-entered, when all that he has done is to give a notice of his intention to re-enter, founded on a statement that the lease has determined, which had not in fact happened, or a demand for possession founded on that notice."

I would, in the way of analogy, refer to what Parke, B. said in *Doe d. Murrell* v. *Milward* (1838), 3 M. & W. 328 at p. 332:

"I am very strongly of opinion that there cannot be a surrender to take place *in futuro*. In *Johnstone* v. *Huddlestone* [(1825), 4 B. & C. 922], it was held that an insufficient notice to quit, accepted by the landlord, did not amount to a surrender by operation of law, and it was there agreed that there could not be a surrender to operate *in futuro*. The case of *Aldenburg* v. *Peaple* [(1833), 6 C. & P. 212] was much shaken by the decision of this Court in *Weddall* v. *Capes* [(1836), 1 M. & W. 50]; for, although this precise point is not there determined, yet it is clear that the Court were of opinion that the instrument could not operate as a surrender *in futuro*."

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It cannot be reasonably said that the appellant in giving the notice in pursuance of the terms of the contract was repudiating the contract, and that such action gave to the respondents a right of action. In this connection I would refer to what Rigby, L.J., said at pp. 584-5, in *Cornwall* v. *Henson, supra.*

In the present case, unquestionably, the appellant never had any intention of repudiating the contract, but it is apparent that the respondents were only too willing to seize upon the notice as amounting to a repudiation, and the learned trial judge has so found, which, with great respect, in my opinion, is an unsound conclusion.

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The notice given was not in its nature, upon a fair reading, a flat repudiation, it was given in pursuance of the contract, and the respondents were not entitled to treat it as a renunciation of the contract. Their duty was plain after the receipt of the notice—that was, to proceed with expedition and carry on the logging operations. The failure to carry on the operations amounted to an abandonment, and upon all the facts and circumstances the appellant was entitled to consider the contract at an end and the appellant was no longer under any obligation in respect thereto. There had been no sufficient performance and all was chaos, and no attempt was made upon the part of the respondents to perform the contract in accordance with its terms and spirit, a contract calling for continuance of operations, time being of the essence thereof, and with reason this term was imposed, as otherwise a very valuable and very large tract of timber lands would remain unprofitable to the appellant. In *Jones* v. *Barkley* (1781), 2 Dougl. 684 at p. 694, Lord Mansfield said:

> "The question is, whether there was a sufficient performance. Take it on the reason of the thing. The party must shew he was ready; but, if the other stops him on the ground of an intention not to perform his part, it is not necessary for the first to go farther, and do a nugatory act."

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Now, can it be reasonably said in the present case that there was readiness to perform the contract upon the part of the respondents? On the contrary, there was complete collapse, a throwing up of hands, a state of paralysis. The notice given did not amount to an intimation upon the part of the appellant that it did not intend to perform the contract. In Leake on Contracts, 7th Ed., p. 655, we find this stated:

> "The notice for this purpose must express an absolute and unequivocal intention of renouncing and repudiating the contract. A mistaken construction of the contract or an imperfect tender which may be amended in time or an expression of present disability to perform it, is not sufficient."

(*Jones* v. *Gibbons* (1853), 22 L.J., Ex. 347; *Mersey Steel and Iron Co.* v. *Naylor* (1884), 53 L.J., Q.B. 497; 9 App. Cas. 434; *Cornwall* v. *Henson* (1900), 69 L.J., Ch. 581; *Borrowman* v. *Free* (1878), 48 L.J., Q.B. 65; *Johnstone* v. *Milling* (1886), 55 L.J., Q.B. 162 at p. 167).

The notice really in its nature was a notice to the respondents of default upon their part, and the respondents were not

at liberty to treat it as they did, *i.e.*, as a notice of repudiation or cancellation upon the part of the appellant. Unquestionably the contract was a partnership asset. The subsequent conduct of the respondents, the dissolution and action of the receiver in dealing with the contract as an asset of the partnership accentuates this, and all the facts and surrounding circumstances bear this out. In *Dale* v. *Hamilton* (1846), 16 L.J., Ch. 126 at p. 132, Wigram, V.C. said:

"In that case of *Lake* v. *Craddock* [(1729), 3 P. Wms. 158], the Master of the Rolls said, 'Supposing one of the partners had laid out the whole money and had happened to die first, according to the contrary construction, he must have lost all, which would have been most unjust.' Lord Eldon commenting on this case, in 9 Ves., p. 597, said 'the purchase of the land was made to the intent that they might become partners in the improvement; that it was only the substratum for an adventure, in the profits of which it was previously intended they should be concerned.'"

If it could be interpreted that the notice was a repudiation of the contract upon the part of the appellant for no sufficient reason, *i.e.*, that at the time there was no real default (although I am of the contrary opinion), I would refer to what Greer, J., said in *Taylor* v. *Oakes, Roncoroni and Co.* (1922), 38 T.L.R. 349 at p. 351:

"I have considered it desirable to make these observations about *Braithwaite's* case [(1905), 21 T.L.R. 413; 2 K.B. 43] because I know that in actual practice it is frequently misunderstood, and sometimes supposed to be inconsistent with the rule of law to which I have referred, that a man who puts forward a bad reason for refusing to perform his contract is not liable in damages if there exist in fact sufficient grounds which in law justify his refusal. In my opinion the decision is not inconsistent with that rule."

MCPHILLIPS, J.A.

In the present case, in view of all the facts and circumstances, there were undoubtedly "sufficient grounds which in law" justified the appellant in treating the contract as abandoned. Further, upon the facts, the appellant was justified in treating the contract as being no longer binding upon it.

The notice, as I have more than once stated, in my opinion, did not amount to a repudiation nor renunciation of the contract, and the case is not covered by *Hochster* v. *De La Tour* (1853), 2 El. & Bl. 678; also see *Avery* v. *Bowden* (1855), 5 El. & Bl. 714 at p. 722, and at pp. 727-8, Lord Campbell, C.J. said:

"Was there any evidence that, on or before the 1st of April, a cause of action had accrued to the plaintiff for breach of the charter-party? We

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think not. According to our decision in *Hochster* v. *De La Tour*, 2 El. & Bl. 678 (E.C.L.R. vol. 75), to which we adhere, if the defendant, within the running days and before the declaration of war, had positively informed the captain of The Lebanon that no cargo had been provided or would be provided for him at Odessa, and that there was no use in his remaining there any longer, the captain might have treated this as a breach and renunciation of the contract; and thereupon, sailing away from Odessa, he might have loaded a cargo at a friendly port from another person; whereupon the plaintiff would have had a right to maintain an action on the charter-party to recover damages equal to the loss he had sustained from the breach of the contract on the part of the defendant. The language used by the defendant's agent before the declaration of war can hardly be considered as amounting to a renunciation of the contract; but, if it had been much stronger, we conceive that it could not be considered as constituting a cause of action after the captain still continued to insist upon having a cargo in fulfilment of the charter-party."

Now, as previously pointed out, the notice was not one of repudiation nor renunciation as I view it, and the language of Lord Campbell above quoted is exceedingly apposite in the consideration of the present case, and in *Avery* v. *Bowden* (1856), 6 El. & Bl. 953, Cresswell, J., at p. 975, said:

"I observe that Lord Campbell relies on a double ground: he thinks the language can hardly amount to a renunciation of the contract by the defendant's agent; but he also adds that, if it were much stronger, it would not constitute a cause of action when the master continued to insist upon having a cargo."

MCPHILLIPS, J.A.

Here, of course, we have the respondents treating the notice as a repudiation and renunciation of the contract, but in that they were wrong in my opinion, as the notice did not amount to a renunciation of the contract, but was given in pursuance of its terms, and it rested with the respondents to comply with the contract. They did not do this. The breach of contract has been on their part and the appellant, in my opinion, is entitled to have it declared that it is freed from any obligation in respect of the contract.

The notice which the appellant gave admitted of the respondents' recommencing the logging operations within the time stipulated, which was a time fixed in the contract, and if they had done so or any one or more of them had done so, the appellant could not have objected; in fact, everything points to the anxiety only upon the part of the appellant to have the contract performed and a desire to live up to its terms.

In my opinion, the case is one which admits of there being

a declaratory judgment that the appellant is no longer bound by the terms of the contract, *i.e.*, that the counterclaim should be allowed and the action dismissed (see *Guaranty Trust Company of New York* v. *Hannay & Company* (1915), 2 K.B. 536).

I would, therefore, allow the appeal.

EBERTS, J.A. would allow the appeal.

Appeal allowed, Martin, J.A. dissenting.

Solicitors for appellants: *Burns & Walkem.*
Solicitors for respondents: *Phipps & Cosgrove.*

REX *EX REL.* MILLER v. READER.
REX *EX REL.* MILLER v. THOMPSON.

Criminal law—Sale of liquor—Conviction—Quashed in County Court—Appeal by Crown—Notice of appeal—Personal service not effected—Service on solicitor acting below—Insufficient—B.C. Stats. 1915, Cap. 59, Secs. 14 and 76 (b); 1918, Cap. 87, Sec. 3.

Section 76(*b*) of the Summary Convictions Act as amended in 1918 requires that notice of appeal be served upon a respondent within a certain time after conviction and the Rules of Court also provide for service upon all parties affected. Where the accused (respondent) has left the jurisdiction and personal service cannot after every reasonable effort has been made, be effected upon him or any person representing him the Court has no jurisdiction to try the appeal (MARTIN and MCPHILLIPS, JJ.A. dissenting).

Service upon the solicitor who acted for the accused in the Court below is ineffectual where it does not appear that at the time of such service he was acting for the accused.

APPEALS from the decision of BROWN, Co. J., of the 6th of May, 1922, quashing convictions of the accused on the charges that they sold intoxicating liquor. The convictions were quashed, on the ground that the warrants upon which the

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respondents were arrested were illegal as the informations upon which they were issued did not comply with the Summary Convictions Act. On the appeals it appeared that the Crown was unable to effect personal service of notice of appeal on either of the accused as they had both left the Province, having gone to the United States before service could be effected upon them.

The appeal was argued at Victoria on the 29th of June, 1922, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Carter, for appellant.

The accused were not represented.

Cur. adv. vult.

3rd October, 1922.

MACDONALD, C.J.A.

MACDONALD, C.J.A. would dismiss the appeals.

MARTIN, J.A.

MARTIN, J.A.: These appeals are governed by our decision in *Rex* v. *Johnson* (delivered on June 29th last) unless we have no jurisdiction to entertain them because of the notice of appeal not having been served upon the respective respondents "within ten days after the conviction" as required by section 76 (*b*) of the Summary Convictions Act, B.C. Stats. 1915, Cap. 59, as amended by section 3, Cap. 87, 1918. It appears from the affidavits filed that everything that was reasonably possible to be done was in fact done to effect said service, but it was impossible to effect it because the respondents had left this country immediately after their acquittal and gone to parts unknown in the United States. Service was made within due time upon the solicitor who had acted for them at their trial, but we are informed that he said he had no authority to continue to do so, and as there was nothing to be done in the working out of the judgment (conviction) the service upon him was unauthorized and wholly ineffectual upon the principle we recently laid down in *Sunder Singh* v. *McRae* [(1922), *ante* p. 67]. We have been referred to the case of *Wills & Sons* v. *McSherry* (1912), 82 L.J., K.B. 71; (1913) 1 K.B. 20, in support of the submission that it in principle covers the facts at bar and after a careful examination of it, I am of opinion it does so, and hence we have jurisdiction

herein. There are additional facts, it is true, in the *Wills* case which are absent from these and there has been an unfortunate conflict of authority in the English cases, but from the *Wills* case there is to be extracted from the judgment of each of the three judges who sat on it, the clear opinion, stripped of extraneous circumstances, that where the appellant had done everything in his power to serve the respondent, and it was shewn that it was impossible to do so, then that "is a valid excuse for not complying with the section," as Lord Alverstone, C.J. puts it at p. 23, and the other judges concurred, which concurrence involved the overruling of *Foss* v. *Best* (1906), 2 K.B. 105; 75 L.J., K.B. 575, to which Channell, J. had been a party, and he stated the principle in question thus at p. 26:

"The question is whether the statute has been sufficiently complied with if the party has done everything in his power to effect service and it is clearly impossible for him to do so. There are authorities which support both views, but as my Lord has discussed them so fully I need not do so again."

MARTIN, J.A.

I have considered the case of *Godman* v. *Crofton* (1914), 3 K.B. 803; 83 L.J., K.B. 1524, which is not in point and the question did not arise therein, because as Mr. Justice Atkin says, p. 812:

"In the present case it is clear that the solicitors had in fact authority to accept this notice. That being so, it is unnecessary to go further and shew that the notice actually came to the mind of the client."

It follows that the appeal from the order of the learned County judge should be allowed and the conviction restored.

GALLIHER, J.A.: On the 24th of February, 1922, the accused Pete Thompson was convicted of selling liquor and sentenced to six months in the common gaol at Nelson by Neil McCallum, stipendiary magistrate for Yale County.

GALLIHER, J.A.

On motion by way of appeal to the County Court judge of Yale, the conviction was on the 3rd of May, 1922, quashed. From this judgment the Crown appeals to this Court. Counsel for the Crown (no one appearing for the respondent) stated that he had been unable to effect personal service of the notice of appeal upon the accused, he having left the Province and gone to the United States, and that failing to make such service, after every effort to do so, he had caused a copy of the notice

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of appeal to be served on C. F. R. Pincott, who had appeared as solicitor for the accused on the appeal to the County Court. This is confirmed by an affidavit of service which appears in the appeal book.

There is no evidence or suggestion that Mr. *Pincott* was at the time of service acting in any capacity for the accused, and the inference is all the other way as the accused had left the country.

The question to be determined is: Is such service sufficient to give this Court jurisdiction to hear the appeal? In my opinion it is not. Our rules provide that notice of appeal shall be served on all parties affected by the appeal. Here there was no service upon the accused nor upon any person representing him.

GALLIHER, J.A.

The most recent case I have been able to find is *Godman* v. *Crofton* (1914), 83 L.J., K.B. 1524, where most of the cases bearing on the point are considered. There it was held (Lord Coleridge, J., at p. 1527) that there was *prima facie* evidence that the solicitors upon whom the notice was served were still acting on behalf of the respondent, and therefore were acting as the agents of the respondent in receiving the notice of appeal, and in such a case personal service was not necessary. With this view, the others, Avory and Atkins, JJ., concurred. As I before pointed out, neither the accused nor any one that could be said to be representing him was served.

As will be seen by a reference to the cases cited, and referred to in *Godman* v. *Crofton, supra,* there is some conflict of authority on the point, but none of them go so far as to say that the Court can entertain an appeal on facts similar to those in the case at bar.

MCPHILLIPS, J.A.

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

EBERTS, J.A.

EBERTS, J.A. would dismiss the appeal.

Appeals dismissed,
Martin and McPhillips, JJ.A., dissenting.

Solicitor for appellant: *Walter Clayton.*
Solicitor for respondents: *C. F. R. Pincott.*

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Criminal law—Sale of draft—To be payable in Liverpool—Payment at Liverpool refused—No credit—Charge under section 355 of Criminal Code—Conviction—Quashed on appeal.

H. entered the offices of Faulds Limited in Vancouver and in exchange for $1,000 received £23 in cash and a draft for £200 drawn on the London County Westminster & Parr's Bank Limited, Cornhill Street, London, reciting "pay from our credit balance to the order of H. £200" and signed Faulds Limited, J. A. M. Faulds, President, and A. George, Secretary Treasurer. H. then indorsed the draft "pay to the order of Lloyd's Bank Limited for deposit to my credit" and the clerk in Faulds Limited who was putting the matter through for H., wrote a letter to Lloyd's Bank, Limited, in Liverpool, asking them to place the proceeds of the draft (which was enclosed) to the credit of H. The letter with enclosure was then handed to H. When H. presented the draft at Lloyd's Bank, Liverpool, payment was refused. On a charge against J. M. Faulds under section 355 of the Criminal Code for converting the money to his own use and for failing to account for it, it was found by the trial judge that Faulds Limited was an *alias* for Faulds himself; that Faulds stood close by and knew of the transaction carried out by his clerk; that Faulds Limited had no credit either at Lloyd's Bank, Liverpool, or at Parr's Bank, London, and they did not remit H.'s money to England as undertaken. Faulds was convicted on both counts under said section.

Held, on appeal, by way of case stated from CAYLEY, Co. J., that on the facts as stated the case did not come within section 355 of the Criminal Code and the conviction should be set aside.

Per MACDONALD, C.J.A.: On the finding the money was deposited with Faulds Limited, an incorporated company entirely distinct from Faulds himself; that it was misappropriated by Faulds Limited, and Faulds Limited did not carry out the trust imposed upon it. There is no finding that the company misappropriated the money with the knowledge and consent of Faulds, so that the foundation for the charge is wanting. The finding of the company being an *alias* for Faulds is not material.

Per MARTIN and GALLIHER, JJ.A.: The finding of fact is insufficient to bring the offence home to the accused and does not support the charge.

Per MCPHILLIPS, J.A.: There is no evidence to connect the defendant with any transaction which would fall within the purview of section 355 of the Criminal Code.

APPEAL by way of case stated from the conviction of the accused on a charge under section 355 of the Criminal Code. Statement

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The facts are set out in the case stated and reasons for judgment of the trial judge.

Wood, for the Crown.

Hogg, for the accused.

5th October, 1922.

CAYLEY, Co. J.: Halliday went into the office of Faulds & Company with $1,000, which he wished to put into English money. He received some £23 in English money. It was suggested to him by the cashier in Faulds & Company that he should take a draft on Liverpool for the balance. He paid $895 to Faulds accordingly. Now, on what terms was that $895 paid to Faulds? It was paid to Faulds & Company on the terms that it was to be accounted for to this man in Liverpool. There were two accountings, as a matter of fact; one was an accounting to a Liverpool bank, as mentioned in the requisition—Lloyd's Bank, Limited, of Liverpool; and in the second place it was to be accounted for to Halliday himself. Now that accounting was never made. Why need we go beyond that? The draft was to be paid out of the proceeds of Faulds's credit balance according to the draft given to Halliday; "pay from my credit balance." He had no credit balance; no credit balance of any kind. He never had, according to the evidence, any credit with Lloyd's Bank. Lloyd's Bank were advised from time to time by Faulds of drafts that would be presented to them. They entered those advices as if the drafts had arrived, and debited his account accordingly. But when the drafts did arrive, it is quite apparent from the statement made by the bank that they paid no draft unless the funds had also arrived.

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At the time this draft was issued to Halliday, advices had been sent out by Faulds amounting to over $10,000. If he ever had any credit in Liverpool, it had long since been exhausted by previous advices.

Fraud, direct swindle, comes under the terms of section 355—receiving money on terms requiring him to account for and pay the same—or pay the same. He neither accounted for the same nor paid the same. It is contended by counsel for the defence that it was a company that did this, and not Faulds

personally. The evidence given was that Faulds was the whole company. Everybody took their orders and directions from Faulds. The conversation carried on between the cashier and Halliday in applying for this English money was carried on within three feet of Faulds, and I have not the slightest doubt —not for a moment have I any doubt but that Faulds's ears were wide open and that he heard every part of it, and knew exactly what was going on; that a man had come in with $1,000. He was an easy mark for Faulds; that money was doomed right there, only certain plausible mechanism had to be gone through in order to send the applicant with a quiet mind over to England where he would be a long way from this Province and where he would find it very difficult to take any action to protect himself. And it has been found difficult in the past, as evidenced by the fact that $16,000 of customers' money has been dissipated I presume in a similar manner.

Of the legal point as to whether Faulds personally is a party, you will find the case of *Rex* v. *Campbell* in (1912) 19 Can. Cr. Cas. 407. A man named Campbell was the president of the Campbell Shoe Company; he made a report in which false representations were contained. The question was, was the company liable, or was Campbell personally liable? He was found personally liable on two grounds. One was that the company was really himself in disguise; he owned nearly all the shares. The other was under section 69 of the Code.

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In what respect does that resemble the present case? If I understand aright, there were 101 shares in this company here; it may have been one hundred and five. Ninety-eight of these shares were held by Faulds's wife. A nominal share was held by himself; an unpaid share was held by George, and there was some suggestion that some Russians held a share each, but what that meant I cannot ascertain. At all events Faulds's wife, who must for the purpose of this case be considered as identical with Faulds himself, was the whole company. When a man puts all the shares of a company of which he is the sole manager—a one-man company—in the name of his wife, no Court for a moment believes that any value has been paid for those shares. It is a method of escaping liability for the man himself.

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Faulds and Faulds Company are identically one. Faulds is liable for anything that Faulds Company do. And in the second place he would be liable under section 69 of the Code as an abettor; an aider and abettor. A company cannot commit frauds except by and through certain people. These people are all aiders and abettors, and as such they are liable as principals.

I hold Faulds guilty, under section 355 of the Code, of receiving money on terms that he should account for, and not accounting for them. He is charged with converting it to his own use or failing to account for it. There is no doubt he did convert it to his own use. I convict him under both charges.

The case stated is as follows:

"I find, from the evidence of Halliday, who says: 'From the surroundings it led me to believe there was foreign money exchanged and that was the idea or thing that brought me in there.' That Halliday went to exchange Canadian money for English money; that he put down $1,000 Canadian money and received £23 English money and that as to the balance 'The cashier suggested to me that he send it over for me.' 'The result was I received a cheque.'

"I had no doubt of Halliday's essential veracity. He was both moderate and exact in his statements. I would judge also that, while not illiterate, he was not a business man as we would understand a business man. If he had wanted to buy a draft he would have gone to a bank. He did not want to buy a draft. Finding that Faulds Ltd. were willing to send his money over to England for him he accepted them as his agents and in effect they became his trustees to transmit his money in England. This is confirmed by exhibit 3 which is a letter dated May 23rd from Faulds Limited to Lloyd's Bank Limited, Liverpool. This letter concludes: 'Thanking you for your kindness to our client.' It is further confirmed on pages 13 and 14 of the transcript where Faulds personally said to Halliday with reference to this money: 'I sent it' or 'We sent it,' meaning that Faulds's office sent the money to England. I must conclude, from this evidence, that Faulds Ltd. occupied the position of agents of Halliday to forward $895 to Lloyd's Bank at Liverpool.

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"I must also find that Faulds Limited was an *alias* for Faulds himself. The evidence was that 98 shares of Faulds Limited was in the name of Mrs. Faulds, 1 share in the name of the prisoner, 1 share in the name of Fauld's clerk, George, and 1 share said in an indefinite manner by Faulds's counsel to be held by a Russian. George did not recollect ever attending a meeting of shareholders and when confronted with the minutes of one such meeting seemed surprised from which I surmised that such a meeting of shareholders was probably an informal affair, more or less of a perfunctory operation such as is habitual in all one man companies.

"I find that Faulds was within three feet of Eldridge and Halliday when the transaction referred to took place and I judge that he heard every

word of what transpired. Faulds was then in a bankrupt condition. They went into bankruptcy a month later and had no business to receive money from clients at the time.

"It was shewn that Faulds Ltd. had no credit at Lloyd's Bank, Liverpool, or at the London County Westminster & Parr's Bank, Limited, London; that they had no overdraft at either place and that they did not remit Halliday's money as they undertook to do but fraudulently converted it to their own use. Something was said about interest being charged up against Faulds Limited on his overdraft. There was no interest charged up to Faulds. This is shewn by the statement of account rendered to Faulds Limited by their London agents brought up to June 30th and enclosed in a letter to Faulds dated July 4th, 1922, and marked Exhibit 11.

"Halliday presented his duplicate cheque to Lloyd's Bank, Liverpool, but there was no money for him.

"On these facts I held that the case came within section 355 of the Code and the question on which I think counsel for the defence wishes a case stated is: Was I right in so holding?"

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The appeal was argued at Vancouver on the 20th of October, 1922, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Hogg, for appellant: This was a contract there being the purchase of a draft. The instrument is complete in itself. The question of accounting does not arise and evidence to vary the contract is inadmissible: see Leake on Contracts, 5th Ed., 122; *Brown* v. *Langley* (1842), 4 Man. & G. 466 at p. 472. The money was not received on terms requiring him to account: see *Rex* v. *Unger* (1894), 5 Can. Cr. Cas. 270; *Rex* v. *MacKay* (1918), 1 W.W.R. 945; *Rex* v. *Thompson* (1911), 1 W.W.R. 277; *Rex* v. *Nevison* (1919), 27 B.C. 12 at p. 14.

Argument

Wood, for the Crown: The charge is he took the money ($895) to remit it to Lloyd's Bank, Liverpool. The bill of exchange was simply the matter of remitting. He did not remit but kept the money: see *Rex v. Campbell* (1912), 19 Can. Cr. Cas. 407. The Court below found that Faulds Limited was an *alias* for Faulds. It was a one man company: see *Salomon* v. *Salomon & Co.* (1897), A.C. 22.

MACDONALD, C.J.A.: The question on the facts in the case stated is, "Was the learned judge right in holding that the charge came within section 355 of the Code?" My answer to that is that it did not come within that section of the Code. The

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crucial point in the case, as I see it, is that by his finding the learned judge says that the money was deposited with Faulds Limited. Now, Faulds Limited is an incorporated company, and a distinct entity from Faulds himself; that it was misappropriated by Faulds Limited we also are told by the finding, in other words, that Faulds Limited did not carry out the trust that was imposed upon it, and which it had agreed to carry out. I can quite conceive that if a further finding had been made by the learned judge that Mr. Faulds, to use the language of section 69 of the Code, had aided and abetted the fraud which the learned judge has found—was committed by Faulds Limited —then he would be within the section, and other things being sufficient, would be guilty of the offence mentioned in that section; but there is no such finding. The only finding that can possibly be said to approach nearly to it is that he was within three feet of Mr. Eldridge when Eldridge carried out the transaction, and that the learned judge thought he had heard. Now if he had found that he had heard, instead of saying "I judge that he heard"; had he said, "I find that he had heard what took place," still the offence would not be complete. No offence, up to that time, had been committed because on the assumption that the company received the money to be remitted the time had not then arrived at which there was any breach of trust. He would have to go further and find that the company misappropriated the money with the knowledge and with the consent of Faulds. There is no such finding, and therefore the foundation for the charge is wanting. I think the finding of the learned trial judge as to the *alias* is not very material, for this reason, the company was an incorporated company, not a mere trade name; it was therefore a distinct entity; it had its officers and it had its directors, and it had its servants. It could act independently altogether of Mr. Faulds, it could accept the money independently of him, it could misappropriate it independently of him, and therefore the proportion of stock held by him, whether 99 per cent. or one per cent. could make no difference.

MACDONALD, C.J.A.

I think therefore the question should be answered as I have indicated in my opening statement.

The order then will be for the discharge of the accused.

MARTIN, J.A.: The findings of fact here are insufficient to bring the offence home to the accused. I experience no difficulty about the law, but the evidence in the case before us, to which we are confined, does not support the charge. The appeal should be allowed, and the conviction set aside.

GALLIHER, J.A.: I agree.

MCPHILLIPS, J.A.: I would allow the appeal and quash the conviction. In my opinion, section 355 does not, in its intent, nor in its plain reading, cover the case that the learned judge in the Court below had before him. The case that he had before him was one of contractual obligation. Whatever may have been the discussion that took place before the draft was accepted, according to good canons of law, whether it be civil or criminal law, it is only the result to which we look, not that which was in the nature of negotiations, and the learned judge in the Court below has accepted the result. The result was a bill of exchange. The practical result was that Mr. Halliday not only accepted the bill of exchange, but he exercised ownership of the bill of exchange, and indorsed on its back the name of the indorsee, from him, not from Faulds Limited, but he being the payee, created the indorsee—Lloyd's Bank. And then that bill of exchange being sent to England to Lloyd's Bank, Liverpool, strange to say, never was presented to the London bank upon which it was drawn as far as the evidence in the case is reported to us by virtue of this case stated. The incident which would follow ordinarily has not followed, that is, not being paid, there would be the responsibility to pay it, upon Faulds Limited. It would seem to me that there has been the endeavour to utilize the Criminal Code to collect a debt.

MCPHILLIPS, J.A.

Being a corporation, the question is, who did offend against section 355, if the transaction did come within 355? I have before me a decision of the Supreme Court of Canada in the case of *Union Colliery Company* v. *Reginam* (1900), 31 S.C.R. 81 at pp. 88 and 89. There Mr. Justice Sedgewick, delivering the judgment of the majority of the Court, said, referring to the first words that we find in 355, "every one"—"Every

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one commits a theft." "Every one" is an expression of the same kind as person, and therefore includes bodies corporate unless the context requires otherwise.

And if a case was made under section 355, it could not be made against the individual, *i.e.*, Faulds, upon the facts of this case; it would be against the corporation.

Then it might be said, you cannot imprison a corporation, therefore it cannot refer to a corporation. Let me read what Mr. Justice Sedgewick says on that point:

"The anticipated event occurred and they are criminally responsible for it. It is not, I think, necessary to search through other provisions of the Code to find the penalty. The common law, in the case of a corporation, prescribed it—a fine."

MCPHILLIPS, J.A.

Now if this corporation is guilty of an infraction of section 355, it could have been proceeded against as a corporation, and could have been fined. The enormity of this case, as it occurs to me, is this, that the criminal law is used to propel a citizen into gaol when nothing more is established than a contractual obligation or at the most the wrong doing of the corporation. There is no evidence to connect the defendant with any transaction which would fall within the purview of section 355 and constitute an infraction thereof.

EBERTS, J.A.

EBERTS, J.A.: I agree. The case would not come under section 355. I think the ruling was an erroneous one, and the accused should be discharged.

Conviction set aside.

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REX v. BEGUIN

Criminal law—Charge of murder—Acquittal—Shot-gun and rifle seized when arrested—Application for order for their return—In the circumstances of the case application refused.

The applicant's shot-gun and rifle were seized when he was arrested on a charge of murder. The evidence of the accused on the trial was that his wife told him that one Denoreaz (who was married to accused's sister) had had criminal association with her five years previously. He took his gun and went to Denoreaz's house intending to kill him but on getting there he told Denoreaz he would give him a week to leave the country. He then went home and had further conversation with his wife in which she admitted criminal association with Denoreaz during the five years previously. He got up the next morning early and going near Denoreaz's house waylaid him as he was going to his barn and shot him. The jury brought in a verdict of not guilty. On the application of the accused for an order for the return of his shot-gun and rifle:—

Held, refusing the application, that inasmuch as a verdict of murder was the only verdict open on the evidence, the administration of the law should not be further discredited by the return of the weapons to the assassin.

APPLICATION by accused who was acquitted of the charge of murder for the return of his shot-gun and rifle. The facts are set out in the reasons for judgment. Heard by HUNTER, C.J.B.C. at Nelson on the 24th of October, 1922. Statement

Beguin, in person, for the application.

25th October, 1922.

HUNTER, C.J.B.C.: This is an application by Charles Beguin for an order for the return of a shot-gun and rifle which had been secured by the police on his arrest for the murder of one Denoreaz, his brother-in-law. Judgment

On his trial for murder before me, it appeared, according to his own statements, that, on his being told by his wife that Denoreaz had had criminal association with her five years previously, he took up the shot-gun and proceeded to Denoreaz's house with the intention of killing him, but after an interview with Denoreaz and Mrs. Denoreaz, who is his sister, told him

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that he would give him a week to leave the country, otherwise he would kill him on sight; that after his return to his own house about 5 p.m., he had another conversation with his wife, by whom he was informed that different acts of association (forced, according to her) had taken place during the five years. Some time after going to bed he got up, dressed himself, took the rifle, placed four soft-nosed cartridges in the magazine, and after wandering about like a wild beast, as he expressed it, secreted himself in a shed on Denoreaz's place, just on the way between the house and the barn, where it was Denoreaz's habit to do the milking in the morning; that he met him coming down with a bucket to the barn about 7 a.m.; and that he fired at him when close to him; that he thought he had missed as Denoreaz turned to run away; that he had dropped him with a second shot after he had got about 50 yards away. In reality it was about 50 feet. Examination of the body shewed that Denoreaz had received two wounds, either of which would cause death within three minutes. About 7.30 a.m. the postmaster, hearing of the affair, went to Denoreaz's place and found his wife lying over the body. A couple of hours afterwards he had a conversation with the accused, the latter saying: "I suppose you want to know all about it. I shot him this morning. He has been persecuting my wife." That same night he was arrested by Constable Oland, who, after giving him the usual caution, received a written statement signed by the accused, which he had prepared before the constable's arrival. In his statement he says: "I heard him coming out of his house at about 7 and as I was stepping out of the shop he was ten feet away from me. The first shot missed, I believe, and he started to run back. The second shot dropped him about 50 yards away," and at the end of the statement he says: "I regret deeply having rendered my sister a widow, but then she had only one child to my wife's three babies, and it was one of us that had to go." At the preliminary hearing five days later, after being given the usual caution, he said he wished to hand in a written statement. In this statement, after detailing what had been told him by his wife, and, according to her, the acts of association were without her consent, he says:

Judgment

"I felt also that as long as he lived I could not care for my wife any

more, although I never had any doubt she was innocent, so I killed him, and although I have been tormented with remorse ever since on account of his wife and relatives at Trail, I feel the regained love of my wife and three little children is worth anything that I have to pay for it. Denoreaz told my wife once that he had seen me coming against his house with a gun and was sure it was to kill him. Also, on the night of his death, even after I had given him a week's notice, he said to his wife he felt sure I was going to shoot him in the morning. This shews that he would have done it if he were in my place, and for him, like for me, there was only one possible way to redeem one's woman's honour."

The evidence is, therefore, indisputable, that there was a threat to kill, followed by the killing itself after the lapse of several hours, during which the accused and the deceased were not near each other, and although the deceased had been given a week to leave the country. Undaunted by these facts, counsel for the accused eloquently pleaded self-defence, which, however, must have seemed a mockery to anyone who heard him.

To speak plainly, the only verdict open on the evidence was that of murder, and if the jury saw fit they could have added a recommendation to mercy, which doubtless would have been carried out.

Judgment

The result is that a self-confessed murderer was allowed to go scot-free by a jury of his peers, and for the first time, as far as I know, a special kind of lynch-law has been sanctioned in this country, as it makes no difference in principle whether the victim is slain by one man who lurks in ambush or by a mob who openly attack him.

I am now asked to add further discredit to the administration of the law by returning the weapons to the assassin.

I reject the application.

Application refused.

COURT OF APPEAL

1922

Oct. 26.

ATLAS RECORD CO. LTD. v. COPE & SON, LTD.

ATLAS RECORD COMPANY, LIMITED v. COPE & SON, LIMITED.

Practice—Appeal—Right to—Waiver by taking benefit under judgment below.

If a party appeals from a judgment that is in his favour for a portion of the amount claimed and pending the appeal he proceeds upon the judgment and obtains the relief granted thereby, he has precluded himself from further prosecuting the appeal.

APPEAL by plaintiff from the decision of CAYLEY, Co. J., of the 9th of June, 1922, in an action to recover $150 under an agreement to insert in three issues of the "British Canadian Industries" the trade announcement of the defendant. The plaintiff Company recovered $50 and costs on the trial and gave notice of appeal. Solicitors for the plaintiff then sent the defendant's solicitors a bill for the amount recovered and costs amounting to $84.95 and asked for a cheque for this amount, which was paid and accepted by plaintiff's solicitors.

Statement

The appeal was argued at Vancouver on the 26th of October, 1922, before MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Molson, for appellant.

Martin, K.C., for respondent, took the preliminary objection that having demanded payment of the amount it was entitled to under the judgment and having received payment plaintiff is now precluded from appealing against said judgment. If plaintiff takes the money and keeps it it cannot bring an appeal: see *Videan* v. *Westover* (1897), 29 Ont. 1 at p. 6. If you take advantage of an order you must stand by it: see *Royal City Planing Mills* v. *Woods* (1888), 6 Man. L.R. 62; *Wilcox* v. *Odden* (1864), 15 C.B. (N.S.) 837; *Pearce* v. *Chaplin* (1846), 9 Q.B. 802; *Giraud* v. *Austen* (1842), 1 Dowl. (N.S.) 703; *Hayward* v. *Duff* (1862), 12 C.B. (N.S.) 364; *Spencer* v. *Cowan* (1896), 5 B.C. 151.

Argument

Molson, contra: The underlying principle is "approbate and reprobate": see *Russell* v. *Diplock-Wright Lumber Company* (1910), 15 B.C. 66. The affidavit shewed it was not the intention to take advantage of the judgment, the money was taken subject to the right of appeal. We are only appealing from that portion of our claim that is not enforced: see *International Wrecking Co.* v. *Lobb* (1887), 12 Pr. 207 at p. 212.

MARTIN, J.A.: We are all of opinion that the objection is well taken, and that, upon the general principle that you cannot approbate and reprobate a judgment, the appellant has put himself out of Court. The case is, that having obtained a judgment (at the same time intending to appeal from that judgment) an extraordinary thing was done; *videlicet,* while contemplating that appeal the judgment creditor wrote to the judgment debtor and demanded payment. Now, only one of two things could follow. If he did not pay, the sheriff would make him pay. Instead of waiting for the sheriff, he sent the cheque. Now, that judgment was then completely paid and satisfied. That is the end of the matter, in my opinion, because it is perfectly apparent there was nothing else to be said about it, having paid. The whole thing is, that if you propose to bring an appeal from a judgment, you must be careful not to take benefits under that judgment.

MARTIN, J.A.

GALLIHER, J.A.: I have nothing to add to my brother MARTIN'S views. I would naturally feel disposed to relieve them if the law would allow me to do so, but I see nothing in this case, according to the authorities, to permit me.

GALLIHER, J.A.

MCPHILLIPS, J.A.: I am of the same opinion as my brother MARTIN. I would refer to *Videan* v. *Westover* (1897), 29 Ont. 1 at p. 6. There is a well-recognized principle (and practitioners must pay attention to it) that you waive your right to appeal if you do anything voluntarily in the way of taking the fruits of a judgment that you are not satisfied with. Anything you may do in the way of compulsion in respect of the judgment is different, and it does not affect the right of appeal.

MCPHILLIPS, J.A.

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

Appeal dismissed.

Solicitors for appellant: *Walsh, McKim & Housser.*

Solicitors for respondent: *Martin, McGeer, McGeer & Wilson.*

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1922

Oct. 30.

VINEY v. B.C. ELECTRIC RY. CO.

VINEY v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY LIMITED.

Practice—Judgment obtained by default—Plaintiff offers to allow defendant in to defend if Statute of Limitations not pleaded—Application to set aside judgment—Terms—Costs.

The Court, in setting aside a judgment obtained through a slip of the defendant Company's solicitor and in allowing the defendant to defend the action, has no power to impose upon him the condition that he shall not plead its special Statute of Limitations.

Statement

APPLICATION by defendant to set aside a judgment obtained through a slip of the defendant Company's solicitor. After judgment was entered the plaintiff's solicitor immediately offered to allow the defendant in to defend if he did not plead the Company's special Statute of Limitations, and the plaintiff asked that this be a term of the order. Heard by MCDONALD, J. at Chambers in Vancouver on the 6th of October, 1922.

Gilmour, for the application.

Ross, K.C., contra.

30th October, 1922.

Judgment

MCDONALD, J.: This is an action for damages in which the plaintiff, owing to a slip of the defendant's solicitor, entered judgment by default. The plaintiff's solicitor immediately upon signing judgment wrote a letter to the defendant's solicitor stating that he was prepared that the judgment be set aside

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upon the terms that the defendant should not be allowed to set up its special Statute of Limitations. The defendant now moves to set aside the judgment. Plaintiff's solicitor does not ask for costs but asked that the term above mentioned be imposed. In my opinion, there is no power to make any such order. It seems clear on the authorities that where this is a meritorious defence and judgment has been obtained by a slip, the only terms to be imposed on setting the judgment aside are that the defendant shall pay the costs of the entering of the judgment and the application to set it aside. See *MacGill* v. *Duplisea* (1913), 18 B.C. 600; *Pooley* v. *O'Connor* (1912), 28 T.L.R. 460, and *Village of Kronau* v. *Euteneier* (1916), 34 W.L.R. 168.

The judgment is accordingly set aside without costs to either party inasmuch as the plaintiff's solicitor does not ask for costs.

Application granted.

DENNY v. LLOYD.

MCDONALD, J.

1922

Oct. 25.

DENNY v. LLOYD

Costs—Further evidence by plaintiff after defendant's case is in—Adjournment—Pleadings.

After the evidence was all in and defendant's counsel had submitted his argument the plaintiff asked leave to call a witness to prove that notice of an assignment of the claim in question from R. to the plaintiff had been delivered to the defendant before action. The statement of claim did not disclose the assignment of the claim from the plaintiff to R. or the re-assignment from R. to the plaintiff nor did the defence raise any issue as to them, but when disclosed on the trial the pleadings were amended accordingly. The plaintiff was allowed to call the witness and an adjournment was taken until the following day for that purpose. On the disposition of the costs:—

Held, that the plaintiff was entitled to the general costs of the action but the defendant was allowed to set off the costs thrown away by reason of the amendments to the pleadings.

Statement

ACTION on a claim for $1,200, tried by MCDONALD, J., at

MCDONALD, J. 1922 Oct. 25. DENNY v. LLOYD

Vancouver on the 23rd of October, 1922. The facts are set out in the head-note and reasons for judgment.

Wismer, for plaintiff.
Jamieson, for defendant.

25th October, 1922.

MCDONALD, J.: As stated at the hearing, I find for the plaintiff on the facts, and there will be judgment for the plaintiff for $1,200.

The question of costs has given me some difficulty. After the evidence was all in and counsel for the defendant had submitted his argument, the plaintiff's counsel asked leave to call a further witness to prove that notice of assignment of the claim in question from one Russell to the plaintiff had been delivered to the defendant before action brought. The assignment and notice were already in. In fact, the notice was in possession of the defendant and bore date the 3rd of July, 1922, whereas the writ was issued on the 4th of the same month; but, as stated, there was no proof of the actual delivery of the notice. Under these circumstances I thought it in the interests of justice that the plaintiff should be permitted to call this further witness, and an adjournment was taken to the following day for that purpose.

Judgment

It might further be mentioned that the statement of claim did not disclose that the plaintiff Denny had ever assigned his claim to Russell or that it had been reassigned by Russell to the plaintiff, and the statement of defence did not raise any issue as to these assignments, though the defendant knew of them. When at the trial, the fact appeared that these assignments had been made, I allowed the plaintiff to amend his statement of claim and the defendant to amend his defence as it might be advised. Under all these circumstances I think the plaintiff is entitled to the general costs of the action, but that the defendant ought to be allowed to set off the costs thrown away by reason of the adjournment and by reason of the amendments to the pleadings. There will be judgment accordingly.

Judgment for plaintiff.

RE LEE CHEONG, DECEASED.

MCDONALD, J. (At Chambers)

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Nov. 17.

RE LEE CHEONG, DECEASED

Succession duty—Marriage—Foreign law—Polygamy—Deceased a domiciled Chinaman—Two wives lawfully married in China survive.

A domiciled Chinaman by his will bequeathed to his two wives to whom he had been lawfully married in China an annuity of $1,000 each. On petition by the executor for a declaration that each of the wives is entitled to be recognized as a lawful wife of deceased and that succession duty be payable in accordance with such declaration:—

Held, that the petition must be refused as the Courts will not hold that any woman possesses the civil *status of* wife, if her marriage has taken place in a country which recognizes polygamy as lawful.

PETITION by the executor of Lee Cheong, a domiciled Chinaman who died in Victoria in September, 1910, for a declaration that each of his two wives is entitled to be recognized as his lawful wife and that succession duty be payable in accordance with such declaration. Deceased was lawfully married in China to Lee Loo Sze in 1875, according to the laws of China then in force, and in 1893 he was lawfully married in China to Lee Seto Sze according to the laws of China then in force. By his will, dated the 16th of August, 1910, he bequeathed to each of his wives an annuity of $1,000. Both wives were alive and had the same civil *status* at the time of Lee Cheong's death. Heard by MCDONALD, J. at Chambers in Victoria on the 14th of November, 1922. Statement

Luxton, K.C., for the petition.
Carter, D.A.G., contra.

MCDONALD, J.: The above-named Lee Cheong died in the City of Victoria, in September, 1910, a domiciled Chinaman. By his will dated 16th August, 1910, he bequeathed to each of his wives, named respectively, Lee Loo Sze and Lee Seto Sze, an annuity of $1,000. The executor of his will petitions for a declaration that each of the said wives of the testator is entitled to be recognized as his lawful wife and that succession duty shall be payable in accordance with such declaration. Judgment

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Mr. *Carter,* on behalf of the Crown, admits that the testator was in the year 1875 lawfully married in China to Lee Loo Sze, according to the laws of China then in force, and that in the year 1893 the testator was lawfully married in China to Lee Seto Sze, according to the laws of China then in force, and that both wives were living at the death of the testator. It is further admitted that the deceased was throughout his lifetime domiciled in China. It is further proven that there are three children of the first marriage and six children of the second marriage, and also that at the time of the execution of the testator's will and at the time of his death, it was lawful for a domiciled Chinaman to have more than one wife and that each such wife had the same civil *status.* For the Crown, however, it is contended that neither Lee Loo Sze or Lee Seto Sze is the lawful wife of the testator, and that succession duty is accordingly payable as if both were strangers.

It seems strange that in this Province where so many Chinamen have died leaving estates for distribution this question has not hitherto come up for decision, but I am assured by counsel that such is the case. Many cases have been cited, a perusal of which leads one into a very interesting investigation of the law of marriage and the effects of marriage upon the civil *status* of the parties and the law of succession.

Judgment

Mr. *Luxton,* counsel for the petitioners, admits that in matrimonial cases the law of England looks upon a marriage as the voluntary union of one man and one woman to the exclusion of all others, but contends that no case can be found relating to succession, intestacy, legacy, or succession duties which lays down the same principle. With a view to arriving at a conclusion, the authorities cited below have been examined.

In *Warrender* v. *Warrender* (1835), 2 Cl. & F. 488, it was held that a Scotchman domiciled in Scotland, who had been married to an English woman in England, could bring in Scotland an action for divorce from that marriage. In the judgment of Lord Brougham, at pp. 530-32, the following passages occur:

"Thus a marriage, good by the laws of one country, is held good in all others where the question of its validity may arise. For the question

always must be, did the parties intend to contract marriage? And if they did that which in the place they were in is deemed a marriage, they cannot reasonably, or sensibly, or safely, be considered otherwise than as intending a marriage contract. The laws of each nation lay down the forms and solemnities, a compliance with which shall be deemed the only criterion of the intention to enter into the contract. . . . . But the rule extends, I apprehend, no further than to the ascertaining of the validity of the contract, and the meaning of the parties, that is, the existence of the contract and its construction. . . . . But marriage is one and the same thing substantially all the Christian world over. Our whole law of marriage assumes this; and it is important to observe, that we regard it as a wholly different thing, a different *status*, from Turkish or other marriages among infidel nations, because we clearly never should recognize the plurality of wives, and consequent validity of second marriages standing the first, which second marriages the laws of those countries authorize and validate. This cannot be put upon any rational ground, except our holding the infidel marriage to be something different from the Christian, and our also holding Christian marriages to be the same everywhere."

In *Hyde* v. *Hyde and Woodmansel* (1866), L.R. 1 P. & D. 130, it was held in an action brought by a husband for the dissolution of a marriage contracted in Utah, at a time when polygamy was there lawful, that the action did not lie, as such a marriage was not a marriage as understood in Christendom. It is to be noted, however (see p. 138), that the Court made the following reservations:

"This Court does not profess to decide upon the rights of succession or legitimacy which it might be proper to accord to the issue of the polygamous unions, nor upon the rights or obligations in relation to third persons which people living under the sanction of such unions may have created for themselves. All that is intended to be here decided is that as between each other they are not entitled to the remedies, the adjudication, or the relief of the matrimonial law of England."

Judgment

In 1866, it was held in *Doglioni* v. *Crispin,* L.R. 1 H.L. 301, that the law of the domicil of a deceased person governs the succession to his personal property. This principle, I take it, has never been questioned, but the case was cited as shewing that the natural son of a person domiciled in Portugal, who by the law of that country was entitled to inherit his father's property, had been rightly admitted to be heard as contradictor to a will set up in England as having been made by the deceased disposing of his personal property there. So far as I can see this case is of little value in deciding the questions now at issue, as the decision rested entirely upon the ground that all the matters in question had been decided by a Portuguese Court having juris-

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diction in the premises and that the English Courts were bound by that decision.

In 1867, an important case, *Connolly* v. *Woolrich and Johnson,* 11 L.C. Jur. 197, was decided by Mr. Justice Monk, in a most instructive and elaborate judgment, in which the learned judge discusses the history of marriage and its effects upon civil *status* from the very earliest times. It may be noted that in *In re Bethell* (1888) 38 Ch. D. 220, counsel, in referring to this judgment, stated that it was decided upon the old French and Canon laws, and could have no effect therefore in an English Court. This does not appear to be the fact. A perusal of the judgment of Monk, J., shews that the learned judge dealt not with the Canon or Civil law in deciding the questions before him but with the law of England. In that case it was decided that a citizen of Lower Canada who went to the North-West Territories and there entered into a marriage with a Cree Indian woman in accordance with the customs of her tribe, though he had not lost his domicil of birth, was legally married, and his children were legitimate, it being further held as a fact that the law applicable to Rat River, where the marriage took place, was the Indian law which had never been superseded by any other. The learned judge dealt with the question of polygamy at p. 246, and says that polygamy is "an incidental, not an essential element, in the law or custom of marriage known among those aboriginal tribes," and that its abuse is "not a condition of, or an essential ingredient in these barbarian obligations of matrimony." And the learned judge goes on to say:

Judgment

"If proved at all in this case, it is manifestly established as the exception, not the rule; and in regard to marriages between Christians and the natives, it is not proved to be the custom."

After a further discussion as to polygamy being countenanced by various nations, the learned judge continued (p. 247):

"No doubt this [*i.e.*, law which countenances polygamy] is the law which Christianity expressly condemns, yet the Court has not the least hesitation in saying, that its existence among the Crees did not render Mr. Connolly's marriage with the Indian a nullity."

I take it, therefore, that it was intended to be decided in *Connolly's* case that, the fact that the country where the marriage took place recognized polygamy as being lawful did not prevent our Courts from holding such marriages lawful if

solemnized in accordance with the *lex loci contractus*. *Connolly's* case being that upon which counsel for the petitioners most strongly relied, it must be noted that nowhere in the judgment, among all the legal authorities both English and otherwise, which were cited, is any reference made either to *Warrender* v. *Warrender, supra,* or *Hyde* v. *Hyde and Woodmansel, supra,* though the former had been decided 32 years and the latter one year previously. It is a fair conclusion to draw that had these cases been cited they would have been followed.

In *Udny* v. *Udny* (1869), L.R. 1 H.L. (Sc.) 441, it was held that a domiciled Scotchman could, in accordance with the laws of Scotland, legitimate his son by his subsequent marriage to the child's mother. The real point to be decided in that case was the ascertainment of the true domicil of the father. But the remarks of Lord Westbury, where he says, at p. 457,—

> "The political *status* may depend on different laws in different countries; whereas the civil *status* is governed universally by one single principle, namely, that of domicil, which is the criterion established by law for the purpose of determining civil *status*. For it is on this basis that the personal rights of the party, that is to say, the law which determines his majority or minority, his marriage, succession, testacy, or intestacy, must depend,"

are of interest in this case.

In *Skottowe* v. *Young* (1871), L.R. 11 Eq. 474, it was held that the proceeds of land in England devised by a British subject domiciled in France, on trust to sell and pay the proceeds to his daughters born of a French mother before marriage, but afterward legitimated according to French law, were liable to legacy duty upon the basis that the daughters were the lawful children of the deceased and not "strangers in blood" within the meaning of the Legacy Duty Act. The decision is based upon the ground that the will in question was that of a domiciled Frenchman and that his *status* and that of his children must be their *status* according to the law of France. That *status* having been determined, the daughters were legitimate and could not accordingly be argued to be "strangers in blood." This case was relied upon as shewing that in matters relating to legacy duty, different considerations arise from those arising in matrimonial causes, in which latter cases alone

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it had been held that English Courts would recognize only exclusive marriages. It is argued from this that in the case at bar, once the *status* of the wives is ascertained, succession duty is payable accordingly, and that it must be found that each had the *status* of a lawful wife, having been married according to the laws of the place where their respective marriages took place and to a man domiciled in that place.

In *In re Bethell, supra,* it was held by Stirling, J. that a domiciled Englishman who went to South Africa and there married a woman of the Baralong tribe according to the customs of the tribe, among whom polygamy is allowed, was not validly married, according to the law of England, inasmuch as the marriage was not formed on the same basis as marriages throughout Christendom, and was not in its essence "a voluntary union for life of one man and one woman to the exclusion of all others." The child of the marriage was held to be illegitimate.

In *Brinkley* v. *Attorney-General* (1890), 15 P.D. 76, on a petition under the Legitimacy Declaration Act to establish the validity of a marriage, contracted in Japan by a British subject domiciled in Ireland, with a Japanese woman according to the forms required by the law of the country, it was held there was a valid marriage, the basis of decision being that in Japan the law of marriage requires that one man unites himself to one woman to the exclusion of all others. The distinction is pointed out between the Japanese case on the one hand and the Mormon and Baralong cases on the other, and it is made clear that in both the latter instances an unsuccessful attempt was made to establish as a valid marriage one which admitted of the possibility of marriage with another person during the life of the first wife. Again the principle is reiterated, "that a marriage which is not that of one man and one woman, to the exclusion of all others, though it may pass by the name of a marriage, is not the *status* which the English law countenances, when dealing with the subject of marriage."

Judgment

From the above decisions it is, in my opinion, well established that though the civil *status* is, generally speaking, fixed by the law of the domicil, yet our Courts will not hold that any woman

possesses the civil *status* of wife if her marriage has taken place in a country which recognizes polygamy as lawful.

It follows that the petitions of both Lee Loo Sze and Lee Seto Sze must be dismissed.

Petition dismissed.

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ERIKSEN BROTHERS v. THE "MAPLE LEAF." CHRISTIAN v. THE "MAPLE LEAF." HEMEON v. THE "MAPLE LEAF." DALY v. THE "MAPLE LEAF."

MARTIN, LO. J.A.

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ERIKSEN v. THE "MAPLE LEAF"

Admiralty law—Jurisdiction of Court—Alterations and additions to ship—The Admiralty Court Act, 1861 (24 Vict., Cap. 10, Imp.), Sec. 4—"Building or equipping"—Ship or proceeds under arrest of Court—When work done ship in possession of purchaser, vendor still owner upon the registry and later retaking possession on default in payment of purchase price—Vendor's knowledge of and participation in work—Liability of ship—Ship arrested at suit of one whose claim really part of claim of his firm which instituted action immediately after arrest—Arrest sham proceeding and not available to support firm's claim—Arrest good to support other suits instituted bona fide in reliance on records of Court.

It was held that work done in making certain alterations in and addition to the pilot-house, rig, spars, sails, tanks, etc., of a gasoline-boat necessitated by her intended new employment in outside waters, was for the "building" or "equipping" of a ship within section 4 of The Admiralty Court Act, 1861 (24 Vict., Cap. 10), Imperial, and claims therefor were within the jurisdiction of the Admiralty Court where at the time of the institution of the causes the ship or the proceeds were under arrest of the Court.

The work had been ordered by the master on behalf of the purchaser who was in sole possession under agreement for sale. The vendor still remained as owner upon the registry, and later retook possession before action, upon default in payment of the balance of the purchase-price. The vendor had personal knowledge of the alterations, etc., and worked on them himself.

Held, under these circumstances, taken together, there was nothing in them which formed an objection to the liability of the ship for the claims in question.

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The ship was arrested at suit of a member of a firm which was one of the present plaintiffs. His independent claim for wages as a "ship's carpenter on board the ship 'Maple Leaf,'" was in fact only a part of his firm's claim sued on herein, and immediately after the ship was arrested his firm's action was instituted.

Held, that these facts so obviously disclosed *mala fides* and an abuse of the process of the Court that the arrest could only be viewed as a sham proceeding and as not having any legal existence as regards that firm; but the other claimants could support their suits upon its existence in fact, because in good faith they instituted their suits relying upon the records of the Court which on their face shewed that its jurisdiction could be invoked.

Statement

ACTIONS to recover payment for equipping and altering a ship. Tried by MARTIN, Lo. J.A. at Vancouver on the 12th and 13th of September, 1922.

E. A. Lucas, for Eriksen Bros., Christian and Hemeon.
Killam, for Daly.
Robinson, for the "Maple Leaf."

17th November, 1922.

Judgment

MARTIN, Lo. J.A.: These are four actions for equipping and altering the gasoline-boat "Maple Leaf" at the port of Vancouver to which she belongs, and it has been agreed that the evidence taken in all of them shall apply to each of them. The vessel had been used as a cargo-boat plying from Vancouver to the Islands in the inside waters of the Gulf of Georgia, but after she came into the temporary possession of a new owner, one Thompson, in April last under an agreement for sale, he decided to employ her in outside waters, which necessitated (apart from the state of good repair she was in) certain alterations in and addition to her pilot-house, rig, spars, sails, tanks, etc., and it is for various parts of this work that the respective claims are asserted.

At the outset objection is taken to the jurisdiction to entertain these claims on the ground that they are for necessaries which were not supplied to a ship "elsewhere than in the port to which [she] belongs," under section 5 of The Admiralty Court Act, 1861 (24 Vict., Cap. 10), Imperial, "but in that port," *i.e.*, Vancouver, in answer to which objection the plaintiffs submit that assuming the work of these material-men (as they

have long been called, *The Neptune* (1834), 3 Hag. Adm. 129 at p. 142) may be classed as necessaries, yet quite apart from section 5, their claims are "for the building, equipping or repairing of any ship" under section 4, and so there is jurisdiction, because "at the time of the institution of the cause the ship or the proceeds [were] under arrest of the Court," as section 4 goes on to require. In *The Neptune* it was said, respecting the ancient remedy of material-men as then regarded, and the scope of their operations, p. 142:

"Those are commonly called material-men, whose trade it is to build, repair, or equip ships, or to furnish them with tackle and provision (necessary in any kind). Those men, when they have furnished any victuals or materials upon the credit of a ship, are certain losers, if they be prohibited from taking their remedy against such ships, by arresting and proceeding to gain a possession of the ship itself till the debt be satisfied, according to the ancient course of the Admiralty."

Upon the facts it is beyond doubt that the work herein, though not "repairing" is nevertheless within the expression "building and equipping," as employed in section 4: "building" would obviously include additions built on to the original building, and "equipping" is a very wide term depending upon the service in which the ship was employed, just as frequently "there is very little distinction to be found" between "repairs" and "necessaries" under sections 4 and 5 respectively—*The Skipwith* (1864), 10 L.T. 43; 10 Jur. (N.S.) 445, wherein Dr. Lushington said:

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"Now, with respect to the meaning of the 4th section . . . . I am of opinion that, however the claim originally arose, whether it arose from giving credit to the master of the vessel, or not—provided that the claim was not satisfied at the time, and that the work for building, equipping, or repairing had been done and provided, also that the ship and proceeds were under the arrest of the Court—it was and is competent to the party to proceed here."

In Maclachlan on Merchant Shipping, 5th Ed., 117, it is said that claims for necessaries under section 5 "would no doubt cover repairs and equipping," which further illustrates how the two sections are interwoven, and in the leading case of *The Riga* (1872), L.R. 3 A. & E. 516 at p. 522; 41 L.J., Adm. 39 (affirmed by the Privy Council in *Foong Tai & Co.* v. *Buchheister & Co.* (1908), A.C. 458 at p. 462; 78 L.J., P.C. 31, and applied by me in *Victoria Machinery Depot Co.* v. *The*

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Canada and The Triumph (1913), 18 B.C. 515; 5 W.W.R. 581; 25 W.L.R. 826), Mr. Justice Phillimore said:

"I am unable to draw any solid distinction . . . . between necessaries for the ship and necessaries for the voyage."

I see no reason, therefore, why said section 4 does not cover these claims, and this view brings me to the further objection that although the work had been ordered by the master, Lewis, on behalf of the purchaser, Thompson, who was in sole possession of her under said agreement for sale for $5,250 (upon which he paid $500) yet the ship was not liable because the vendor, Brooks, still remained as owner upon the registry, and later retook possession before action upon default in payment of the balance. Brooks, however, not only gave absolute possession to Thompson originally but had personal knowledge of the alterations, etc., that were being carried on and actually worked on them himself in making spars, and raised no objection because, he says in cross-examination, "I didn't consider it my business." In these very unusual circumstances there is no similarity between these cases and those three relied upon by Brooks's counsel, *viz., Young* v. *Brander* (1806), 8 East 10; *Mitcheson* v. *Oliver* (1855), 5 El. & Bl. 419; 25 L.J., Q.B. 39; and *Hibbs* v. *Ross* (1866), L.R. 1 Q.B. 534; 35 L.J., Q.B. 193, and the nature of the actions is entirely different, being personal and not *in rem,* when carefully examined, indeed, the ratio of their principles supports the plaintiffs herein; note, *e.g.,* the observations of Mr. Justice Le Blanc in the first of them, at p. 12, wherein it was only held that the vendor who was still upon the register and therefore the legal owner was not for that mere reason personally liable in *assumpsit* for work ordered by his vendee, through his master, who had taken possession, and so the said master was a "mere stranger" to the legal owner who, consequently, could not be made liable for his acts: *Cf. Hibbs* v. *Ross, supra,* p. 548.

Judgment

But the present actions are against the *res* under the radically different circumstances of the legal owner's sale, knowledge, and active participation, and no authority has been cited to shew why the *res* should not be made answerable in such circumstances, whatever might be said about the personal liability of the registered owner. Here, though the purchaser was not

the legal owner yet as he had been entrusted with the absolute possession of the vessel under the agreement for sale, whereby he became the beneficial owner, as he is styled in the cases, *e.g.*, *Frost* v. *Oliver* (1853), 2 El. & Bl. 301 at pp. 310, 312; 22 L.J., Q.B. 353, he became personally answerable on the facts for the work in question and the *res* also became answerable when the circumstances set out in section 4 arose, *i.e.*, "if at the time of the institution of the cause the ship or the proceeds thereof are under arrest of the Court." As to this, the fact is that the ship had been arrested by the marshal on May 19th last, before the institution of these causes, but the objection which was taken before on motion to dismiss on June 22nd last (reported in (1922), [*ante*, p. 325]; 3 W.W.R. 41) is renewed, *viz.*, that the arrest which was at the suit of Henry Eriksen was only a sham proceeding and therefore should be disregarded, and hence jurisdiction could not be founded thereupon. At that time I was of opinion that the evidence which would justify me in reaching such a conclusion was wanting, but at this trial it was proved that Henry Eriksen was at the time of this said suit, and is a member of the firm of Eriksen Brothers, one of the present plaintiffs, and that his independent claim for $97.20 for wages as a "ship's carpenter on board the ship 'Maple Leaf'" was in truth only a part of his firm's claim for $486.67 sued on herein and is included in the particulars of that claim as carpenter's wages, $346.60, and immediately after the ship was arrested at Henry's suit his firm's action was instituted, *viz.*, on the next day. These facts so obviously disclose *mala fides* and an abuse of the process of the Court that the arrest can only be viewed as a sham proceeding, and as not having any legal existence as regards those plaintiffs who improperly sought to profit by it., *viz.*, Eriksen Brothers; but as regards the other claimants I see no reason why they are not entitled to support their suits upon its existence in fact, because in good faith and in innocence of any wrong-doing they instituted their suits relying upon the records of this Court, which, on their face, shewed that its jurisdiction could be invoked.

Judgment

The result is that judgment, with costs, will be entered in

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favour of all the plaintiffs, except Eriksen Brothers, whose suit is dismissed with costs for want of jurisdiction.

Judgment for plaintiffs except Eriksen Brothers.

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IMPERIAL CANADIAN TRUST CO. v. WINSTANLEY

IMPERIAL CANADIAN TRUST COMPANY v. WINSTANLEY.

Gift — Donatio mortis causa — Evidence of donee — Corroboration — Evidence Act, R.S.B.C. 1911, Cap. 78, Sec. 11.

Where articles were claimed under a *donatio mortis causa* it was *held* that the evidence of the claimant was sufficient to establish such a gift notwithstanding section 11 of the Evidence Act, 1911, especially where there are circumstances which tend to corroborate such evidence.

ACTION by the administrator of the estate of H. A. Lilley, deceased, to recover a watch and chain and diamond ring claimed as the property of the deceased. The defendant had lived in Lilley's house as his housekeeper and deceased had proposed marriage to her, they expecting to be married at a later date. Letters to the donee by the deceased were produced that were written in affectionate terms. According to the donee's evidence the articles were given to her by the deceased during his last illness and shortly before his death, and before he was removed to the hospital. She stated deceased handed her the articles and said that if anything happened to him she was to keep them and not allow anyone else to have them. There was no one present at the time of the alleged gift nor was there anything in writing produced substantiating the alleged gift. Tried by MORRISON, J. at Victoria on the 23rd of October, 1922.

Statement

Higgins, K.C., for plaintiff: The gift was made in terms sufficient to constitute a valid *donatio mortis causa*, but there is no corroboration by material evidence other than that of the

Argument

donee and this is required before she can retain the articles in question: see section 11 of the Evidence Act.

Davie, for defendant: If the Court is satisfied that the donee's evidence can be relied upon it is sufficient, notwithstanding the Act.

20th November, 1922.

MORRISON, J.: I find that what is known as the three attributes of a *donatio mortis causa* which go to constitute such a gift, exist in the present case, *viz.*: The gift was made with a view to the donor's death. It was conditioned to take effect only on the donor's death by his existing disorder—there was a delivery of the subject-matter of the donation.

As to the second attribute, it is not necessary that the donor should by express terms declare that the gift is to be accompanied by such a condition. The law infers the condition.

The serious contention at the trial was as to whether corroboration is necessary in circumstances of this kind. I find that the evidence of the donee is trustworthy and sufficient to establish the *donatio mortis causa*: Williams on Executors, 11th Ed., p. 594 (note). There are, however, circumstances which tend to corroborate the donee's evidence, assuming that the interpretation of the Evidence Act, as submitted by counsel be based on authority: *In re Dillon* (1890), 44 Ch. D. 76 at p. 80. I do not think that such cases as *Thompson* v. *Coulter* (1903), 34 S.C.R. 261; *Ledingham* v. *Skinner* (1915), 21 B.C. 41, or *Blacquiere* v. *Corr* (1904), 10 B.C. 448, are apposite.

Judgment

Of the articles claimed the defendant has only the watch and chain and the ring.

The action is dismissed with costs.

Action dismissed.

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OLIVER v. GRANBY CONSOLIDATED MINING, SMELTING & POWER COMPANY LIMITED.

OLIVER v. GRANBY CONSOLIDATED MINING, &C., POWER CO.

Company law—Company incorporated in British Columbia—Companies Clauses Act—Share register—To be kept in Province—Execution—Sheriff's transfer of shares—Registration enforced—B.C. Stats. 1901, Cap. 75, Sec. 35—R.S.B.C. 1911, Cap. 40, Sec. 9—R.S.B.C. 1911, Cap. 79, Sec. 20.

Where by the Act of Incorporation of a company in British Columbia the Companies Clauses Act applies, it must keep its register of shareholders within the Province, the proper place being the registered office of the company.

The defendant Company kept its register of shareholders at an office outside the Province. The plaintiff purchased from the sheriff under execution certain shares held by a person in the Company.

Held, that he is entitled to compel the Company to make the proper entries to make him the registered holder of the shares.

Held, further, that the *situs* of the shares is in British Columbia in so far as the provisions of the Execution Act are concerned.

ACTION for a declaration that the plaintiff become the owner of 200 shares of the defendant Company on a sale by the sheriff under execution and that he is entitled to be registered as holder upon the sheriff's certificate of sale, and to receive from the Company a certificate of proprietorship and for a *mandamus* commanding the defendant Company to register the transfer and issue the certificate. The plaintiff purchased from the sheriff under execution the 200 shares of the defendant Company of which Myran K. Rogers died possessed on the 23rd of July, 1917. The execution was directed against the administrator of the deceased. The defendant Company declined to register the transfer pursuant to section 20 of the Execution Act. The defendant Company has an office in New York where the Company's register of shares has been kept. The plaintiff submitted that the *situs* of the shares in question was in British Columbia, the defendant Company having been incorporated under a private Act of this Province, and that the register of shareholders should be kept at the registered office of the Company within the Province. Tried by MURPHY, J. at Vancouver on the 11th of October, 1922.

Statement

A. M. Whiteside, for plaintiff.
Mayers, for defendant.

24th November, 1922.

MURPHY, J.: In my opinion, the defendant Company is bound to keep its register of shareholders within the territorial limits of British Columbia. By section 35 of its Act of Incorporation, B.C. Stats. 1901, Cap. 75, the provisions of the Companies Clauses Act apply to defendant Company, subject to provisoes not applicable to the question under consideration. By section 9 of the Companies Clauses Act, R.S.B.C. 1911, Cap. 40, all companies subject to said Act must keep a register of shareholders. The defendant Company, is, therefore, not only given the right or power to keep a register of shareholders by the Legislature, but a statutory duty is imposed upon it to do so. It was laid down by the Judicial Committee in *Bonanza Creek Gold Mining Co. Lim.* v. *Regem* (1916), 85 L.J., P.C. 114, that the limitations of the legislative powers of a Province expressed in section 92 of the B.N.A. Act, and in particular the limitation of the power of legislation to such as relates to the incorporation of companies with Provincial objects confine the character of the actual powers and rights which the Provincial Government can bestow either by legislation or through the Executive to rights and powers exercisable within the Province. The same decision declares that capacity to acquire rights and powers beyond the territorial limits of a Province may by apt steps be conferred on a company created by Provincial authority, but no question on this phase of the decision arises on the facts herein. My opinion is strengthened by the provisions of sections 14 to 20 inclusive of the Companies Clauses Act dealing with the transmission of shares. The compulsory carrying out of these provisions against a recalcitrant Provincial company would be greatly hampered, if not rendered impossible, if the register of shareholders were outside the territorial limits of the Province. The provisions of the Execution Act, as to seizing the shares of a judgment debtor, would likewise be made most difficult to work out. As to where in the Province the register of shareholders should be kept, I hold it should be at the registered office of the Company.

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By the Companies Clauses Act Amendment Act, 1916, the defendant Company is compelled to have a registered office in the Province to which all communications and notices may be addressed. Since to carry out a transfer of shares in its entirety there must be communication with the Company and a change in the register of shareholders it follows, I think, this book must be at the registered office. It may be possible for the Company, by virtue of the provisions of section 3 of its Act of Incorporation, to designate some other place within the Province where this book may be kept, but on this I am not called upon to express an opinion in order to decide the present application. As the plaintiff is the purchaser of the shares in question at proceedings under the Execution Act, as to the regularity of which there is no question other than the contention that the defendant Company having purported to keep its register of shareholders outside the jurisdiction such proceedings are abortive. I hold the plaintiff is entitled to succeed in this action. Defendant Company is a corporation created by the British Columbia Legislature. Its corporate rights and powers are at present confined to the territorial area of British Columbia. Its shares, therefore, represent property exclusively situate in British Columbia. The British Columbia Legislature has by the provisions of the Execution Act provided a method for seizure of these shares when owned by a judgment debtor. I hold the *situs* of the shares is in British Columbia in so far as the provisions of the Execution Act are concerned. I think this view is in accordance with the decisions in *New York Breweries Co.* v. *Attorney-General* (1898), 68 L.J., Q.B. 135.

Judgment

Judgment for plaintiff.

REX v. WILHELMINA DAVIS.

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REX v. WILHELMINA DAVIS

Interpleader—Order without notice—Rehearing before County Judge—Ice-cream parlour used for sale and consumption of liquor—Scope of section 57 of Government Liquor Act—B.C. Stats. 1910, Cap. 30, Secs. 76 and 77; 1921, Cap. 30, Secs. 57 and 60.

A magistrate or other interdiction official may make an order of interdiction under Section 57 of the Government Liquor Act without first giving notice to the person against whom the order is to be made.

An order of interdiction under said section was made by two justices of the peace against the proprietor of an ice-cream parlor on the ground that loggers and others congregated there to drink liquor, that drinking was carried on on the premises and it was disorderly. On appeal to the County Court judge under section 60 of the said Act:—

Held, that as the whole scheme of the section is to prevent a person who is abusing the use of liquor from doing so to the detriment of himself and family, and that as the accused was not shewn to be indulging in excessive drinking nor was his family suffering from his use of intoxicants, the order for interdiction should therefore be set aside.

Per curiam: To effect the purpose desired the Provincial authorities at the *locus in quo* might have made representations to the Liquor Control Board under section 18 of the Government Liquor Act.

APPEAL to the County Court Judge at Vancouver, under section 60 of the Government Liquor Act, from an order of interdiction made against Mrs. Wilhelmina Davis by two justices of the peace at Alert Bay, B.C. The order was made at the instance of the police constable at Alert Bay on the information that an ice-cream parlor kept by Mrs. Davis was a place where loggers and others congregated to drink liquor, that there was a great deal of drinking going on there, that the provisions of the Government Liquor Act were habitually violated, that in the opinion of the constable liquor was sold there, and in the sense of being a liquor dive the place was disorderly. Argued before CAYLEY, Co. J. at Vancouver on the 24th of November, 1922. Statement

Wood, for accused.
Orr, for the Crown.

CAYLEY, Co. J.: I have taken the opportunity during the lunch hour to look into this question of notice. This matter is Judgment

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dealt with in the Liquor Act, 1910, Cap. 30, Part V. This is not a trial; it is a procedure introduced into the Liquor Act for the purpose of protecting a man's family against his own excesses, and the matter is dealt with privately in order to protect the reputation of the man and of his family. It is in the discretion of these officers named in the Act. The apparent intention is to treat people who indulge to excess in the same way as the British laws treat sailors and to restrict their liberty for their own protection.

This has extended down to the present time. In places where it is distant from the offices of the Provincial police, where they cannot be dealt with by the head of the Provincial police because they live in Victoria, they have given the same power to any Court of summary jurisdiction, that is, two justices of the peace, etc., that they might have the same power as would the superintendent of the Provincial police. The idea is to have this dealt with in as quiet a manner as possible, for the protection of a man and of his family. Therefore, when I said this morning that I thought section 57 must have some reference to the old Acts, it was with a view of looking into the old Acts.

Section 57 of the Government Liquor Act says: [after reading the section the learned judge continued].

Judgment

There is the same thing, the kind of procedure is identically the same, not to allow unnecessary shame to fall upon a man or upon his family by making public his own excesses, but quietly to deal with the matter, issuing an order to the liquor licence sellers, no longer to supply liquor to these people. Therefore, what seems to be contrary to British justice that a matter should be decided without notice to the party—and which does appear so contrary to British justice—yet it appears reasonable, looking at it from another point of view, the protection of the good morals of the community, and the cases cited by Mr. *Orr* therefore do not apply, and these magistrates who made the order in question were within their rights in acting without notice, and Mr. *Orr's* objection in that respect is overruled.

I might point out further in reference to that matter that any defects in the order made, or in the conviction appealed

from to the County Court, still confines the Court to the one thing, not the setting aside of the conviction, but to the mere matter of rehearing the case. In ordinary cases that would have to go to the Supreme Court in the way of *certiorari*. However, that is now taken away, so you cannot go to a Supreme Court judge by way of *certiorari*, you must go to the County Court by way of appeal. It would be a ridiculous thing if there were any defect in the proceedings before the magistrate, if the County Court should not hear the case, and a case should go into the discard because of some technicality in the magistrate's Court, which as everyone knows is a Court not presided over, as a rule, by professional legal men. In that case, even if Mr. *Orr's* contention were correct, I could not quash that order. I have no authority to quash the order, no authority to set the decision of the magistrate's Court aside. There is no Act, Provincial or Dominion, that gives any authority to do anything else than rehear the case. I shall therefore rehear the *Davis* case.

Judgment

The evidence was then heard and judgment was given as follows:

Statement

CAYLEY, Co. J.: The evidence in this case shews that the ground of complaint against Mrs. Davis is that her ice-cream parlor is a place where loggers and others congregated to drink liquor and that there was a great deal of drinking going on there and that the place was, in the sense of being a drinking dive, disorderly.

I might say perhaps that the provisions of the Government Liquor Act, B.C. Stats. 1921, Cap. 30, were, in the opinion of the constable, habitually violated; in other words, that he believes liquor was sold there. The constable seems to have gone before two justices of the peace under the provisions of section 57 of the Government Liquor Act, and obtained from them *ex parte* an interdiction order.

Judgment

The history of the origin of section 57 is important here. Section 57 is derived from the Liquor Act, 1910, Part V., sections 76 and 77. A reading of section 76 shews that when

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it is made to appear to the satisfaction of the superintendent of Provincial police or the inspector of licensed premises, or the chief of police in any municipality that any person in British Columbia by excessive drinking of liquor misspends, wastes or lessens his estate, or injures his health or endangers or interrupts the peace and happiness of his family, such chief of police, etc., may interdict the party. Section 77 gives this same power to a Court of summary jurisdiction composed of two justices of the peace or a police magistrate or a stipendiary magistrate.

Section 77 undoubtedly is for the purpose of enabling justices of the peace to perform the same duties in this respect in parts of the country distant from the officers of the Provincial police and municipal officers, as are performed by the superintendent of Provincial police and the chief of police in municipalities. The whole scheme is to enable a family to prevent a man who is abusing the use of liquor from doing so to the detriment of his family. It, therefore, does not render it necessary to summons the interdicted party or give him notice of any kind. It is a private matter, as far as possible, for the protection of a family. These provisions have been carried right into section 57 of the Government Liquor Act. The same words are used and the same intention is manifest. Section 57 of the Government Liquor Act must be read, therefore, in the light of sections 76 and 77 of the Liquor Act, 1910. It is for the protection of the family, and for families solely, and cannot be used by the police or any other person for any other purpose.

Judgment

Here, the police constable at Alert Bay is endeavouring to use this section for a totally different purpose, and two justices of the peace at Alert Bay have agreed with him that they could interdict the accused in this action. I am sorry they cannot, but it seems to me that this accused is not abusing liquor personally by excessive drinking on her part, and that her family are not suffering from her excessive use of intoxicants, and that therefore she cannot be interdicted under section 57 of the Act.

To effect the purpose desired by the Provincial authorities at

Alert Bay, they might have made representations under section 18 of the Government Liquor Act, to the Liquor Control Board. The Liquor Control Board can interdict a person for violating any provisions of the Act. Surely selling liquor is violating a provision of the Act, and conducting a house of this kind must be violating a provision of the Act. However, that would be for the Liquor Control Board to decide. I am satisfied that it is under section 18, if any, that the violations of the Act must be dealt with, and that the interdiction of the accused under section 57 cannot be supported.

Appeal allowed.

DOANE v. THOMAS.

Practice—Appeal to Supreme Court—Application to Court of Appeal for leave—Rule as to granting or refusing leave—Can. Stats. 1920, Cap. 32, Sec. 41.

On application to the Court of Appeal for leave to appeal to the Supreme Court, leave should only be granted where the case involves matters of public interest, some important question of law, the construction of Imperial or Dominion statutes, a conflict of Provincial and Dominion authority or questions of law applicable to the whole Dominion (McPHILLIPS, J.A. dissenting).

Per McPHILLIPS, J.A. agreeing with the Court that leave should not be granted in this case, *held*, that Parliament had instituted this Court a sovereign Court to grant leave to appeal and until Parliament has stated a guiding rule or until the Court has pronounced a rule, applications for leave to appal should be considered upon the merits shewn in each case.

MOTION to the Court of Appeal for leave to appeal to the Supreme Court of Canada. Heard by MARTIN, GALLIHER, McPHILLIPS and EBERTS, JJ.A., at Victoria on the 28th of November, 1922. Statement

[MARTIN, J.A.: Judgment was given in this case on the 3rd

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of October last. We are sitting this time but I think you should be more prompt in making your application.]

J. R. Green, for appellant: My grounds for appeal are: (a) That two judges of the five sitting on the appeal were in my favour. (b) That $1,200 was involved. (c) That there was not contributory negligence on the part of the plaintiff in coasting down the hill on his bicycle as he did at the time of the accident. There is divergence of opinion upon which the Court might grant leave to appeal: see *The Royal Templars of Temperance* v. *Hargrove* (1901), 31 S.C.R. 385.

Argument

Robertson, K.C., contra: Unless the case involves an important question of law, a question of public interest or the construction of a statute, leave will not be granted: see *Girard* v. *Corporation of Roberval* (1921), 62 S.C.R. 234; *Lake Erie and Detroit River Rway. Co.* v. *Marsh* (1904), 35 S.C.R. 197 at p. 200; *Whyte Packing Co.* v. *Pringle* (1910), 42 S.C.R. 691 at p. 693; *Riley* v. *Curtis's and Harvey and Apedaile* (1919), 59 S.C.R. 206; *Walker* v. *Sharpe* (1921), 1 W.W.R. 1127; *Jackson Machines Ltd.* v. *Michaluck* (1922), 3 W.W.R. 664; *Miller* v. *O'Neill-Morkin Machinery Co. Ltd.* (1921), 2 W.W.R. 788; *Rex* v. *Sam Jon* (1914), 20 B.C. 549.

Green, in reply.

MARTIN, J.A.: We are all of the opinion that leave should not be granted.

Fortunately we have the recent judgment of the Supreme Court of Canada which declares what our duty is in cases of this description, laid down in *Girard* v. *Corporation of Roberval* (1921), 62 S.C.R. 234. There the Court expressed its view as to the principles which should direct us in applications of this nature, and adopted the view of a prior decision of its own, in which judgment was given by Mr. Justice Nesbitt, in *Lake Erie and Detroit River Rway. Co.* v. *Marsh* (1904), 35 S.C.R. 197, wherein it was said at p. 200:

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> "Where, however, the case involves matter of public interest or some important question of law or the construction of Imperial or Dominion statutes or a conflict of Provincial and Dominion authority or questions of law applicable to the whole Dominion, leave may well be granted."

It would not, I think, be safe for us to depart from that rule.

And I notice that the Supreme Court in that case went so far as to express its regret (at pp. 236 and 238, Anglin, J. concurring) that the Court of King's Bench below had given leave for the appeal to come before it.

The motion is dismissed with costs.

GALLIHER, J.A.: I take the same view as my brother MARTIN. I think we have to proceed upon some principle and we have the guidance, at all events, though *obiter,* of the judges of the Supreme Court of Canada, and I think we would not go far wrong in following that.

GALLIHER, J.A.

I might say, being the judge who dissented below, if I could see my way clear to granting the application I would do so. But we have to really lay down some rule, otherwise there would be no limitation at all in the case of appeals to the Supreme Court of Canada.

I do not say this should be a hard and fast rule which would not be departed from in exceptional cases.

MCPHILLIPS, J.A.: I am of the opinion that leave should not be granted in this case. But I wish to guard myself from being assumed to have decided that this Court must necessarily be guided by the view of the Supreme Court of Canada in the matter. It seems to me that Parliament has constituted this Court a Sovereign Court, if I may use the term, to grant leave to appeal. There is only an appeal from us if we have refused leave.

MCPHILLIPS, J.A.

It is reasonable that there should be some rule, that is the granting of leave cannot be a matter of caprice; however, Parliament has left the matter at large, and, as I view it, at the sole discretion of this Court, save that if there be refusal of leave, an appeal lies to the Supreme Court of Canada. It would have been very simple for Parliament to have stated the rule that should guide us. In the rules that guide us in granting leave to appeal to the Privy Council, there are apt words, and the apt words are really in terms that conform with the views of the learned judges of the Supreme Court of Canada, in the authorities cited at this bar, but the legislation is silent in

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the matter. With great respect though the laying down of any positive rule partakes of legislation. At the same time, there ought to be some rule possibly of an elastic nature capable of well conserving the true ends of justice, but this Court has as yet not pronounced any rule. I hold myself open (until there is binding authority or controlling legislation), to consider all applications for leave to appeal, wholly unfettered by any intractable rule, and upon the merits shewn. There might be cases that would appeal to the discretion of this Court, and they might not be in alliance with the *ratio decidendi* of the cases that have been cited.

EBERTS, J.A.

EBERTS, J.A.: But for the case of *Girard* v. *Corporation of Roberval* (1921), 62 S.C.R. 234, I would have been in favour of giving leave; but in that I feel I am so strongly directed by the Supreme Court of Canada under the circumstances, I would have to refuse leave.

Leave to appeal refused.

REX *EX REL.* TOWNLEY v. CHOW.

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REX v. CHOW

Architects—Incorporation—Right to practise—Sign-board—Word "architect" printed thereon—B.C. Stats. 1920, Cap. 106, Sec. 30.

Accused had placed a sign-board in front of his office on which was printed the words "W. H. Chow, Architect." He was convicted on a charge of unlawfully advertising or putting out a sign for the purpose of indicating to the public that he was entitled to practise as an architect in contravention of section 30 of the British Columbia Architects Act.

Held, on appeal, reversing the decision of McDONALD, J., that there is a large field open to architects in British Columbia without it being incumbent upon them to become registered under the Act so that the use of the word "architect" alone on the sign is not an infraction of the Act.

APPEAL by way of case stated from the decision of McDONALD, J., of the 13th of October, 1922, sustaining the conviction of the accused by the police magistrate at Vancouver on a charge of unlawfully advertising or putting out a sign for the purpose of indicating to the public that he was entitled to practise as an architect under the British Columbia Architects Act. The accused had put a sign-board in front of his office on which was printed the words " W. H. Chow, Architect," he not holding a certificate of registration as an architect under the Act.

Statement

The appeal was argued at Vancouver on the 15th of November, 1922, before MARTIN, GALLIHER, McPHILLIPS and EBERTS, JJ.A.

Harper, for appellant: Accused was convicted under section 30 and the question is whether in putting under his name "architect" he is holding himself out as an architect under the Act. In sections 2 and 3 of the Act they use the words "registered architect." A practitioner within the Act would use both words and when he uses "architect" alone he does not assume to be qualified under the Act: see *Association of Architects of the Province of Quebec* v. *Gariepy* (1916), 50 Que. S.C. 134 at p. 138. When you cut a man off from his livelihood

Argument

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the statute must be interpreted strictly. The registered architects must have a wider field. If you are allowed to do a thing you have the right to bring it to the attention of the public: *Bellerby* v. *Heyworth* (1910), A.C. 377. In our statute a field is left open in the architect business: see *Royal College of Veterinary Surgeons* v. *Kennard* (1914), 1 K.B. 92. The word is not calculated to lead the public to believe he was qualified under the Act: see *Regina* v. *Tefft* (1880), 45 U.C.Q.B. 144.

Argument

Maitland, for respondent: The man on the street sees "architect" and he will assume the man whose name is above the word is a full-fledged architect: see *L'Association des Architectes de la Province de Quebec* v. *Paradis* (1915), 48 Que. S.C. 220.

Harper, in reply: In the *Gariepy* case they did not follow the *Paradis* case.

MARTIN, J.A.

MARTIN, J.A.: We all agree that this appeal should be allowed and that the section has not been infringed by the advertisement this man has put up, having regard to his right to practise in a very large field recognized by statute. As the matter is of some importance I think it will be more convenient, to place my views with exactness, if I hand down a short judgment.

The result is, the question reserved is answered in the negative, and the appeal is allowed.

GALLIHER, J.A.

GALLIHER, J.A.: I may say I am not dissenting in this, although I have some doubts regarding it.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I am of the same opinion as my brother MARTIN. The decision of the Court below cannot be supported.

Parliament has halted in making it a requirement that architects should all be registered under the provisions of the Act. There is an absence of intractable language which must be present when persons are affected in their ordinary avocations of life; further there is the use of language which indicates at once that there is a large field open to architects in the Province of British Columbia, without it being at all incumbent upon the

architects to become registered architects. That being so, it is plain to demonstration that the placing upon a sign of the word "Architect" cannot be considered to be any infraction of the statute. If we sustained the judgment it would be in effect enacting legislation, which of course does not come within the province of the Court.

I would allow the appeal.

EBERTS, J.A.: I cannot add to the remarks of my learned brothers. I would allow the appeal.

EBERTS, J.A.

Appeal allowed.

Solicitors for appellant: *Harper & Sargent.*
Solicitors for respondent: *Maitland & Maitland.*

NORTH v. SICILLIANO *ET AL.*

Interpleader—Household goods seized under execution—Claimed by debtor's wife—Evidence—Joint occupation—Previous admissions by husband as to wife's ownership.

Where an execution debtor's wife claims household goods which were seized under execution, joint occupation of the premises has no weight against her claim especially when she is the registered owner thereof.

In support of the wife's claim evidence of third parties was admitted to shew that prior to the execution creditors' cause of action arising the execution debtor had admitted to said parties that the goods belonged to his wife, and as the admissions were such as would estop him from subsequently claiming the goods as against his wife, the execution creditors would be in no better position.

INTERPLEADER issue to determine the ownership of certain household goods seized by the sheriff in the house occupied by Joseph North (the execution debtor) and his wife under an execution and claimed by the wife as her property. Tried by MACDONALD, J. at Victoria on the 5th of June, 1922.

Statement

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Stuart Henderson, and *Clearihue,* for plaintiff.
Higgins, K.C., for defendants.

11th December, 1922.

MACDONALD, J.: Plaintiff claims in this interpleader issue that practically all the household goods in the dwelling-house, situate at 1109 Johnson Street, Victoria, B.C., were, at the time of seizure by the sheriff, her property, as against the defendants, who are execution creditors of her husband, Joseph North.

The fact that the goods were, at the time of seizure, in the house jointly occupied by the plaintiff and her husband, and thus would formerly have been, *prima facie,* subject to seizure under execution against the husband, is affected by the Married Woman's Property Act. Lord Esher, M.R. refers to this change, in *Ramsay* v. *Margrett* (1894), 2 Q.B. 18. At p. 25 he said:

"A married woman and her husband are no longer in law one person; they are two persons, just as if they were two men. . . . When she [the plaintiff] bought these goods from her husband and paid him the price, they became her sparate property. The goods were in the house in which the husband and the wife were living together, and in that state of things you could not say which of them had the actual possession of the goods. . . . . When the possession is doubtful it is attached by law to the title."

Compare *French* v. *Gething* (1922), 1 K.B. 236 where *Ramsay* v. *Margrett, supra,* was followed. There Bankes, L.J. at p. 244, in referring to the question, as to whether goods, in the conjugal domicil of the husband and wife, are to be considered in the apparent possession of the husband, says:

Judgment

"How can the proper inference be that, although not in his apparent possession, they are in his reputed ownership?"

Compare Scrutton, L.J. at p. 246:

"I should like to point out that properly speaking the fact that goods are in the order and disposition of a person is evidence that he is the reputed owner of them; but this section seems to imply that to be in the order and disposition of the husband is different from being in his reputed ownership. Be that as it may, however, in the present case there is no evidence that these goods remain in the order and disposition of the judgment debtor, nor any evidence that they remain in his reputed ownership; though I think in this case the one conclusion follows the other, for if the goods, being household furniture, are not in his order and disposition, they are not in his reputed ownership."

Thus I do not think that the fact of joint occupation by the husband and wife has any weight against the plaintiff, especially when you consider that she is the registered owner of the house

The question then is, whether the plaintiff had such a title to or ownership of these goods or any of them, as entitles her to succeed in the issue.

There were no judgments shewn to exist against Joseph North, the execution debtor, prior to those, upon which the executions were issued by the defendants, nor was it proved that he had any prior unsatisfied unsecured liabilities, so the right of the defendants to dispute the ownership of the plaintiff to the goods cannot receive any assistance arising from the transfer to the wife being in fraud of then existing creditors. While some of the goods were acquired by plaintiff, after her marriage, still the great bulk of the property in dispute was owned by her husband and only became her property upon her marriage. It appears that Mr. and Mrs. North had arranged for a marriage, prior to his obtaining a divorce from his first wife. Further, that the gift of household goods arose through and was consequent upon a marriage brought about in this manner. It is contended, that, even aside from the Statute of Frauds, a transfer of property, under such circumstances, should not be upheld, as being opposed to public policy. The cases of *Spiers* v. *Hunt* (1908), 1 K.B. 720 and *Wilson* v. *Carnley, ib.* 729, are cited in support of this proposition. While it may have been there decided, that promises of marriage, formed under circumstances somewhat similar to those here outlined, were unenforceable, still it was not decided that, if the marriages had taken place under such unenforceable promises, the husband could not, at or after the marriage, have given his wife, whatever personal property he possessed, subject to the rights of his creditors. Here, while the gift may have been dependent upon the marriage, still, if I accept the evidence of the plaintiff, there was subsequent ratification.

Judgment

Both the husband and wife state, that all the household goods were always considered as her property. This condition, if not directly supported, appears tenable from the fact that she became the owner of the house in which they lived. It was only when a dispute arose between them and divorce proceedings were threatened, that any change was contemplated as to the ownership of the property. To effect this purpose, an

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agreement of sale was drawn, at that time, reciting a payment of $1,400, but this amount was not actually paid. The agreement became inoperative and should have been cancelled. Should I then accept the statements of the husband and wife, as to the ownership of the goods and chattels? There was no writing between them evidencing the transaction. Some of the plaintiff's statements were inconsistent, especially as to alleged payments by her some years ago upon the mortgage then existing upon the house and lot.

It was also pointed out that the goods were insured in the name of the husband, as owner, though this point lost some of its weight by the fact that the house was also insured in the husband's name, though the wife was the registered owner. The lack of corroboration of the transaction between the husband and wife became apparent at the trial. In this connection the case of *Koop* v. *Smith* (1914), 20 B.C. 372; (1915), 51 S.C.R. 554 was discussed. Duff, J. there refers to the trial judge, appearing to have laid it down as a proposition of law, that an impeached transaction between two near relatives carried out, in circumstances in themselves sufficient to excite suspicion,

"can only be supported (in an action brought to impeach it by creditors) if the reality or the *bona fides* of it are established by evidence other than the testimony of the interested parties; and there is a series of authorities in the Ontario Courts which has been supposed to decide that."

Judgment

After stating that this may be the settled law of Ontario today, he adds as follows (p. 558):

"I do not think the proposition put thus absolutely is part of the English law or the law of British Columbia; but I think it is a maxim of prudence based upon experience that in such cases a tribunal of fact may properly act upon that when suspicion touching the reality or the *bona fides* of a transaction between near relatives arises from the circumstances in which the transaction took place then the fact of a relationship itself is sufficient to put the burden of explanation upon the parties interested and that, in such a case, the testimony of the parties must be scrutinized with care and suspicion; and it is very seldom that such evidence can safely be acted upon as in itself sufficient. In other words, I think the weight of the fact of relationship and the question of the necessity of corroboration are primarily questions for the discretion of the trial judge subject, of course, to review. . . . . I may add that I think it doubtful whether the Ontario decisions when properly read really do lay it down as a rule of law that the fact of relationship is sufficient in itself to shift the burden of establishing the burden of proof in the strict sense. It may

be that the proper construction of these cases is that the burden of giving evidence and not the burden of the issue is shifted."

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Here the plaintiff assumed the burden and unless the ownership, which was stated to exist, as to these goods, was fabricated, in order to prevent realization under the executions, then I think such burden was satisfied. If a transfer of the property from the husband to the wife really took place, prior to the defendants becoming creditors of the husband, then he was not only in a position at the time to make a gift to the wife of the household goods, but, when the surrounding circumstances are considered, it was a very probable course for him to pursue. It was sought, however, to strengthen and give support, should it be required, to statements of what had transpired between the parties, by the introduction of evidence of third parties. Notwithstanding objection, I allowed the evidence of Sidney Child and W. H. Davies to be given on this point. They proved to my satisfaction that, long prior to the utterance by the husband of the defamatory statements complained of and the recovery of judgments against him, he had admitted that the household goods were owned by the plaintiff. Further, he made these admissions under such circumstances, that he would be subsequently estopped from asserting to the contrary, as against his wife. The defendants, as execution creditors, would not be in any better position than the husband would have been, and he could not have successfully contended that such goods were his property. In my opinion, all the goods seized by the sheriff, and the subject of the issue, were the property of the plaintiff as against the defendants. She is entitled to judgment and her costs.

Judgment

Judgment for plaintiff.

MACDONALD, J.

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IN RE LIVINGSTON, DECEASED.

Husband and wife—Husband's will—Insufficient provision for wife—Testator's Family Maintenance Act—Principles to be applied—B.C. Stats. 1920, Cap. 94.

IN RE LIVINGSTON, DECEASED

There having been inadequate provision for her maintenance under her husband's will, a widow applied for relief under the Testator's Family Maintenance Act, and it was *held* that the Court in exercising its discretion should consider: (1) the station in life of the parties; (2) age, health and general circumstances of the wife; (3) the testator's means at the time of his death; and (4) property or means of the wife in her own right. The Court should consider whether or not, having regard to all surrounding circumstances, the testator has been guilty of a manifest breach of moral duty owed to his wife and if there has been a breach, repair it.

Held, further, that there should be an investment of sufficient moneys that are in the hands of the trustees to create a certain net income which should be paid the widow quarterly for her life and that if this be accepted it should be in lieu of her benefits under the will.

Statement

APPLICATION by the widow of the late Robert Livingston for relief under the Testator's Family Maintenance Act, B.C. Stats. 1920, and that she be provided with proper maintenance and support. Heard by MACDONALD, J. at Chambers in New Westminster on the 2nd of December, 1922.

W. J. Whiteside, K.C., for the application.
Lidster, for the Executors.
Gibson, for John Livingston.

14th December, 1922.

Judgment

MACDONALD, J.: The late Robert Livingston, by his will, devised and bequeathed all his real and personal property to Florence Livingston, James Livingston and David Currie in trust. The will directed that, after payment of expenses and debts, the estate should be divided between his wife and his seven children by a former wife, therein named, share and share alike. Florence Livingston, the widow, now applies, under the Testator's Family Maintenance Act (B.C. Stats. 1920, Cap. 94) and alleges that provision for her "proper maintenance and support" has not been afforded under the terms of the will. She seeks to have such provision made as the Court may think adequate, just and equitable in the circumstances. The applica-

tion has been adjourned from time to time, in order to realize upon that portion of the estate, consisting of an interest in valuable land on Lulu Island. This object has been accomplished, and the estate, in the hands of the executors and trustees, now consists of over $10,000 cash and a house and lot in New Westminster unencumbered and worth approximately $4,000.

It is quite evident that Robert Livingston, in making his will, did not adequately provide for his wife, who had married him late in life and when he was in poor health. He was apparently quite eccentric and she had been a good and faithful companion to him during his declining years. The legislation, upon which this application is based, is of recent enactment in this Province, but has been in force in other portions of the Empire for a considerable period. A decision under a similar statute in New Zealand was reviewed in *Allardice* v. *Allardice* (1911), A.C. 730. A reference to such case in 29 N.Z.L.R. 959, outlines some very instructive principles, that should be adopted by the Court in applying this remedial legislation. It was pointed out, that the intention of such an Act was not, to interfere with the will of the testator, to the extent of apportioning his estate, but that "the first inquiry in every case must be, what is the need of maintenance and support, and the second, what property has the testator left?" These two essentials are amplified by Cooper, J. at p. 974, in which he mentions his judgment in *Plimmer* v. *Plimmer,* 9 Gaz. L.R. 10, and refers to it in a very instructive way, as applied to the present application. He cited a portion of his judgment, as follows:

Judgment

"The principle upon which the Court should exercise its discretion in the case of a widow claiming against the estate of her husband under the corresponding provisions in The Testator's Family Maintenance Act, 1906. I said: 'What is an adequate provision for the wife of a testator is a question which depends—1, upon the station in life of the parties; 2, upon the age, health, and general circumstances of the wife; 3, upon the means possessed by the testator at the time of his death; and 4, upon any property or means which the wife possesses in her own right. What would be an adequate provision for the wife of an artisan or a labouring man who died possessed of a comparatively small estate would be inadequate for the wife of a prosperous tradesman or a wealthy merchant or professional man. What would be an adequate provision for the wife of a man who died possessed of an estate of £20,000 would be inadequate for

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the wife of a millionaire. So also what might be considered sufficient for a woman in the prime of life, of robust health, and capable in mind and body might be insufficient for a woman of advanced years or in ill-health.'

"These observations, in my opinion, state a reasonable rule applicable to the claims of the widow of a testator. I think that the widow of a testator may stand in a different position to a widower or children of a testator."

Here it is a difficult matter to determine, to what extent the will should be interfered with, in default of the testator making proper provision for his widow. She had a first claim upon the consideration of her husband in view of the circumstances and her advanced years. The Court of Appeal of New Zealand in *Allardice* v. *Allardice, supra,* at pp. 972-3, referred to the duty of the Court in this connection and the difficulty that must necessarily be encountered as follows:

"It is the duty of the Court, so far as is possible, to place itself in all respects in the position of the testator, and to consider whether or not, having regard to all existing facts and surrounding circumstances, the testator has been guilty of a manifest breach of that moral duty which a just, but not a loving, husband or father owes towards his wife or towards his children, as the case may be. If the Court finds that the testator has been plainly guilty of a breach of such moral duty, then it is the duty of the Court to make such an order as appears to be sufficient, but no more than sufficient, to repair it. In the discharge of that duty the Court should never lose sight of the fact that at best it can but very imperfectly place itself in the position of the testator, or appreciate the motives which have swayed him in the disposition of his property, or the justification which he may really have for what appears to be an unjust will."

Judgment

There is no doubt that the testator was neglectful of the duty he owed to his wife, and divided the property irrespective of the necessities that should have been prevalent in his mind. It appears that he was, in a measure, estranged from his children, but must have been aware that some of them were in comfortable circumstances and did not require a share of his estate, or, at any rate, any share that would operate to deprive the widow of reasonable maintenance. All the children, except one, have realized the position in which their stepmother has been placed, through lack of adequate provision. They have, through their solicitor, proposed a division of the estate which would properly solve the difficulty, but opposition has ensued from John Livingston, one of the children, who will not accede to either of the schemes for maintenance, presented

by such solicitor. This necessitates the formulation of a plan which will provide maintenance for the widow according to her station in life. I should endeavour, in so doing, to repair the manifest breach of the testator. Were it not for the opposition of John Livingston, the difficulty could have been solved by family arrangement, without the intervention of the Court. While John Livingston will not agree to the proposition presented by counsel for the widow, supported by counsel for the other brothers and sisters, it would be unfair, in interfering with the terms of the will, to discriminate in his favour. He is desirous of obtaining and having a division of his father's estate, or, in any event, receiving a portion of his share immediately. If this course were pursued, even to a limited extent, and applied to all the beneficiaries under the will, it would reduce the amount available as a fund to create an income, to such an extent that proper maintenance for the widow could not be obtained. I should add that John Livingston is not the only one of the children of the testator, to whom a present payment of a portion of the estate, while not sought, still, is needed and would be appreciated. Under all the existing facts and circumstances, and bearing in mind the purpose sought to be obtained by the legislation, I think that proper maintenance and support should be afforded to the widow for her lifetime, by the investment of sufficient moneys, that may come into the hands of the trustees, to create a net income of $700 per annum, payable to the widow quarterly. To effect this purpose, the house property might be sold as soon as possible, and the trustees should, in the investment, comply with the provisions of section 12 of the Trustee Act (R.S.B.C. 1911, Cap. 232). Pending the sale of the house property, the widow might have its use, free of rent, subject to the payment of the taxes by her. The acceptance by the widow of these provisions for maintenance derived under the order she is thus obtaining, and the details of which may be subsequently settled, should be considered as in lieu of all benefits, to which she might be entitled under the will. Upon her death, her share under the will would thus become a portion of the estate and divisible amongst the other beneficiaries.

Judgment

The costs of all parties should be payable out of the estate.

Order accordingly.

MARTIN, LO. J.A.

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RUMELY v. THE "VERA M.": WESTERN MACHINE WORKS, LIMITED, CLAIMANT.

RUMELY v. THE "VERA M."

Lien—Shipping—Loss of lien by giving up possession—Possessory lien claimed for repairs on vessel—After ship arrested in other cause pending claimant suing and causing arrest of ship in his action, thereby invoking transfer of right of possession to marshal and loss of lien.

A lien is destroyed if the party entitled to it gives up his right to the possession of the goods.

If A, claiming a possessory lien at common law for repairs done on a vessel, after the vessel has been arrested at suit of B asserting a maritime lien for seamen's wages and while that cause is pending begins an action for the value of his repairs and causes the ship to be arrested in that action, A, as against B, loses what lien he had, as his proceeding involved the transfer of his right of possession to the marshal whose assistance was invoked, and such passing of possession destroyed the lien which existed only by possession.

Statement

ACTION for wages, tried by MARTIN, LO. J.A. at Vancouver on the 12th and 13th of December, 1922.

Ginn, for plaintiff.
Dickie, for claimant.

28th December, 1922.

Judgment

MARTIN, LO. J.A.: This is a contest between the plaintiff who asserts a maritime lien for seaman's wages and the Western Machine Works, Limited, which claims a possessory lien at common law for repairs done on the vessel. Several questions of nicety arose at the trial, and have caused me to give the matter much consideration, but in the conclusion I have reached it will be necessary to consider only the most important one of them, *viz.*, that relating to the consequences of the arrest of the vessel by the Company. It appears that after the vessel was arrested at the suit of the plaintiff, and while the cause was pending, the defendant Company began an action for the value of its repairs and caused the ship to be arrested in that action, the result of which is that the vessel is in the custody of the marshal under two independent warrants of arrest, each

of which requires him "to arrest the ship . . . . and keep the same under safe arrest until you shall receive further orders from us" (Form 15). It is submitted by plaintiff's counsel that by voluntarily giving up its right to possession the Company has destroyed its lien, assuming it to be a valid one upon the facts in proof, and the case of *Jacobs* v. *Latour* (1828), 5 Bing. 130; 2 M. & P. 201; 6 L.J., C.P. (o.s.) 243, is relied upon as establishing that principle. There it was held that a trainer of horses had lost his lien (if he had one) because he sued the owner for his charges and eventually issued a *fi. fa. de bonis* against him under which the horses, which had remained in the trainer's possession, were sold. The principle involved was thus laid down by the Court of Common Pleas, in term (5 Bing. at p. 132):

"A lien is destroyed if the party entitled to it gives up his right to the possession of the goods. If another person had sued out execution, the defendant might have insisted on his lien. But Messer [the defendant] himself called on the sheriff to sell; he set up no lien against the sale; on the contrary, he thought his best title was by virtue of that sale. Now, in order to sell, the sheriff must have had possession; but after he had possession from Messer, and with his assent, Messer's subsequent possession must have been acquired under the sale, and not by virtue of his lien.

"As between debtor and creditor the doctrine of lien is so equitable that it cannot be favoured too much; but as between one class of creditors and another there is not the same reason for favour."

Judgment

After a careful consideration of the question I can only reach the conclusion that this principle applies to the case at bar. Indeed, in one way it is stronger here, because in the common law Courts the execution (*fi. fa.*) is directed against the goods in general and so might be satisfied otherwise than out of the goods in possession, whereas in this Court the initial arrest was directed against the *res* in particular, which was looked to for prime satisfaction at least, and therefore the intention must inevitably have been that the possession of the *res* should pass to the marshal, and with its passing came the destruction of the lien upon it which exists only by possession. See also *Mulliner* v. *Florence* (1878), 3 Q.B.D. 484; 47 L.J., Q.B. 700; and *Gurr* v. *Cuthbert* (1843), 12 L.J., Ex. 309.

It is unfortunate that this second action should have been begun by the claimant contrary to the practice, because its

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interests would have been protected by the Court in the ordinary way in the first action wherein the first arrest was made: Mayers's Admiralty Law and Practice, 57; Williams & Bruce's Admiralty Practice, 3rd Ed., 319 (*n*); because a lien cannot be asserted against the authority of the Court, and even though that course was taken in excess of caution, yet it nevertheless involved the transfer of the claimant's right of possession to the marshal whose assistance was invoked: a shipwright cannot obtain the assistance of a Court to enforce his lien by sale—*The Thames Iron Works Company* v. *The Patent Derrick Company* (1860), 1 J. & H. 93; 29 L.J., Ch. 714.

Judgment

The result is that the claim of the Company for a possessory lien fails, and is dismissed with costs, and the plaintiff's maritime lien is established for the amount for which he has obtained judgment, with costs. Pending further information as to the state of the cause of the Company's action, I withhold any present direction concerning it and the action for necessaries in which one Yates obtained judgment by confession in open Court on the 13th instant.

GREGORY, J. (At Chambers)

1922

Dec. 27.

IN RE MUNICIPAL ELECTIONS ACT AND CORPORATION OF ESQUIMALT

IN RE MUNICIPAL ELECTIONS ACT AND CORPORATION OF ESQUIMALT.

Municipal vote—Franchise—Qualification — Soldiers — Permanent corps—Whether included in "active militia"—Living in barracks—"Householder"—Scope of—R.S.B.C. 1911, Cap. 71, Sec. 2(1)—B.C. Stats. 1914, Cap. 52, Sec. 54(168).

Statutes conferring the right of franchise should be construed liberally particularly when the history of the Act shews that the tendency has been to broaden or enlarge the scope of the Act as time progresses.

Soldiers in barracks are "householders" within the meaning of the Municipal Elections Act as they physically occupy a portion of a building which is used exclusively as a dwelling.

The permanent corps of Canada is a part of the active militia within the meaning of section 54(168) of the Municipal Act.

GREGORY, J. (At Chambers)

1922

Dec. 27.

IN RE MUNICIPAL ELECTIONS ACT AND CORPORATION OF ESQUIMALT

APPEAL from the Court of Revision of Esquimalt to reinstate names of about 130 householders most of whom were soldiers and soldiers' wives. Objection was taken to the qualifications of the soldiers that they had not paid their road-tax and that they were not exempt therefrom under the provisions of the Municipal Act exempting members of the active militia of Canada, it being contended that soldiers of the permanent force or professional soldiers did not come within "active militia force," but that the term was confined to the volunteer militia. Further objection was taken that they were not "householders" within the meaning of the Municipal Elections Act. The single men lived in barracks and the married men in houses within the military area known as "married quarters." Argued before GREGORY, J. at Chambers in Victoria on the 22nd of December, 1922.

Statement

Maclean, K.C. (*Finland,* with him), for the petitioners.
Robertson, K.C., for Eliza H. Anderson.
Sedger, for the Municipality.

27th December, 1922.

GREGORY, J.: The first question to be decided is, are the appellants "householders" within the meaning of the Municipal Elections Act.

Statutes of this nature conferring the right of franchise should be construed liberally and this is particularly true in the present case, as the history of the Act shews conclusively that the tendency has been to broaden or enlarge the scope of the Act as time progresses. And the Legislature which has just closed shews this intention in a most conclusive manner, for by section 2 of Bill No. 13, the definition of householder entirely wipes out all question of occupancy about which so much was said during the argument.

Judgment

The English decisions on the question are not very helpful, as there the occupancy had to be as tenant under the statute. The case of *McClean* v. *Pritchard* (1887), 20 Q.B.D. 285, was decided under section 3 of 48 Vict., Cap. 3, giving persons occupying premises by virtue of holding an office the right to be placed on the parliamentary but not the municipal franchise.

GREGORY, J. (At Chambers)

1922

Dec. 27.

IN RE MUNICIPAL ELECTIONS ACT AND CORPORATION OF ESQUIMALT

So far as his municipal franchise was concerned, he was still governed by the old rule and required to occupy as tenant.

In the more recent case of *Dover* v. *Prosser* (1904), 1 K.B. 84, it was held that the appellant was entitled to be fully registered though the premises he occupied were not his but those of his employer, and which he was permitted but not compelled to occupy.

I think the appellants are householders. Until the present objection was taken they have always been treated as such. If they are not then persons living in boarding-houses, other than the legal tenants of the premises are not householders. They physically occupy a portion of a building which is used exclusively for dwelling in.

I do not think the Municipal Act can be referred to for an interpretation of the word "occupies," for the word is not there interpreted, although the word "occupier" is. Having to interpret the Act in question liberally, I should not be astute to look for anything cutting down a right which has always heretofore been granted.

That the permanent corps of Canada is a part of the active militia is, I think, beyond dispute. The Militia Act itself says so in precise language, and it is immaterial that in certain sections it uses language which would seem to indicate there was a difference. The exact statement must govern if there is any conflict.

Judgment

It is objected that the declarations claiming exemptions from the payment of road tax are insufficient, in that there is no declaration that the declarant has been certified as efficient, etc. The Elections Act does not require such a declaration, it only requires a declaration to the effect in Form 2 in the Schedule. Form 2 only requires that the person making the declaration (is) "a member of . . . . ." There is no hint that a certificate of efficiency is required. It is true that a certificate of efficiency must be given before any member of the active militia can escape the payment of road-tax otherwise due by him, but this is by virtue of subsection (167) of section 54 of the Municipal Act. And the filing and production, as

here, of the actual certificate is much better evidence of efficiency than the declaration that it has been issued.

Objection is also taken to the person who signed many of the certificates in question, and it is urged that they should have been signed by an officer (who in some of the cases was stationed at Ottawa) who had no personal knowledge of the facts, because he is the officer who, in a military sense, commanded the unit to which the person in question belonged; and it is also urged that the whole body of the corps must be in British Columbia.

There are many military units throughout Canada, a few members of which are stationed in different parts of the Dominion. Surely those of them stationed in British Columbia are entitled to the exemption, if efficient, as much as those members of a unit entirely within the Province. I read the word "corps" not in its strictly military sense, but in its natural sense as defined in the Standard Dictionary—"A member or body of persons associated or acting together"; and the certificate of efficiency is good when signed by the officer actually in command of that body or corps where the certificate is actually issued. He need not be a commissioned officer, but he may be a warrant or non-commissioned officer, for they are officers though their rank and manner of appointment are different from that of a commissioned officer; he must, though, have command over the entire body or corps within the municipality where the certificate is to be filed.

Judgment

The preliminary objection must be overruled. To give section 18 of the Elections Act the interpretation suggested would unquestionably work a great hardship in many cases, as it would prevent persons whose names had been improperly struck off the list by the Court of Revision from having them restored. The list which I have to deal with is the list certified by the Reeve and not that prepared by the Clerk of the Municipality.

As counsel stated they could apply my ruling to the individual cases of appellants, I content myself with these general remarks, but should there be any difficulty, or should I have omitted to deal with any matter, there will be leave to apply.

Appeal allowed.

MORRISON, J.

1923

Jan. 9.

AIKMAN v. BURDICK BROS., LIMITED AND AIKMAN.

AIKMAN v. BURDICK BROS., LTD.

Husband and wife—Agency—Whether husband acting in single transaction authorized to sell as well as purchase—Purchase made in wife's name—Proceeds of sale paid by broker to husband.

Stockbrokers—Purchase of shares on margin—Broker's right to deal solely with person purchasing—Illegality—Gaming Act (8 & 9 Vict., Cap. 109)—Criminal Code, Sec. 231.

A husband, acting for his wife, purchased through a firm of stockbrokers certain shares on margin. Later he instructed the brokers to sell. He received and retained the proceeds. In the *interim*, marital differences arose and the parties separated. In an action by the wife against the husband and the brokers:—

Held, that the husband was the agent of the wife for the purpose of purchasing, and, in due course, selling, and that it was the wife's duty to have notified the brokers of the termination of the agency.

Held, further, that the husband was liable to the wife for the proceeds of the sale.

The defendant husband pleaded in his defence that the transaction in question was illegal, and a contravention of the provisions of the Criminal Code.

Held, that the purchase was an ordinary stock-buying and in no sense a gambling transaction.

[An appeal by defendant Aikman from this judgment was dismissed and a cross-appeal against Burdick Bros., Ltd., was allowed.]

Statement

ACTION to recover moneys retained by the defendant Aikman and as against the defendant Burdick Bros., Limited, to recover the amount wrongly paid by them to the defendant Aikman and retained by him. The facts are set out in the reasons for judgment. Tried by MORRISON, J. at Victoria on the 25th and 26th of October, 1922.

Bass, for plaintiff.

W. J. Taylor, K.C., for defendant Aikman.

Ernest Miller, for defendant Burdick Bros., Limited.

9th January, 1923.

Judgment

MORRISON, J.: The plaintiff, at the time material to the issues herein, was the wife of the defendant Aikman. The defendant Aikman, acting as his wife's duly-authorized agent, bought certain C.P.R. shares through the defendant Burdick Bros., Limited. The transaction was what may be termed colloquially an ordinary everyday stock buying transaction. The employee of the defendant Company whose particular duty it was to deal with the public in buying and holding stock, dealt solely with the defendant Aikman, to the knowledge of

the plaintiff. At any rate, I must so hold, since she did nothing to lead the defendant Burdick Bros., Limited, to believe that there had been any change in the relationship of Mr. and Mrs. Aikman, either as regards the agency or otherwise.

Whilst the defendants Burdick were under instructions from Aikman regarding this stock, Aikman and the plaintiff, his wife, as she then was, separated and their domestic infelicities ultimately terminated by the defendant Aikman securing a divorce. It was during the Aikmans's conjugal association that the Burdicks sold the stock, which they had bought for him as his wife's agent, and paid over to Aikman as her agent the proceeds. Aikman has retained these moneys, for which as against him the plaintiff seeks a judgment, to which, in my opinion, she is unquestionably entitled. She, however, also seeks to recover from the defendant Burdick Bros., Limited, the amount so paid by them to Aikman and retained by him. This aspect of the case raises a different and more difficult point to be determined. In the first place, I find that Aikman was the agent of the plaintiff for the purpose of buying and, in due course, selling this stock; that she knew that Aikman was dealing with the broker, on her behalf, and that he had bought; that the brokers were unaware either of the domestic or marital tribulations of the Aikmans; that the plaintiff did not notify the brokers of such, nor did she notify them terminating the agency; that there was nothing in the apparent relationship of the Aikmans known to the brokers to put them on guard as regards the scope of the defendant Aikman's agency which would justify them in limiting that scope; that the defendant Burdick Bros., Limited, acted *bona fide* within the scope of the instructions given them by the plaintiff's agent; that having regard to the nature of the transaction, promptitude was essential, and that it is no evidence of negligence on their part that they dealt with the proceeds in the way in which they did. Knowing, as she did, that Aikman had been dealing on her behalf with the brokers, it seems to me that it was negligent on the plaintiff's part not to have terminated the agency of the defendant upon the cessation of their marital relations. Aikman's conduct as between him and the plaintiff,

Judgment

MORRISON, J.

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during the continuance of the agency, is a matter which should not concern the brokers unless disclosed to them. It may well be as submitted, that both the plaintiff and the defendants, the brokers, are the vicarious innocent victims of the defendant Aikman. Whilst there is no general rule of law that where one or two innocent persons must suffer for the acts of a third, that innocent person, who has enabled such third person to occasion the loss, must himself sustain the loss; there is, however, a general rule of law that in such a case an innocent person who has enabled the third person to occasion the loss by his neglect of some duty owing from him to the other innocent person must himself sustain the loss. *Rimmer* v. *Webster* (1902), 2 Ch. 163; 71 L.J., Ch. 561. As between the plaintiff and the defendant Burdick Bros., Limited, I find that it was her duty to have notified them of the termination of the agency at a time when, doubtless, the progress of the defendant Aikman toward obtaining and retaining the proceeds of the sale of the stock would have been intercepted. It was submitted, on behalf of the defendant Aikman, that the action as against him should be dismissed on the ground that the transaction savoured of a gambling one and was, therefore, illegal and criminal. The transaction in no way savoured of that character. There will be judgment for the plaintiff as against the defendant Aikman for the amount claimed, with interest and costs. There will be a reference as to the goods, the other subject-matter of the action, as suggested at the trial.

Judgment

The action as against the defendant Burdick Bros., Limited, is dismissed.

Judgment accordingly.

SMITH *ET AL.* v. THE CORPORATION OF THE DISTRICT OF SOUTH VANCOUVER AND THE CORPORATION OF THE TOWNSHIP OF RICHMOND. (No. 2).

COURT OF APPEAL

1923

Jan. 9.

SMITH *v.* SOUTH VANCOUVER AND CORPORATION OF RICHMOND

Damages—Negligence—Contributory negligence—Parties—Wife of deceased —Children—Limitation provisions in Municipal Act, and Families Compensation Act—Control—Jury—Failure to find on question of contributory negligence—New trial—R.S.B.C. 1911, Cap. 82, Sec. 5—B.C. Stats. 1914, Cap. 52, Sec. 484.

In an action for damages under the Families Compensation Act, on the ground that death resulted from the defendants' negligence, the jury after three hours consideration made a three-fourths finding that the defendants were guilty of negligence, but on a question as to the deceased's guilt of contributory negligence the answer was: "Five, no. Three, yes." They then assessed the damages. Judgment was entered for the plaintiffs.

Held, on appeal, reversing the decision of MACDONALD, J., that the judgment could not be sustained and there should be a new trial.

Section 5 of the Families Compensation Act as to limitation of actions dealing as it does with a particular subject and conferring new rights upon the dependants of a deceased person applies to this action and section 484 of the Municipal Act does not apply.

In the circumstances of this case it was not necessary that the children be made parties to the action the only requirement being that their names should appear in the statement of claim.

The fact that the bridge upon which the accident occurred was built by the Province does not relieve the defendant municipalities of liability. The test of liability is not ownership but control and as the right of control and the duty of maintenance was given the defendants and exercised by them, they are bound to see that those using the bridge are reasonably protected.

APPEAL by defendants from the decision of MACDONALD, J. (reported *ante* p. 168) and the verdict of a jury of the 13th of May, 1922, in an action for compensation under the Families Compensation Act. The plaintiff, Charlotte E. Smith, is the widow, and the other plaintiffs, the children of the late George C. Smith, who was drowned on the 11th of November, 1916. The deceased drove a jitney and at about 6.30 in the evening with a full load came north towards the bridge (there being a draw in the centre) spanning the north arm of the

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Statement

Fraser River which divides the Municipality of Richmond from the Municipality of South Vancouver. It was a clear moonlight evening. The drawbridge was a 150-foot span, a light was in the centre shewing travellers on the bridge a red light when the span was open, and white when it was shut. A gate on the stationary portion of the bridge about 20 feet from the span was closed when the draw was open. The jitney moving at from 10 to 15 miles an hour broke through the gate and went over the edge twenty feet beyond into the river and Smith was drowned. The evidence disclosed that the gate was first seen from the jitney when about 20 feet away but no one appears to have seen the red light on the middle of the span beyond the open space which was about 95 feet beyond the gate. The bridge was built by the Provincial Government under arrangement with the defendants. Both of said Municipalities contributed towards the cost of construction and both contributed towards the maintenance of the bridge, but its operation was in charge of the Municipality of Richmond. The jury did not agree on a unanimous verdict, and after being out three hours brought in a majority verdict finding that the defendants were guilty of negligence in not having sufficient warnings on the near side of the danger, by a vote of 6 for, and 2 against, that George C. Smith, deceased (driver of the automobile), was not guilty of contributory negligence by a vote of 5 for, and 3 against, and that the damages be assessed at $12,500. The death of Smith occurred on the 11th of November, 1916, and this action was commenced on the 15th of October, 1917.

The appeal was argued at Vancouver on the 12th and 13th of October, 1922, before MACDONALD, C.J.A., MARTIN, MCPHILLIPS and EBERTS, JJ.A.

Argument

Mayers, for appellant Township of Richmond: There are four points: (1), Judgment was entered where there was no verdict upon which the learned judge could enter judgment; (2), the learned judge should not have left the case to the jury as there was a question of law that he should have decided himself; (3), the accident was entirely owing to the driver's own carelessness; and (4), judgment was given against both

Municipalities and South Vancouver contend Richmond alone is responsible to which we take issue. On the first point, three of a jury of eight disagreed with the majority finding that there was no contributory negligence by Smith: see *Faulknor* v. *Clifford* (1897), 17 Pr. 363; *Scott* v. *B.C. Milling Co.* (1894), 3 B.C. 221; *Bank of Toronto* v. *Harrell* (1917), 55 S.C.R. 512 at pp. 517 and 538; *Mitchell* v. *Rat Portage Lumber Co.* (1911), 19 W.L.R. 314; *Sawyer* v. *Millett* (1918), 25 B.C. 193 at p. 195. On the question of false verdict see (1922), 66 Sol. Jo. 466. On the second point we say there is nothing here to raise any legal liability on the corporations as we did not construct the bridge. The other case, *Evans* v. *South Vancouver and Township of Richmond* (1918), 26 B.C. 60, does not apply as it is distinguishable. The complaint is that there was not proper protection but at most there is failure to do something and the Municipalities have no pecuniary interest so that there must be a clear statutory liability: see *Sanitary Commissioners of Gibraltar* v. *Orfila* (1890), 15 App. Cas. 400 at pp. 408 and 411; *McPhalen* v. *Vancouver* (1910), 15 B.C. 367 at p. 370; *Victoria Corporation* v. *Patterson* (1899), A.C. 615 at p. 620. As to the duty of the jury to disregard evidence see *British Columbia Electric Rway. Co.* v. *Dunphy* (1919), 59 S.C.R. 263 at p. 268. This is the first accident on this bridge which has been in operation for 30 years. There was not sufficient evidence for the jury to find for the plaintiffs and the action should be dismissed: see *Astley* v. *Garnett* (1914), 20 B.C. 528 at p. 536; *Gavin* v. *Kettle Valley Ry. Co.* (1918), 26 B.C. 30; *Fraser* v. *B.C. Electric Ry. Co.* (1919), *ib.* 536 at p. 541; *Maltby* v. *British Columbia Electric Ry. Co.* (1920), 28 B.C. 156 at p. 160. In the case of *Von Mackensen* v. *Corporation of Surrey* (1915), 21 B.C. 198, the corporation assumed more control of the defective road than South Vancouver did on this bridge.

Argument

D. Donaghy, for appellant District of South Vancouver: We contributed to the cost of maintenance but had nothing to do with the operation. This was always in the hands of Richmond. The boundary of South Vancouver is high-water mark on the

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north bank of the river so that the bridge is not within its boundaries. The bridge was built by the Provincial Government and not by the Municipalities: see *Pacific Coast Coal Mines, Limited* v. *Arbuthnot* (1917), A.C. 607. For the jury not to find that Smith was guilty of contributory negligence was perverse.

Argument

A. D. Taylor, K.C., for respondents: As to the contention that there was no verdict the Ontario case does not apply as the rules are different as they must answer the questions: see Holmsted & Langton, 3rd Ed., 158, Sec. 112, and p. 1019. We have a verdict in our favour: see *Scott* v. *B.C. Milling Co.* (1894), 3 B.C. 221; *Mitchell* v. *Rat Portage Lumber Co.* (1911), 19 W.L.R. 314; *Marshall* v. *Cates* (1903), 10 B.C. 153 at p. 155; *McMillan* v. *Western Dredging Co.* (1895), 4 B.C. 122. All they say in regard to contributory negligence is excessive speed and defective brakes, but as the jury assessed damages their finding on these questions must be in our favour: see *Rowan* v. *The Toronto Railway Company* (1899), 29 S.C.R. 717 at p. 724; *Mitchell* v. *Rat Portage Lumber Co.* (1911), 19 W.L.R. 314 at p. 315; *Winterbotham, Gurney & Co.* v. *Sibthorp & Cox* (1918), 87 L.J., K.B. 527.

Mayers, in reply.

Cur. adv. vult.

9th January, 1923.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I agree with the learned trial judge in finding that the action is not barred by the provisions of the Municipal Act, or of the Families Compensation Act. The only section relied upon as against the widow, is section 484 of the Municipal Act, B.C. Stats. 1914. That section, I think, is not applicable to the facts of this case. But even if it were so, the Families Compensation Act, dealing as it does with a particular subject and conferring new rights upon the dependants of a deceased person, is not controlled by that section. This latter Act meets the further objection that the children were joined in the action too late to be entitled to its benefits. In my view of the Act, the children are not made necessary parties to the action at all in the circumstances of

this case. All that was necessary was that their names should appear in the statement of claim, and they do so appear.

Then it is said that the defendants were under no obligation to provide safeguards against accident such as that which befell the deceased; they say they did not build the bridge; that it was built by the Province. The test of liability is not ownership but control, and as the right of control and the duty of maintenance were given to the defendants and exercised by them, they were, I think, bound to see that those using the bridge were reasonably protected.

This branch of the case is, I think, fully covered by the principles enunciated by their Lordships in *Evans* v. *Township of Richmond* (1919), 3 W.W.R. 339, which was a case arising out of the same accident, and in the *Victoria Corporation* v. *Patterson* (1899), A.C. 615.

It was argued by Mr. *Mayers* for the appellants that, because the Dominion Government by reason of its jurisdiction over navigation, had made it a condition of its consent to the building of the bridge, that a swing span should be put in so that shipping might pass through, and that lights should be placed in the centre of the span for the guidance of navigation, therefore the defendants had no option but to comply with these regulations, and that having complied with them they were under no further obligations to the public using the bridge. The Dominion Government was concerned only with navigation and not with the safety of traffic over the bridge; the latter responsibility rested upon the defendants, and if additional safeguards were necessary to protect traffic it was the duty of the defendants to have supplied them before opening the span. As was said in *Evans* v. *Township of Richmond, supra,* it was misfeasance to open the span without having provided the proper safeguards against injury to those using the bridge.

MACDONALD, C.J.A.

This disposes of the grounds of appeal other than those of negligence, contributory negligence and the effect of the jury's findings of fact. The evidence of defendants' negligence is in effect the same as that upon which *Evans* v. *Township of Richmond, supra,* was decided, and therefore nothing further

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need be said of its sufficiency to sustain the like finding of the jury in this case.

Contributory negligence did not come into question in that case, since the plaintiff there was a passenger in the car under circumstances which did not make the driver's negligence her own. Unless therefore the only inference to be drawn from the evidence is that the accident happened because of the driver's own negligence, the learned judge was right in submitting the case to the jury, and the question now is, was the evidence of contributory negligence so conclusive that the judge ought to have withdrawn the case from the jury? I do not think it was, and I am supported, I think, in this conclusion by some observations of their Lordships in *Evans* v. *Township of Richmond, supra.*

The last question to be considered is the effect of the verdict. Under our law, the jury if unable to find a unanimous verdict may, after three hours deliberation, find one by a majority of two-thirds of their number. The jury was composed of eight men, and after the expiration of the three hours, the proper majority found the defendants guilty of negligence in the premises, but disagreed on the question of the contributory negligence of the deceased. They assessed the damages and judgment was entered for the plaintiffs.

MACDONALD, C.J.A.

In my opinion the judgment cannot be sustained. With respect, the cases relied upon by the learned judge do not, I think, support his judgment, nor is it supportable on principle. *Mitchell* v. *Rat Portage Lumber Co.* (1911), 19 W.L.R. 314, was decided by this Court. The jury having found that the defendants were negligent and that their negligence caused the accident, ignored the question of contributory negligence altogether but assessed damages for the plaintiff. The Court held that the jury inferentially found the question of contributory negligence in favour of the plaintiff. It was pointed out by the majority of the Court that the verdict could not stand unless on the evidence this inference was justifiable, and the Court thought that it was. In this Province the Court of Appeal has power to draw inferences of fact and thus supplement the finding of the jury. This is a power which, as was

pointed out in *McPhee* v. *Esquimalt and Nanaimo Rway. Co.* (1913), 49 S.C.R. 43, is to be sparingly exercised, yet of course it may be exercised in a proper case. The fact then is that *Mitchell* v. *Rat Portage Lumber Co.* was decided not in face of a disagreement of the jury but in compliance with what the Court thought was the jury's intention, supporting, as it did, the inference from the evidence drawn by the Court itself.

In *McPhee* v. *Esquimalt and Nanaimo Rway. Co., supra,* Mr. Justice Anglin succinctly expressed the principle applicable to this case, when he said at p. 59:

"The jury having failed to determine a vital issue, with which it was within their province to deal, the only course open is to order a new trial."

There the question left unanswered had reference to the defence of *volens,* but it has the like application to the defence of contributory negligence.

Scott v. *B.C. Milling Co.* (1894), 3 B.C. 221, was also relied upon, but that case was reversed by the Supreme Court of Canada (1895), 24 S.C.R. 702, and a new trial was ordered. In the case at bar the Court could not properly make the inference that there was no contributory negligence when three of the eight jurymen had come to the opposite conclusion, and when the evidence is such as ought to be submitted to the jury.

MACDONALD, C.J.A.

There should be a new trial, the appellant to have the costs of the appeal, the costs of the new trial to abide the result.

MARTIN, J.A.: Several questions arise herein but in the view I take of the matter it is only necessary to deal with one, *viz.,* that of the contributory negligence of the deceased driver of the motor-car, the question as to which, No. 3, was not answered by the jury by that percentage of their number which could alone return any answer at all after they were out three hours; in other words, there was a disagreement; yet, strangely, the word "no," illegally noted by the foreman as an answer to the question, was permitted to remain upon the record, and the matter treated by the learned trial judge as though an answer in law had been made, despite section 45 of the

MARTIN, J.A.

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Jury Act, 1913, Cap. 34, which only makes it "lawful to receive the verdict of three-fourths [or more] of the jury impanelled," and as the jury stood five to three only, they had reached no verdict on this vital question, and no general verdict was added to the questions, as there was in *Bank of Toronto* v. *Harrell,* 55 S.C.R. 512 at p. 517; (1917), 2 W.W.R. 1149, even assuming that could have saved the situation. When this disagreement became apparent the jury should have been sent back for further consideration upon further instruction, according to the practice long established by this Court, so as to prevent, if possible, just such an unfortunate and very expensive conclusion as is before us.

MARTIN, J.A.

I felt much inclined to exercise, on the ground of manifest contributory negligence, that power of dismissal which this Court possesses to a greater degree than the trial judge, as has been pointed out by the Supreme Court in *McPhee* v. *Esquimalt and Nanaimo Rway. Co.* (1913), 49 S.C.R. 43; 5 W.W.R. 926; 27 W.L.R. 444, and *Bank of Toronto* v. *Harrell, supra,* at p. 1163, but upon further consideration and consultation, and out of due deference to the views held by some of my brothers, I have reached the conclusion that the better and safer course would be to allow the appeal and order a new trial, the costs of the former trial to abide the new one.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: It is with much regret that I have to come to the conclusion that a new trial must be directed.

No valid verdict was given by the jury in this case, unfortunately, and with great respect to the learned trial judge, it was not a verdict which he was entitled to receive. The two questions, negligence and contributory negligence, were essential questions requiring answer. The jury did not render a general verdict. Negligence was found after three hours deliberation, but contributory negligence was ineffectually negatived, *i.e.,* as to negligence there was the requisite three-fourths finding. As to contributory negligence it was not a three-fourths finding, being less than that. Section 45 of the Jury Act (Cap. 34, B.C. Stats. 1913) reads as follows:

"45. On the trial of any action or cause or issue of fact, or on the execution of any writ of inquiry of damages, 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 to try such action or cause or issue of fact, or on the execution of any such assessment or inquiry of damages, 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."

In *White* v. *Barry Railway Company* (1899), 15 T.L.R. 474, Lord Justice A. L. Smith in his opinion said at p. 475:

"The defendants said that the plaintiff had by negligence of his own contributed to the accident, and there was some evidence of such contributory negligence. But the question of negligence on the part of the defendants and the question of contributory negligence were both for the jury. In his opinion it was necessary for the plaintiff to make out a case of negligence against the defendants, and if he succeeded in doing that it became necessary for the defendants to shew that the plaintiff had by his own negligence contributed to the accident, and, if the jury were satisfied that that was made out, the question arose whether, in spite of that contributory negligence, the defendants, by the exercise of reasonable care, could have done something to avoid the accident. That also was a question for the jury. He did not think that they could say in such a case that as a matter of law there must be a non-suit. It was true that in *Davey* v. *London South Western Railway Company* (12 Q.B.D. 70), this Court did hold in a case somewhat like the present that it was the duty of the judge to non-suit the plaintiff because it was apparent that he had been guilty of contributory negligence. Lord Justice Baggallay, however, dissented, and Lord Esher had since expressed a doubt whether the judgment of himself and Lord Justice Bowen was right."

The *Barry* case went on appeal to the House of Lords ((1901), 17 T.L.R. 644) and was reversed, but this statement of law was not disagreed with, the appeal being reversed on other grounds, *viz.*, that the learned trial judge had erred in stating to the jury that there must be gross negligence to disentitle the plaintiff to damages. The Lord Chancellor said:

"That was not the law—it must simply be negligence contributing to the accident."

Now, the position in the present case is that there has been no finding upon the question of contributory negligence. We are, however, pressed to determine the question upon the evidence. I do not think it would be proper or permissible, in view of the particular facts of this case and in view the judgment of the Supreme Court of Canada in *McPhee* v. *Esquimalt and Nanaimo Rway. Co.* (1913), [49 S.C.R. 43]; 5 W.W.R. 926, Duff, J., at pp. 931-33. At p. 933, Duff, J. said:

"I think, however, the respondents are entitled to a new trial on the

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ground that their plea *volenti non fit injuria* was not passed upon by the jury."

Here the plea is that of contributory negligence and it has not been effectively passed upon by the jury. (Also see *McPhee* v. *Esquimalt and Nanaimo Ry. Co.* (1915), [22 B.C. 67]; 8 W.W.R. 1319 at pp. 1323-4).

In *White* v. *Barry, supra*, the Lord Chancellor said, in moving that the appeal be allowed and a new trial ordered in that case:

"He regretted most sincerely the hardships inflicted on this poor man."

I, in this case, deeply regret "the hardships" that will result upon the plaintiff, the widow of the driver of the car who lost his life owing to the open draw-bridge, and I would adopt further the language of the Lord Chancellor and apply it to this case—"if it was the fault of the appellants, the damages were not too great."

Manifest error occurred at the trial. The verdict was not in accordance with law, in truth was not a verdict at all, and, with great respect to the learned trial judge, should not have been received. The jury should have been directed to retire and further consider their verdict, and if it was a case of impossibility to agree, then it would be a case of disagreement and a new trial would have taken place in due course without the attendant costs of this appeal, which costs, I regret, are not open to be dealt with by this Court, but follow the event.

EBERTS, J.A.

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

New trial ordered.

Solicitor for appellant District of South Vancouver: *G. S. Wismer.*

Solicitor for appellant Township of Richmond: *George H. Cowan.*

Solicitor for respondents: *F. A. Jackson.*

THURLOW LOGGING COMPANY LIMITED AND AICKIN, AND CARTER v. NATIONAL POLE COMPANY AND THE ROYAL BANK OF CANADA.

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Contract—Sale of goods—Condition precedent—Waiver.

The plaintiff entered into a contract with the defendants to supply 15,000 cedar poles of dimensions specified, on or before the 30th of September, 1921, agreeing to deliver the poles cribbed and sorted at ship's tackle at a harbour to be selected by the defendants. Five thousand seven hundred and seventy-two poles were delivered and paid for under the contract and on the 26th of September, 1921, the defendants notified the plaintiff Company in writing that they would only accept such poles as were ready for delivery on the 30th of September in strict accordance with the contract. One thousand two hundred and eighty-three additional poles had been inspected and passed but not taken over and a further 7,763 logs were prepared by the 30th of September, but the defendants neither gave directions as to the harbour selected nor supplied ships at whose tackle poles could be delivered. An action for damages for breach of contract was dismissed.

Held, on appeal, reversing the decision of MORRISON, J., that the plaintiff Company was entitled to damages to the difference between the contract price and the amount realized on all poles that the plaintiffs could have delivered under the contract.

APPEAL by plaintiffs from the decision of MORRISON, J. of the 27th of January, 1922, dismissing an action for damages for breach of contract to accept and pay for certain cedar poles. On the 29th of October, 1920, the defendant Company entered into a written contract with the plaintiff Aickin, whereby the defendant Company purchased and agreed to accept delivery of 15,000 cedar poles to be used as telephone and telegraph poles the sizes being set out in the contract. The plaintiff Aickin assigned the contract to the plaintiff Company. In order to secure advances the plaintiff Company agreed that all moneys due under the contract be paid to the Royal Bank of Canada. The contract was to be completed not later than the 30th of September, 1921. Five instalments aggregating 5,772 poles were accepted and paid for. A further instalment of 1,283 poles was inspected and passed but not taken,

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the contract price of which was $8,605.27, and the plaintiffs got out under the contract before the 30th of September, 1921, a further 7,763 cedar logs, the contract price of which was $36,414.90, and were ready for delivery. On the 25th of September the defendant Company notified the plaintiffs that it would only accept such poles as were ready for delivery in accordance with the contract up to the 30th of September and two days later notified the plaintiffs that an inspector would be at Deep Bay and Pender Harbour to inspect and take delivery of the poles. The defendant Company gave no further notification of ships for loading nor were any provided. The plaintiffs were paid $32,497.74, for the poles delivered and accepted and claimed $8,321.88 for poles inspected and passed but not taken and $36,414.90 for the 7,763 poles ready for delivery but which the defendant Company wrongfully refused to accept.

The appeal was argued at Vancouver on the 9th and 10th of October, 1922, before MACDONALD, C.J.A., MARTIN, MCPHILLIPS and EBERTS, JJ.A.

Argument

J. A. MacInnes, for appellants: The judgment as entered is inconsistent and defective on its face and it is the duty of the party taking it out to see that it is in proper form: see *Belcher* v. *McDonald* (1902), 9 B.C. 377 at p. 393. The learned judge erred in saying plaintiffs did not comply substantially with the terms of the contract. The full number of poles were in the water ready to be placed at ship's tackle when the boats were available but ships were not supplied so we could do no more within the specified time: see Benjamin on Sale, 6th Ed., 641 and 783; *Mackay* v. *Dick* (1881), 6 App. Cas. 251. The buyer had to supply the ships to admit of our completing the contract and not having done so there was a waiver of the terms as to time of completion: see *Franklin* v. *Miller* (1836), 4 A. & E. 599. They cannot put us in a position where we cannot carry out our contract: see *Legh* v. *Lillie* (1860), 6 H. & N. 165. The notice must give reasonable time for completion: see Leake on Contracts, 7th Ed., 633. Sorting and cribbing was not a matter of substance but merely a matter of temporary convenience for load-

ing: see *Cowan* v. *Fisher* (1900), 31 Ont. 426 at p. 428. This case is stronger than *Royal Bank of Canada* v. *J. H. Baxter & Co.* (1922), [*ante*] 248.

Davis, K.C., for respondents: There was considerable variance in the evidence and the learned judge believed our witnesses. They did not in fact deliver and it made no difference whether we had a ship there or not. They should have had the poles at the places designated both cribbed and sorted. The time for delivery is an essential condition of the contract: see *Reuter* v. *Sala* (1879), 4 C.P.D. 239 at p. 249. We are not bound to accept any logs that are not given in accordance with the contract: see *Jackson* v. *Rotax Motor and Cycle Company* (1910), 2 K.B. 937.

Hossie, on the same side: By agreement the balance of the Ladysmith and Rock Bay poles did not become due until after the issue of the writ, in fact as to the Rock Bay poles nothing was due until after the trial, so that these amounts could not be included in the judgment. Even if it were found these agreements did not exist it would only affect the question of costs up to the time of payment in. Assuming the judgment is not in accordance with the form, that is a merely technical defect and as the registrar found no money owing it would be superfluous to have it corrected. On the settlement no objection was taken to the $2,610 paid to the Bank, the only amount mentioned being $425 paid in on the trial and judgment for that sum was refused so that in any event the costs of the trial are not affected. If the appeal is dismissed costs should be against the trustee personally as he is indemnified. The plaintiffs are not the proper parties to sue as the Bank should have brought the action: see *Hughes* v. *Pump House Hotel Co.* (1902), 71 L.J., K.B. 630.

Argument

MacInnes, in reply, referred to *Jonassohn* v. *Young* (1863), 4 B. & S. 296; *Sutherland* v. *Allhusen* (1866), 14 L.T. 666; *Borrowman* v. *Free* (1878), 4 Q.B.D. 500.

Cur. adv. vult.

9th January, 1923.

MACDONALD, C.J.A.: Without entering into the evidence minutely, it will answer the purpose, I think, to recite briefly

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what the case is about and what inferences from essential facts, in my opinion, ought to be drawn.

The plaintiffs are cedar-pole dealers. They entered into a written contract with defendants to supply them with from 10,000 to 15,000 cedar poles of the dimensions specified. *Inter alia*, the plaintiffs agreed to deliver the poles, cribbed and sorted at ship's tackle, at a harbour to be selected by defendants. The agreement provided that defendants would advance 75 per cent. of the price after a preliminary inspection of the poles, whenever they were ready to be loaded. The balance was to be paid when the poles were finally inspected on board ship; demurrage was to be paid by the plaintiffs if shipments were not ready for delivery. There were other terms alluding to liens and royalties which I do not think are, on the facts of this case, essential to its decision. The contract covered the period from 29th of October, 1920, to 30th September, 1921.

It is not open to question that at the time of the refusal of defendants to take the balance of the poles contracted for, *viz.*, after the 30th of September, 1921, the plaintiffs had ample poles of agreed quality to enable them to make deliveries. The evidence is voluminous (needlessly so) but certain important facts appear to be established with reasonable certainty. I shall first deal with the pleadings.

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The principal defence to the claim for non-acceptance of poles, if indeed it be not the only one having a semblance of reality, is that the plaintiffs had made default in delivery of poles within the period contemplated by the agreement, *viz.*, on or before the 30th of September, 1921. Evidence was adduced by plaintiffs to shew that there had been a waiver of this term of the contract but, as pointed out by Mr. *Davis*, counsel for the defendants, waiver was not pleaded, and on an examination of the pleadings I find this to be so, but nevertheless the issue was gone into by both counsel without objection, and if this evidence were necessary to sustain the plaintiffs' case, I would hold that the defendants were precluded by the course of the trial from objecting to it: *Scott* v. *Fernie* (1904), 11 B.C. 91. In my view of the case, however, it is not material, since there was nothing to waive.

Another point upon which the defendants insisted was that the learned judge had found the facts in their favour.

It therefore becomes necessary at the outset to determine what he did find. He found that plaintiffs were not ready to deliver the undelivered balance of poles on the 30th of September, 1921; he found that neither the quantity nor quality of the poles on hand were proven so as to enable the damages for non-acceptance to be assessed; he did not find it necessary to say whether the number of poles contracted for had by subsequent agreement been reduced from 15,000 to 10,000, but he says parenthetically, that on this point the preponderance of credible evidence is in defendants' favour; he finds there was no extension of time for performance or, in other words, no waiver.

It was known to defendants and contemplated by both parties, that the poles were to be got from different localities and floated to the selected loading places. The evidence shews that plaintiffs had in the water, as early at least as the 22nd of September, more than a sufficient number of poles to complete their deliveries. On that date they wrote a letter to defendants specifying the number of and the several localities in which the poles then were. They were not then cribbed or sorted, but the plaintiffs' contention is that on the true construction of the contract, they were to be so cribbed and sorted only when delivered at ship's tackle, and, in my opinion, this contention is correct.

The question of preliminary inspection gave rise to conflicting contentions in argument. The plaintiffs' counsel submitted that this inspection was for his clients' benefit and was solely for the purpose of advances on account of purchase price, and that cribbing and sorting for that purpose was not required. I am of opinion that that is the true construction of that term in the contract, and therefore preliminary inspection has nothing to do with the issue in this appeal.

It is, I think, apparent that this inspection was to be made not when they were cribbed and sorted (since this cribbing and sorting was only required to be complete when the poles were brought to ship's tackle) but when they were in the water.

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The term "ready to load" as used with reference to preliminary advances, cannot reasonably be held to mean ready to be placed at ship's tackle. Such a construction would defeat the purpose of preliminary advances. The loading would consume only a few hours, upon completion of which the whole purchase price would become payable, and as both the advance and the balance were to be paid in Vancouver, the very purpose of the provisions for advances would be rendered futile. Moreover, the course of dealing with previously delivered and accepted poles shews that the advances were made before cribbing and sorting. The parties themselves have furnished the key, if one be required, to their meaning, and are not entitled to attribute this practice to good natured concessions. But be this as it may, no question of an advance is now involved in the appeal.

Now, after defendants had received the letter of the 22nd of September, stating the number and locations of poles which plaintiffs could deliver, a meeting took place between the parties at which the plaintiffs were told that defendants had no ship ready to take delivery of the poles, owing to a seamen's strike in the United States. It was on this occasion that the plaintiffs say that the defendants waived delivery, saying that they could not then take delivery on or before the 30th of September. There is no question of default in deliveries up to this time,

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though it is true that the evidence as to previous deliveries would indicate that the term as to cribbing and sorting had been disregarded in some if not in all instances. The fact is that defendants could not on or before that date take delivery at ship's tackle, and what is perhaps of more importance, could not make the final inspection contemplated by the contract. The final and crucial inspection was not to be made when the poles were to a large extent submerged in cribs, but when they were loaded on the vessel.

The situation on the 25th of September, therefore, was, that the plaintiffs were in the position of being able, on a week's notice of the coming of the ship, to make deliveries in accordance with the contract; that defendants, who by the contract were required to give the notice, never gave the notice nor had a ship to take delivery. In view of this situation, the defend-

ants' letters and conduct are of interest. Their letter of the 26th of September to plaintiffs recites in general their contract and proceeds:

"We hereby beg to notify you, and each of you, that we will only accept such poles, and none others, as are ready for delivery, and in strict accordance with the terms of said contract up to and including September 30th, 1921."

This though admittedly they did not propose to have a ship there at whose tackle the poles could be delivered. I say nothing about the want of specification of the place of loading, because there is some evidence from which it might be inferred that the plaintiffs knew this.

In connection with this letter may be read one written on plaintiffs' behalf to defendants of the same date, which I need not quote, though it sheds a favourable light on the plaintiffs' *bona fides*.

On the 27th of September, defendants wrote a second letter, telling the plaintiffs that inspectors would be sent to Deep Bay and Pender Harbour, where some of the poles were, "to inspect and take delivery of the poles." These inspectors do not even profess to have inspected the poles. They were not instructed to inspect and accept delivery. It is only necessary to read the evidence of Bensing, one of defendants' inspectors, to be convinced that these inspectors were sent for no such purpose. Had they been given authority to accept the result would have been the same. They were entitled to reject only when the loading was in process; when the poles could be examined one by one. Bensing said they were a fine lot of poles, but some of them needed further preparation for loading before delivery at ship's tackle.

It, therefore, in my opinion, is unnecessary to consider the question of waiver or the effect of any claims which the Government or the sub-contractors or others may have had against the poles. The plaintiffs had made no default in delivery according to contract at ship's tackle, and there is no evidence from which it can properly be inferred that they could not, had they been regularly called upon to do so, have fulfilled their contract to the letter.

This conclusion is reached without conflict with the findings

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of fact of the learned judge, except in so far as it relates to the quantity and quality of the poles. What that finding is based on is not indicated, but I must assume (since the evidence will bear no other inference) that it is founded on the plaintiffs' alleged want of a clear title to the poles and the inspection referred to above, both of which I have dealt with and neither of which depend on the credibility of witnesses.

The question then arises, was the number of poles to be delivered reduced, by subsequent agreement, to 10,000 in all? It was not seriously contended that the plaintiffs had not the right under the contract to call for the acceptance of the full 15,000, and it is apparent from the efforts made by defendants to prove a reduction, that they had so understood the contract. An attempt was made to shew consideration for this alleged reduction, but I think it failed. There is not the scratch of a pen in support of nor any assertion of such a contract, when the plaintiffs by their said letter of the 22nd of September specified poles in excess of the 15,000 and suggested that defendants should agree to take this excess. The letters above referred to written by the defendants, of the 26th and 27th of September, make no reference to a reduction, while insisting on strict compliance with the contract, though the writer had before him the plaintiffs' letter of the 22nd. Nor is the learned judge's finding that the preponderance of the credible evidence supports the defendants' contention of much assistance, since he did not deal with the merits of the claim. But apart from the dispute about the fact which I would, for the reasons above stated, find in the plaintiffs' favour, there is the one about the law. The contract is one required by the Statute of Frauds to be in writing. In such a case the entire contract may be rescinded by parol, but the terms of it cannot be altered by parol, unless the doctrine of part performance can be relied upon, which is not the case here.

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A dispute as to whether defendants had paid in full for the poles actually delivered under the contract, was referred to the registrar, and he has found that they had done so.

The report does not shew how the registrar arrived at his conclusion. According to the pleadings and particulars, the

plaintiffs' claim that 5,311 poles were delivered and accepted before the 30th of September. The defendants' particulars make the number 5,309, a trifling discrepancy. These were the only poles delivered under the contract prior to defendants' repudiation of it. Some others were accepted after the repudiation, but there were poles upon which advances had been made. These poles were, as stated by the defendants' agent Lafferty, accepted under the contract.

The defendants have paid into Court what they allege to be the balance due on all these poles accepted before and after the 30th of September. It was referred to the registrar to find whether or not the poles accepted under the contract were paid for in full, and he has found that they were. His finding is not very satisfactory since he does not shew the grounds of it, but it was made clear by counsel at our bar, that the money in Court was conceded by defendants to be the balance due on these poles. Therefore, I take it that the moneys in Court were treated by the registrar as a payment of the balance, payable for poles accepted, and belongs to the plaintiffs. There is no appeal from the report or the confirmation of it, and therefore it must be taken to be a final adjudication upon the rights of the parties with respect to all poles except those which form the subject of the claim for damages.

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The only question left is the amount of the damages to be awarded in respect of poles of which acceptance was refused. As regards this branch of the case, the claim is not one for the purchase price. The poles were not set aside or otherwise appropriated to the contract. Something remained to be done before final acceptance could be called for. Moreover, the poles have since been sold. The damages therefore is the difference betwen the contract price and the price realized or which should have been realized for them. The evidence is rather at loose ends, but this much is reasonably certain, that the plaintiffs had 6,746 poles at Deep Bay and Pender Harbour, which they could have delivered under the contract; that the poles were subsequently sold to J. H. Baxter & Co., at the price set in the agreement of the 24th of December, 1921; that the poles are sufficiently described in the circular letter of the

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5th of November, 1921, to enable the parties to determine mathematically the price realized and in the same way to find what they would have brought under the contract. The difference between these respective figures is the damages for which plaintiffs are entitled to judgment. No other damages have been proven and even these not very exactly, but since Lafferty, defendants' agent, states in his letters that there were approximately 7,000 poles in this lot, and as he had the opportunity to bid on them, the plaintiffs, I think, may fairly be held to have proved that they suffered the damages aforesaid in respect of these poles.

If there should be any difficulty, not apparent to me, in arriving at the amount, the parties have leave to speak to the question.

To the extent indicated, the appeal should be allowed. The plaintiffs should have the general costs of the action and of the appeal, and the defendants those in respect of the poles accepted and delivered, including the costs of the reference.

MARTIN, J.A.

MARTIN, J.A.: In the defendant Company's crucial letter of the 26th of September, 1921, it, "for the purpose of avoiding any misunderstanding of conversations," notified the plaintiffs that it intended to insist upon a "strict accordance with the terms of the contract," and viewing the whole matter in furtherance of that proper attitude, I am of opinion that under said contract the plaintiffs cannot be held to be in default till the defendant Company had furnished the ship alongside which the poles were to be delivered, as therein specified, and to be paid for "when poles are loaded on vessel, inspected and cleared of all Canadian charges and duties." I find nothing substantial to support the submission that this term (which is in favour of the plaintiffs as giving a longer time after the week's notice of the expected arrival of the vessel, which it is conceded it was entitled to) was waived, nor is it established that the plaintiff Company agreed to reduce the amount of poles to 10,000.

With respect to the Rock Bay and Ladysmith poles, which were left behind in August because the ship was then unable to load them, I am satisfied that no arrangement was entered

into which would entitle the defendant Company to delay payment for them beyond the contract period, 30th of September, 1921, at latest, and so the plaintiffs should have had judgment for that amount which was overdue when the writ was issued on the 21st of October, 1921.

As to the damages for the poles which were refused by the defendants, I am of the same opinion as my brothers.

Such being, briefly, and in general, my view of the matter, I only add that the formal judgment is open to the serious objection taken to it, *viz.*, that it cannot in any event stand, because it begins by dismissing out of Court the plaintiffs' action *in toto* upon the contract, and yet goes on (in the final clause) to direct the registrar to take an account to determine what, if anything, is due by the defendant Company "in respect of poles accepted by it under the contract sued on . . . ." It is difficult to understand how such an erroneous and self-contradictory judgment was allowed to be drawn up and entered, and yet that was done despite the continuous objection of the plaintiffs' counsel before the registrar and judge below; the dismissal of the action should obviously have been limited at that stage to the poles which had been refused; the plaintiffs could not be both wholly out, and yet in the Court at the same time under the same contract; therefore the judgment should in any event be amended in that respect at least, and the plaintiffs are entitled to the costs of coming to this Court for that purpose.

MARTIN, J.A.

But I am of opinion that the appeal should be allowed in general and with the costs which follow that event as the statute directs.

McPHILLIPS, J.A.: I concur in the judgment of my brother the Chief Justice.

MCPHILLIPS, J.A.

EBERTS, J.A. would allow the appeal.

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Appeal allowed.

Solicitors for appellants: *MacInnes & Arnold.*
Solicitors for respondents: *Davis, Marshall & Co.*

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ISBELL BEAN CO. v. AVERY

ISBELL BEAN COMPANY v. AVERY.

Guarantee—Letters forming—Construction—Extension of time for payment—Consideration.

The defendant who had bought out his partner and continued the business by himself was pressed by the plaintiff for payment on an old partnership debt when he wrote the plaintiff "kindly let the matter rest for the time being and the writer will personally see that your claim is fully paid."

Held, that this constituted a guarantee.

APPEAL by plaintiff from the decision of RUGGLES, Co. J. of the 10th of April, 1922, in an action to recover $926.20 payable by the defendant under a guarantee contained in two letters written by the defendant to the plaintiff Company whereby in consideration of plaintiff giving time to Creeden & Avery Limited for payment of a debt of $788.30 due from Creeden & Avery to the plaintiff the defendant agreed to pay the full amount of the claim. The facts are that the claim in question was originally owing by Creeden & Avery Limited, the defendant Avery having bought Creeden out and undertook to pay the Company's liabilities. In July, 1919, Avery was proceeding with the closing out of his business when the plaintiff Company pressed for payment. On the 5th of July, 1922, Avery wrote the plaintiff asking that payment be allowed to stand over until final disposition of certain litigation then pending, when he stated "the writer will personally see that your claim is fully paid." The result of the litigation was adverse to Creeden & Avery, Limited, and the Company went into liquidation. The plaintiff then brought this action against Avery on his guarantee which was dismissed.

Statement

The appeal was argued at Vancouver on the 23rd and 24th of October, 1922, before MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Brown, K.C., for appellant: At the time Avery bought Creeden out, this sum was owing the plaintiff Company and Avery assumed the outstanding obligations of the Company. On the

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question of personal liability see *Mayer* v. *Isaac* (1840), 4 Jur. 437 followed in *Horlor* v. *Carpenter* (1857), 3 C.B. (N.S.) 172; see also Bullen & Leake's Precedents of Pleading, 7th Ed., pp. 104 and 142. It is construed most strongly against the person making it; see *Allnutt* v. *Ashenden* (1843), 5 Man. & G. 392; *Caballero* v. *Slater* (1854), 14 C.B. 300; *Hawes* v. *Armstrong* (1835), 4 L.J., C.P. 254; *Matson* v. *Wharam* (1787), 2 Term Rep. 80; *Bateman* v. *Phillips* (1812), 15 East 272; *Bluck* v. *Gompertz* (1852), 21 L.J., Ex. 278; *Sheers* v. *Thimbleby* (1897), 76 L.T. 709.

Grossman, for respondent: The words used are not capable of being construed as a guarantee; if the same be so construed there is a latent ambiguity, and if there was a guarantee it was never accepted. The whole transaction shews it was never understood that there was a guarantee. The letters shew they gave Avery time but did not rely on a guarantee. The words themselves are not a guarantee, the word "personally" being merely surplusage, nor does the word "see" import a guarantee. The words have a double meaning, *i.e.,* that he was to pay out of his own pocket or from the assets of Creeden & Avery.

Argument

Brown, in reply, referred to *Bank of Hamilton* v. *Banfield* (1918), 25 B.C. 367.

Cur. adv. vult.

9th January, 1923.

MARTIN, J.A.: At the hearing we informed the appellant's counsel, in his reply, that we wished to hear him only upon the question of the extension of time being given in consideration of the guarantee, as we deemed it to be. This is a question of fact, and the respondent (defendant) relies particularly upon certain statements of the plaintiff Company in a letter to their debtors, Creeden & Avery, of the 19th of March, 1920. After considering carefully all the admissible evidence on the point, I am of opinion that the reference in that letter as to non-payment "at that time" is to the default under the original transaction in May, 1918, but the forbearance and extension of time now relied on could not and did not arise until the 5th of July in the following year, when the defendant in

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response to the plaintiff's renewed demand upon said debtor company gave his personal guarantee for its debt now sued on, and since that time I have no doubt that the extension of time was given in consideration of that guarantee up to the bringing of this action on the 17th of February, 1921, and therefore the plaintiff is entitled to judgment and the appeal should be allowed.

GALLIHER, J.A.: Mr. *Grossman* presented a very lucid and forceful argument on behalf of the respondent, but notwithstanding, I am clearly of the opinion that this appeal must be allowed.

The letters, in my view, constitute a personal guarantee. These letters were written after Avery had bought out the interest of Creeden, the other member of the company or firm of Creeden & Avery, and at a time when the firm were solvent, though embarrassed by reason of lawsuits. The debt was due by the firm to the plaintiff and the amount is not in dispute.

The plaintiff was pressing for payment in a friendly way when these letters were written and the words used, are:

"We would ask you to kindly let the matter rest for the time being and the writer will personally see that your claim is fully paid, and paid as promptly as possible."

And after referring to a call by a Mr. Elcot on behalf of the plaintiff, Avery says:

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"We told him as we told you in our letter of a few days ago, that we would have this matter settled as soon as possible, and the writer [Avery] would personally see that your account was paid in full."

These words do not seem to me to be ambiguous, nor do I have to apply the rule as laid down in *Mayer* v. *Isaac* (1840), 6 M. & W. 605; 151 E.R. 554 at p. 557, that the instrument should be construed most strongly against the guarantor in order to come to the conclusion that they constitute a guarantee.

The consideration for the guarantee was the giving of time to the principal debtor, and ample time was given. The respondent urges that this time was not given by reason of the guarantee but because of the friendly relationship and satisfactory business connections of Avery & Co. and the plaintiff, and directs us to certain correspondence in the appeal book in support of his contention. While such correspondence is open

to such a construction, it is equally consistent with a desire on the part of the plaintiff to hold its hand as against the guarantor and give him every opportunity of realizing out of the firm assets, and even in assisting him by such leniency before calling upon him to pay personally. If it were to be held otherwise, no one would be safe in neglecting to sue on a guarantee after a reasonable time for extension had elapsed, and his own acts of leniency would be construed against him.

The plaintiff was surely entitled to rely on the guarantee when the principal debtor failed to liquidate, and it was entitled to do so long before it did. Mr. *Grossman's* last point is that the guarantee was never accepted and refers us to certain letters, particularly where in writing to Creeden & Avery, the plaintiff says:

"Payment should have been made immediately upon the closing out of the consignment and our only reason for not insisting upon such payment at that time, was the fact that our relations with you have always been of the best."

Now, this consignment referred to above, being long before the guarantee, all that those last-quoted words mean is: We should have asked for payment as soon as the consignment was closed. We did not do so at that time because of our satisfactory relations with you.

It seems to me it is going too far to say that these words indicate that plaintiff had not accepted and did not rely on a guarantee subsequently given. It was merely a stating of reasons in a letter subsequent to the guarantee, which influenced them at a time long prior to the guarantee.

There should be judgment for the appellant, with costs.

MCPHILLIPS, J.A.: The learned trial judge, RUGGLES, Co. J., has given no reasons for judgment, and it is impossible to determine the point upon which the learned judge proceeded in arriving at his conclusion that the action should stand dismissed. I can only assume that his view was that no guarantee sufficient in law was established.

I agree that the case would appear at first sight to present some difficulties, but upon a careful analysis of the evidence, and the documentary evidence in particular, it is clear, with great respect to the learned judge, that a guarantee was given

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by the respondent for the payment of the debt due by Creeden & Avery, Limited, to the appellant. The conduct of all the parties to the transaction well demonstrates it, and time was given constituting a good consideration for the giving of the guarantee and authorizing its enforcement (see *per* Parke, B. in *Kennaway* v. *Treleavan* (1839), 5 M. & W. 498, 500, 501; *Offord* v. *Davies* (1862), 12 C.B. (N.S.) 748; *Grant* v. *Campbell* (1818), 6 Dow 239; *Stevenson* v. *McLean* (1880), 5 Q.B.D. 346; *Bank of Hamilton* v. *Banfield* (1918), 25 B.C. 367). It is only necessary to note the following excerpts from the letters written by the respondent to the appellant, of date respectively, July 5th and July 15th, 1919, to well indicate this:

"We are merely closing out, so we would ask you to kindly let the matter rest for the time being and the writer will personally see that your claim is fully paid and paid as promptly as possible. Do not worry about it, just let the matter rest and you will most assuredly get your money."

"We told you in our letter of a few days ago that we would have this matter settled as soon as possible, and the writer would personally see that your account was paid in full. This will be done just as soon as possible."

The situation at the time when the guarantee was given was this: Creeden & Avery, Limited, was going out of business, the respondent had acquired Creeden's interest, *i.e.*, the respondent had become the owner of the assets of the Company, and was desirous of preserving them from any enforced levy thereon, and therefore it was a matter of advantage to the respondent that time be given to realize. That is well indicated by the following further excerpt from the letter of July 5th, 1919:

MCPHILLIPS, J.A.

"In regard to the balance owing you, the writer purchased Mr. Creeden's interest in Creeden & Avery, Limited, some weeks ago and is now winding up the firm of Creeden & Avery, Limited. The Company is perfectly solvent but the writer does not wish to continue the firm and we are now getting in all claims, all book debts, etc. Please understand that the firm is not in liquidation."

In good faith the appellant acted upon the representations made to it, accepted the guarantee and gave the respondent time. It is well that there is an enforceable guarantee, as it would be unconscionable that the respondent should escape liability upon the proved facts of the case.

I would allow the appeal.

EBERTS, J.A. would allow the appeal.

Appeal allowed.

Solicitors for appellant: *Ellis & Brown.*
Solicitors for respondent: *Grossman, Holland & Co.*

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Master and servant—Medical practitioner for employees—Appointment—Deduction from wages for payment—Proceeding under Master and Servant Act—Rights of workmen—R.S.B.C. 1911, Cap. 153, Sec. 12—B.C. Stats. 1915, Cap. 42, Sec. 13.

On an interpleader issue to determine to whom certain moneys retained from workmen's wages under the Master and Servant Act for medical attendance should be paid it appeared that the plaintiff's claim was based upon an agreement entered into by a procedure not within the statute but was signed by certain of the employee's officials and by certain individuals and acted upon for some time, whereas the defendant appeared to have been selected subsequently and named as medical attendant of certain employees within the procedure provided by the Act.

Held, as the defendant's appointment was in compliance with the Act he was entitled to the moneys so retained.

Per MACDONALD, C.J.A.: The request of 30 or more workmen under the Master and Servant Act, that the master deduct from their wages a sum to be paid to a medical officer for attendance upon them, affects only those who make it and the employer. It does not bind the others, and the procedure provided by the Act must be followed in order to have its sanction, and there is nothing in the Act making any arrangement binding for any specific period.

Per MARTIN, J.A.: Where the certificate of the chairman and secretary of the meeting given under section 13(1) states that the requisitionists were present either in person or by proxy then in the absence of evidence to the contrary the legality of the meeting in that respect should be presumed especially where by the issue the onus of proof is on the party objecting to its legality.

Per MCPHILLIPS, J.A.: When the procedure has been taken under the Act pure technical objections as to the procedure ought not to prevail when a clear and unequivocal mandate is apparent calling for the application of the statutory privilege accorded the workmen which

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in its essence means that they should have the attention of a medical practitioner of their own choosing and that their money should go to that one only.

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APPEAL by defendant from the decision of BARKER, Co. J., of the 28th of June, 1922, in an interpleader issue. The facts are that the plaintiff Hall who is a doctor of medicine entered into a written agreement on the 12th of November, 1921, with the employees of the Western Fuel Corporation of Canada at Nanaimo whereby he was retained as medical officer to attend the officers and employees of the said company, his remuneration being one dollar per month for each man and 50 cents for each boy in the company's service, the company to retain this amount from their wages, and pay the doctor, the agreement to become effective on the 1st of January, 1922. A special general meeting of the employees of the Western Fuel Corporation had been called at the request of the former medical man in charge and held on the 7th of July, 1921, at which the said former doctor's services were dispensed with as from the 1st of January, 1922. The medical committee were instructed to call for applications for the position of medical officer and call a general meeting of the miners after applications closed. Dr. Hall applied for the position and at a general meeting of the miners duly called on the 15th of October it was not finally decided who should be medical officer but provision was made for balloting later when Dr. Hall's application was approved and on the 12th of November he entered into the written agreement above referred to. He entered on his duties on the 1st of January, 1922. Dr. Hall employed the defendant Dr. Lane as his assistant but after two months' service Dr. Lane resigned owing to disagreement with Dr. Hall. On March the 21st a meeting of the miners was held at which they selected Dr. Lane as their medical practitioner and a certificate of his employment was duly signed in compliance with the Act. Dr. Lane then took over the work and a dispute arose as to $44 withheld by the company and claimed by the plaintiff. The money was paid into Court and on an interpleader issue it was held by the trial judge that Dr. Hall had been appointed in compliance with the provisions

Statement

of the Master and Servant Act and he was entitled to said sum.

The appeal was argued at Vancouver on the 3rd of October, 1922, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Mayers (*Cunliffe,* with him), for appellant: The Master and Servant Act (R.S.B.C. 1911, Cap. 153) as amended in 1915, was in force. The appointment of the plaintiff was not carried out in accordance with the Act. The agreement that was made with Dr. Hall binds the parties to it and no one else.

Maclean, K.C. (*A. Leighton,* with him), for respondent: It is not a contest to which the majority of the workmen or the company are parties but it is between the two doctors. A meeting was held and a majority decided in favour of Hall and they entered into an agreement with Hall. He is entitled to three months' notice.

Argument

Mayers, in reply: The plaintiff must establish his position by shewing his appointment and the certificate necessary under the Act: see *Richards* v. *Jenkins* (1887), 18 Q.B.D. 451.

Cur. adv. vult.

9th January, 1923.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The amount involved in this case is very small, but the question to be decided is of considerable importance to employees and their employers. It is important to have a clear statement of the law applicable to the appointment of a medical attendant under the Master and Servant Act, Cap. 153, R.S.B.C. 1911. Section 12 of this Act provides that whenever 30 or more workmen or servants of any master shall request in writing that the master should deduct from their wages a sum to be paid to a medical practitioner for attendance upon them, it shall be the master's duty to give effect to the request. This request, I think, affects only those who make it and the employer.

The provisions of that Act following section 12 were repealed by Cap. 42 of the statutes of 1915, and new sections were substituted for the ones repealed. Section 13 provides that before making the request above mentioned, a medical attendant shall be selected by such workmen (the 30 or more), either present

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in person or represented by proxy, at a special meeting of such workmen called for that purpose. The chairman and secretary of the meeting shall certify in writing the name of the physician selected and the amount to be deducted from the wages of each workman, and the certificate shall also be signed by the medical practitioner selected. It is also provided that workmen may change the physician at a like special meeting, and that a certificate by the chairman and secretary, signed also by the new medical practitioner selected, shall be furnished to the employer.

It will be noted that the special meetings are to be called, not of all the employees of the master, but of those who propose to make the request mentioned in section 12, and the sole purpose of these meetings is to select the person whom the said employees desire as their medical attendant, and to fix the fee which each workman shall pay, so that when the request and the certificate shall be delivered to the master, he can safely deduct the named amounts from the wages of the men making the request, and from time to time pay it to the person who is to receive it. There is nothing in the Act which makes this arrangement binding for any specific period, and I take it that any one of the 30 or more who have signed the request may withdraw from the arrangement if he chooses to do so, but of course without prejudice to what had already been done on the faith of it. The enactment is for the benefit of the men who choose to take advantage of it and for the protection of the employer who pays money out in pursuance of the request.

MACDONALD, C.J.A.

The course adopted by the employees of the Western Canada Fuel Corporation of Canada, the employer in this case, was not that pointed out by the Act. The course pursued was this: A meeting of employees of the coal company was called, at which a draft agreement with the plaintiff was approved. It does not appear what number of the employees were present, or whether of those present all or only a majority approved the agreement. The agreement when engrossed was signed by the president of the miners' committee and the president of the artisans' committee and by fifteen individuals. This agreement appears to have been acted upon from the 1st of January, 1922, to the time when this dispute arose, apparently in March

of the same year, since on the 21st of March, a meeting of some of the employees was convened and a resolution passed in the terms of the said amended Act of 1915. This meeting selected the defendant as their medical attendant and specified the sum to be deducted from their wages by the employer as remuneration for his services. These employees, to the number of 161, signed the request mentioned in said section 12. It therefore appears that on this date, the 21st of March, 1922, these 161 employees made the statutory request and forwarded it and the requisite certificate mentioned in section 13 of the Act of 1915, to the employer, requesting that the sums therein mentioned should be deducted from their wages, and paid to the defendant Lane as their medical attendant. It is admitted by the plaintiff, through his solicitor, in a letter dated the 7th of June, 1922, that the sum in dispute, $44, which had been paid into Court, "is money retained from the wages of certain men whose names appear on the notices purporting to appoint Dr. Lane" (which I take to mean from the wages of some of the said 161 employees), and it was admitted by counsel on the argument of the appeal that this money had been earned by them and deducted from their wages from and after the 21st of April, 1922.

MACDONALD, C.J.A.

In the interpleader issue herein, the plaintiff affirms and the defendant denies that the plaintiff is entitled as against the defendant to the said sum of $44, and the learned County Court judge found that plaintiff was entitled. With respect, I think that that finding should be reversed. So far as the appointment of the plaintiff as medical attendant is concerned, it was not made in accordance with the provisions of the Act, in fact, it appears to have been made entirely outside the Act, as a matter of agreement between himself and a meeting of some employees. It is not shewn, and the onus is by the issue cast on the plaintiff, that the moneys in Court were deducted from the wages of men bound by said agreement.

It was a simple enough matter to follow the procedure clearly pointed out by the statute, and when such procedure was departed from, as it was in this case, arrangements between men and physician have not the sanction of the Act, and must

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stand or fall by the rules applicable to mere private arrangements.

MARTIN, J.A.: As I understand section 12 of the Master and Servant Act, Cap. 153, R.S.B.C. 1911, it in effect provides that a group of 30 or more workmen employed in "any work or undertaking" may select a medical practitioner to attend upon them and be paid by a deduction from their wages, and upon a request in writing to that effect, it becomes the duty of the master of the work to "give immediate effect thereto." It will thus be seen that in a large work there may be a small group of workmen having their separate medical attendant under the Act, while the rest of the workmen who do not join in the request may make such arrangements for medical attendance as they see fit outside the Act, and in the case of the large "work" at bar (The Western Fuel Corporation of Canada, Ltd.) whereon at the time in question between 1,300 and 1,400 men were employed, it might happen that a small or large group wished to take advantage of the Act and did bring themselves within it, leaving the others without. That this is so appears by the provision that the master is only entitled to make a deduction from the wages of those who "request" him so to do—he could not, *e.g.*, deduct anything from the wages of, say, 1,500 of his workmen who made no request simply because 30 others did so.

MARTIN, J.A.

It only remains then to inquire into the fact of the "selection" of any medical practitioner under sections 12 and 13 as amended by Cap. 42 of 1915. The only existing "request in writing" is that before us, dated 21st March, 1922, which is signed by 161 employees, and in it the defendant is named as their selection. But that alone is not sufficient, because by section 13, before that request is made, the selection must be made by such workmen or servants "either present in person or represented by proxy at a special meeting of such workmen or servants called for that purpose." The objection is taken that the holding of this meeting is a condition precedent to the request, and that it was proved that not more than a dozen of the workmen were present in person at the meeting. But

assuming that to be so, there is not only no evidence that they were not "represented by proxy" as the section contemplates, but the certificate of the chairman and secretary of the meeting given under section 13 (1) states that the 161 requisitionists were present either in person or by proxy, and in the absence of any evidence to the contrary the legality of the meeting should be presumed, especially since by the issue herein the plaintiff has assumed the obligation of proving his case, *viz.*:

"The plaintiff affirms and the defendant denies that the plaintiff is entitled as against the defendant to the sum of $44 being a sum which has been paid by the Western Fuel Corporation of Canada, Limited, into Court less its costs."

Furthermore, and in general, before a statutory certificate of this nature (regular on its face and requiring payment to be made to the person selected as therein named) can be displaced, the onus, is on a party seeking to escape its *prima facie* consequences to establish such facts, conjunctively or alternatively as the case may be, as will completely negative its validity.

MARTIN, J.A.

Being therefore of the opinion that the meeting must be deemed to be regular, the certificate given as aforesaid, shewing the amounts to be deducted from the workmen's wages and the medical practitioner selected, is likewise valid, and as it was duly "furnished to the master along with the request" it became his duty under subsection (3) "to pay all sums so deducted to the medical practitioner named in the then current certificate or certificates" and to no one else, and he became liable to the penalty imposed by section 17 (2) upon a summary conviction should he fail to do so. It follows from this view that the defendant as the payee under the only "current certificate" under the Act is entitled to the fund created by the statute (*Cf.* sections 15, 16 and 17 as amended), whatever rights the plaintiff may have to other funds outside the present statute, and so the issue should be determined in defendant's favour and the appeal allowed.

GALLIHER, J.A.

GALLIHER, J.A.: Dr. Hall's claim to the money in question here can only be supported under the agreement dated 12th November, 1921.

His appointment, so far as the evidence before us reveals,

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was not in accordance with the provisions of the Master and Servant Act, R.S.B.C. 1911, Cap. 153, and amending Act, B.C. Stats. 1915, Cap. 42.

The first question that arises then is: What authority have the medical committee or any number of the men employed to bind others who are not signatory to the agreement? There is no such authority shewn, while on the other hand, the Master and Servant Act confers the right on any 30 or more employees to select a medical practitioner, certify him to the company, and request that a certain sum be deducted from their monthly pay to be paid to the doctor so selected. The Act was complied with by those requesting that Dr. Lane be their medical practitioner.

GALLIHER, J.A.

It is practically admitted that the $44 in dispute here was deducted by the company from the pay of those who had made such request. It makes no difference that the men sign an agreement with the company to have a monthly deduction made from their wages for medical attendance, they have still the right to elect under the Act to whom that amount shall be paid.

The appeal must, in my opinion, be allowed.

McPHILLIPS, J.A.: In my opinion the appeal must succeed. The statute law governing in the matter is clear to demonstration. Any 30 of the employees may, pursuing the statutory steps, designate the medical practitioner whom they desire, and I cannot see how that statutory right can be interfered with nor should it be, as Parliament has accorded the employees this privilege.

MCPHILLIPS, J.A.

I observe that the learned judge in his reasons for judgment adverts to what has been the course of procedure in the past: "This system has been in effect here for years." No system, though can be admitted to abrogate plain statute law. It was pressed strongly at this bar that even if there was the statutory right contended for that there was frailty in the procedure in the way of bringing about the selection of the appellant. I cannot satisfy myself that there was any real failure in the steps taken to comply with any matters of substance, and in matters of this nature questions of pure technicality ought not to prevail when a clear and unequivocal mandate is apparent

calling for the application of the statutory privilege accorded the workman, which in its essence means that they should have the attention of a medical practitioner of their own choosing and that their money should go to that medical practitioner only.

I would, therefore, allow the appeal.

EBERTS, J.A. would allow the appeal.

Appeal allowed.

Solicitor for appellant: *F. S. Cunliffe.*
Solicitors for respondent: *Leighton & Meakin.*

HENDERSON *ET AL.* v. ROUVALA *ET AL.*

Action — Trover — Trespass — Float used for landing — Co-ownership — Removal by one co-owner to another place—Conversion—Damages.

Certain fishermen, including the plaintiff and defendant, built a float that was moored to Government land on a slough on the Fraser River. It was held by piles driven into the bed of the slough and was used by the fishermen for landing purposes. After it had been so used for nine years the defendant moved it to another slough a quarter of a mile away. The plaintiff succeeded in an action for the return of the float, or in the alternative, damages.

Held, on appeal, MARTIN, J.A. dissenting, that the judgment of CAYLEY, Co. J. be affirmed, but that the damages be reduced to the amount of the value of plaintiff's interest in the float.

Per MACDONALD, C.J.A.: The float was built for use by the builders at the slough where it was built and not elsewhere, and considering its purpose and the character of its attachment to the soil, it ought to be regarded as a chattel and not as part of the soil and its removal elsewhere was an infringement of the rights of the plaintiff.

Per MCPHILLIPS, J.A.: The case was not one simply of a tenancy in common in a chattel, but was one of joint ownership of a float in its original position and its removal was an actionable wrong. The facts established ouster by defendant of his co-owners.

Statement

APPEAL by defendants from the decision of CAYLEY, Co. J. of the 24th of April, 1922, in an action to recover $165, the

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value of 5 boom-sticks, 2 boom-chains, and a float with approaches taken and detained by the defendants. The float was built at Woodward Slough on the Fraser River by a number of fishermen including the parties to this action, and for nine years had been used by them for landing purposes in the course of their vocation. The float adjoined Government land and was held in place by piles driven into the bed of the slough. The defendants changed their residence and moved from Woodward Slough to Anderson Slough, about one-quarter of a mile away. They took the float and appurtenances with them to Anderson Slough, claiming it was in danger of being carried away by the ice in its former position, but when asked by the plaintiffs to return it, they refused to do so. It was held by the trial judge that the plaintiffs had a right to demand the restoration of the float or in the alternative compensation to the extent of $165.

The appeal was argued at Vancouver on the 6th and 9th of October, 1922, before MACDONALD, C.J.A., MARTIN, MCPHILLIPS and EBERTS, JJ.A.

Argument

J. E. Bird, for appellants: The float was moved but not destroyed, there was no conversion, and therefore no cause of action: see Halsbury's Laws of England, Vol. 27, p. 898, par. 1579; *Jones* v. *Brown* (1856), 25 L.J., Ex. 345 at p. 347; *Jacobs* v. *Seward* (1872), 41 L.J., C.P. 221; *Mayhew* v. *Herrick* (1849), 7 C.B. 230; 137 E.R. 92; *Heath* v. *Hubbard* (1803), 4 East 110.

W. J. Whiteside, K.C., for respondents: We base our claim on ouster. The float was only useful where it was in connection with these houses. An action for trespass will lie: see Pollock on Torts, 11th Ed., pp. 371-2; *M'Intosh* v. *Port Huron Petrified Brick Co.* (1900), 27 A.R. 262.

Bird, in reply.

Cur. adv. vult.

9th January, 1923.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I would dismiss the appeal. The float in question was built at Woodward's Slough in the Fraser River, by a number of fishermen residing there, for their

common use in that place. The plaintiff and the defendant both resided at Woodward's Slough at the time the float was built and were amongst those who built it. The float was moored to Government land and was also held by piles driven into the bed of the slough. It was built some nine years ago and since that time, and up to the time of the wrong complained of, was used by these fishermen and their assigns in the daily round of their lives.

The defendants having recently moved away from Woodward's Slough to a slough about a quarter of a mile distant therefrom, without the consent of the plaintiff and the others interested in the float, took it away from Woodward's Slough to his own abode and refused to return it. The excuse offered for doing this is twofold: Firstly, the defendant says that the float was in danger of being carried away by the action of the river and that he took it to preserve it. Assuming, though not deciding, that that would be a good defence if proved, the learned judge has found against him, and I see no reason for reversing that finding. There remains then the defence of the right to take it founded on joint ownership or ownership in common. I find as a fact that the float was built for the purposes of the builders to be used by them at Woodward's Slough and not elsewhere. Whether it was joint or common property appears to me to be immaterial. I think that the float ought to be regarded as a chattel and not as part of the soil. Its purpose and the character of its attachment to the soil leads me to this conclusion. The circumstances under which it was built and used for nine years shew clearly enough what its ordinary and legitimate uses were. Each of the persons interested in it had the right to use it at Woodward's Slough and no where else without the consent of the others. It was therefore an infringement of the rights of the plaintiff to remove it elsewhere. The rule to be applied to this case is stated in *Jacobs* v. *Seward* (1872), L.R. 5 H.L. 464:

MACDONALD, C.J.A.

"In order to enable one tenant in common to maintain trover against another, there must not merely be a carrying away of the property, but such a carrying away of it as will disable the party complaining from having the lawful use or benefit of the property, or there must be the destruction of it."

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And again (p. 474):

"It does not signify whether one or other of the tenants in common make use of it, it being made use of in an ordinary and legitimate way."

In my opinion, the defendant did not make use of it in an ordinary or legitimate way when he removed the float from the place where it was intended to be permanently used and thus deprived the plaintiff of his undoubted right to use it.

The question of damages presents some difficulty. The learned trial judge has ordered the return of the float and in default of its return he has awarded the plaintiff $165 damages, being the full value of the float and of the property taken. His judgment ordering the return of the float should not be disturbed, but I think he has come to the wrong conclusion in respect of the damages should the float not be returned. The evidence is very unsatisfactory in respect of the number of persons who were interested in the float with the plaintiff and the defendant, but I make out from the evidence that at least three, including the plaintiff and the two original defendants, were the owners of it, the other builders having left and abandoned it. *Prima facie* the damages for the non-return of the float would be the value of the plaintiff's interest in it and as he has shewn no other damage, although alleging the same in his pleas, I think the damages will have to be divided by three. The judgment should therefore be varied so as to order that in case the float be not returned, the plaintiffs shall recover $55 damages. *M'Intosh* v. *Port Huron Petrified Brick Co.* (1900), 27 A.R. 262.

As the plaintiffs are entitled to have the float returned, that being their substantial cause of action, they should have the costs of this appeal.

MARTIN, J.A.

MARTIN, J.A.: In this action the plaintiffs, who are joint owners (though they wrongly allege they were sole owners) with the defendants of the fishing float and appurtenances in question, set up in their plaint, para. 4 (a), that the defendants have deprived them of the use of "certain goods and chattels," *viz.*, "a float, boom-sticks and chains," and therefore claim damages for its "wrongful detention."

The leading authorities on the point have been cited to us

and I shall only add to them *Poisson and Woods* v. *Robertson and Turvey* (1902), 86 L.T. 302 and Clerk & Lindsell on Torts, 7th Ed., 247, and the effect of them, as applicable to the facts at bar, is well summarized by Chancellor Boyd in *M'Intosh* v. *Port Huron Petrified Brick Co.* (1900), 27 A.R. 262 at p. 267, where he says:

"It is not necessary, by any of the authorities, that there should be a physical destruction of the property as by breaking it in pieces; it is enough that the common interest, or rather the plaintiff's interest, is practically destroyed, as it is a sale by the co-tenant and the buyer taking the property into another State there to be kept."

And *Cf.* Moss, J.A. at p. 278:

"But unless the defendant company, after becoming co-owners with the plaintiff, destroyed the machine or did some act which was equivalent to its destruction, trover would not lie against them.

"The remedy would be to establish a lien on the machine for any balance that might be found due to the plaintiff upon the accounts between him and Pearce and Norris."

In *Jones* v. *Brown* (1856), 25 L.J., Ex. 345 at p. 348 the Court of Exchequer in term unanimously approved of the following passage in *Littleton*:

"'But if two be possessed of chattels personalls in common, by divers titles, as of a horse, an oxe, or a cowe, &c., if the one take the whole to himselfe out of the possession of the other, the other hath no other remedie but to take this from him who hath done to him the wrong to occupie in common, &c., when he can see his time. In the same manner it is of chattels realls which cannot be severed, as in the case aforesaid, where two be possessed of the wardships of the bodie of an infant within age, if the one taketh the infant out of the possession of the other, the other hath no remedie by an action by the law, but to take the infant out of the possession of the other when he sees his time.'"

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And in *Jacobs* v. *Seward* (1872), L.R. 5 H.L. 464, Lord Chancellor Hatherley said, in a case of one tenant in common cutting and taking away a crop of hay, p. 472:

"Now, as regards the question of trespass, it appears to be perfectly settled (there is really no controversy between the counsel in the case upon that part of the matter) that unless there be an actual ouster of one tenant in common by another, trespass will not lie by the one against the other so far as the land is concerned."

And at p. 474:

"The cases in which trover would lie against a tenant in common are reducible to this. They are cases in which something has been done which has destroyed the common property, or where there has been a direct and positive exclusion of the co-tenant in common from the common property, he seeking to exercise his rights therein, and being denied the exercise of such rights."

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And Lord Westbury said, p. 478:

"It is undoubtedly settled law that he cannot maintain trespass unless there is a case of ouster."

In the *M'Intosh* case, *supra,* the machine was removed out of Canada; here the float has only been moved a quarter of a mile to Anderson's Slough, Fraser River, and the plaintiffs do not even allege that the defendant Rouvala refused to let them use it, but merely refused to bring it back to its old moorings from which he said he removed it for purposes of safety from ice, and is confirmed in this statement by the witness Anderson, but though the learned judge finds against Rouvala on that point he decides against him merely because, as he puts it, "Henderson has a right to demand the restoration of the float or in the alternative compensation . . . .": there is no finding (nor could there be on the meagre and unsatisfactory evidence) that Rouvala refused to allow the plaintiffs themselves either to bring it back to its original location or to use it on the new one. And it is admitted by plaintiffs' witnesses that Marjama, who was with Rouvala when he moved the float, is also a part owner thereof, and that he and Rouvala live at Anderson's Slough, where it now is. Moreover, it is also proved by two of plaintiff's witnesses that a few days before Rouvala moved the float the boom that held it to the bank was floating loose. The uncontradicted evidence of Rouvala is that all the original builders of the float have moved away from that locality except the plaintiff, Marjama and himself.

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Furthermore, if it be material, no evidence at all was adduced to shew that its present location is not as convenient as the former, despite the fact that the plaintiffs invited such an issue by alleging in their particulars, par. 2:

"That the plaintiffs have suffered damage through the inconvenience and loss of time in having to anchor their boats in the river and use skiffs for landing purposes, and being unable to reach their boats at low tide."

In such circumstances it is clear, to me at least, that the judgment cannot be supported upon any principle and therefore the appeal should be allowed.

It was not suggested by counsel that all the essential evidence that was before the learned judge below is not before us, and

I am not prepared to strain inferences to supply lack of proof. I adopt the language of Lord Westbury in the *Jacobs* case, *supra,* where he said, pp. 476-7:

"My Lords, if there is any miscarriage in this matter, I think it must be attributed to the want of definite and certain statements in the special case which is the subject of the present appeal."

I have not overlooked the fact that the learned judge found that the float was fixed to the soil and therefore was the "property of the owners of the adjacent bank," whoever they happen to be, but upon this finding, which was quite apart from and destructive of the case set up by the plaint and upon which issue was joined, the only judgment he could have legally entered would have been against the plaintiff.

MARTIN, J.A.

McPHILLIPS, J.A.: In my opinion this appeal should stand dismissed. Upon a careful study of the evidence the case is not one simply of a tenancy in common in a chattel, so ably argued by Mr. *Bird,* the learned counsel for the appellant. With deference, I consider that upon all the facts it is really the case of the joint ownership of a float attached to the soil, *i.e.,* placed within piles driven into the soil, and that there was an actionable wrong committed by the appellant Rouvala in interfering with and removing the float from the situation in which it was. The reasons given for the removal, if cogent and in the way of preserving the float, cannot weigh against the right in the respondents to have the float in its original position. The facts of this case really establish ouster, *i.e.,* the respondents are in effect denied the exercise of their rights in the user of the float where originally situated, and there was no consent to the float's removal (*Barnardiston* v. *Chapman* (1715), cited in *Heath* v. *Hubbard* (1803), 4 East 110, 121; *May* v. *Harvey* (1811), 13 East 197; *Fennings* v. *Lord Grenville* (1808), 1 Taunt. 241). There has been here the infringement by one co-owner of the rights of his co-owners. In *Jacobs* v. *Seward* (1872), 41 L.J., C.P. 221 the action was held not to be maintainable because it was held there that there had been no ouster. That was the case of a tenant in common bringing an action of trespass and trover against his co-tenant for cutting and carrying away the grass of their land, it not being shewn that the grass had been destroyed.

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The facts of the present case clearly establish a case of ouster. The Lord Chancellor in *Jacobs* v. *Seward, supra,* at p. 224, said:

> Now, as regards the question of trespass, it appears to be perfectly settled, and there is really no controversy between the counsel in the case upon that part of the matter, that unless there be an actual ouster of one tenant in common by another, trespass will not lie by the one against the other so far as the land is concerned. Therefore what we have to look at in the findings before us is, whether or not there is anything stated which leads to the conclusion that the plaintiff was ousted by his co-tenant."

Here we have the float withheld and maintained against the consent of the other owners at a very different location not suitable for the exercise of their rights and wrongfully taken away. Then we have Lord Westbury in the same case, at p. 225, saying:

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> "The cases in which trover would lie against a tenant in common are reducible to this: They are cases in which something has been done which has destroyed the common property, or in which there has been a direct and positive exclusion of the co-tenant in common from the common property, he seeking to exercise his rights therein, and being denied the exercise of such rights. There was the case of the ship being taken possession of by one tenant in common, and sent to sea without the consent of his co-tenant. It that case it was held that the property was destroyed by the act of one tenant in common, and therefore trover would lie in respect of the co-tenant's share. But where the act done by the tenant in common is right in itself, and nothing is done which destroys the benefit of the other co-tenant in common in the property, there no action will lie, because he can follow that property as long as it is in existence and not destroyed."

Here there has been the direct and positive exclusion of the respondents from the common property, and they, whilst seeking to exercise their rights, have been denied the exercise of those rights. This unquestionably gives a right of action, and the action was brought after demand made. I see no ground upon which the judgment of the Court below should be disturbed, save as to the *quantum* of damages.

EBERTS, J.A.

EBERTS, J.A. would dismiss the appeal.

Appeal dismissed, Martin, J.A. dissenting.

Solicitors for appellants: *Bird, Macdonald & Co.*
Solicitor for respondents: *A. John Allison.*

MORLEY v. THE CORPORATION OF THE DISTRICT OF OAK BAY.

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Constitutional law — Municipal corporation — By-law prohibiting horse-racing—Municipal Act, B.C. Stats. 1914, Cap. 52, Sec. 54 (118)— Validity of—British North America Act (30 Vict., Cap. 3), Sec. 92, Nos. 8, 13, and 16.

Section 54(118) of the Municipal Act which authorizes the council of a municipality to pass by-laws for preventing or regulating horse-racing is *intra vires* of the Provincial Legislature and a municipality may prohibit horse-racing within its limits.

The provisions of the Criminal Code dealing with horse-racing apply where horse-racing is carried on but does not amount to legislation authorizing horse-racing, and does not interfere with the Provincial Legislature's right to prevent it.

Per MACDONALD, C.J.A.: Dealing with the question on the footing that the Dominion has power to deal with horse-racing in the interest of the "peace, order and good government of Canada," in the absence of Dominion legislation the Province may legislate upon it as being a matter of "a merely local or private nature in the Province."

Per MCPHILLIPS, J.A.: The impugned legislation is *intra vires* as being a power within the exclusive jurisdiction of the Provincial Legislature relating to "property and civil rights," but if wrong in that the legislation is supportable as being within "generally all matters of a merely local or private nature in the Province."

APPEAL by plaintiff from the order of MORRISON, J. of the 30th of August, 1922, dismissing a rule requiring the Corporation of the District of Oak Bay to shew cause why its by-law No. 335 entitled "The Horse-Racing Prevention By-Law" should not be quashed on the grounds: (a) That the same is beyond the competence of the Corporation to enact and (b), that it is beyond the competence of the Legislative Assembly of the Province to authorize the enactment of such a by-law. The material sections of by-law No. 335 are as follow:

Statement

"1. No person shall after the date on which this by-law shall come into effect hold or carry on any horse-racing within the limits of the municipality of the District of Oak Bay.

"2. No person shall after the date on which this by-law shall come into effect aid in, enter in, judge, start, race in, drive in or ride in, any horse-race within the limits of the municipality of the District of Oak Bay.

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"3. Any person holding or carrying on any horse-racing within the limits of the Municipality of the District of Oak Bay, or aiding in, entering in, judging, starting, racing in, driving in or riding in any horse-race within the limits of the municipality of the District of Oak Bay after the date on which this by-law shall come into effect shall be liable on summary conviction to a penalty of not less than twenty-five dollars ($25) and not exceeding one thousand dollars ($1,000) for each offence.

"4. In this by-law the word 'person' shall include a partnership firm consisting of more than one person, an association and a corporation.

"5. The Horse Racing By-law of The Corporation of the District of Oak Bay is hereby repealed."

Statement

Section 54, subsection (118), of the Municipal Act, B.C. Stats. 1914, provided that the council of every municipality could make by-laws "for preventing or regulating horse-racing."

The appeal was argued at Vancouver on the 6th of October, 1922, before MACDONALD, C.J.A., MARTIN, MCPHILLIPS and EBERTS, JJ.A.

Argument

Mayers, for appellant: The first question is whether the Legislature has power to pass subsection (118). We submit there is no such power under section 92 of the British North America Act. The only numbers of section 92 that can be considered are 8, 13 and 16. As to the first, horse-racing has nothing to do with municipal institutions. It is a matter of national importance and comes under moral regulation: see *Re Race-Tracks and Betting* (1921), 49 O.L.R. 339 at p. 348. Horse-racing is not within "civil rights." It is within the ambit of public law: see *Russell* v. *Reginam* (1882), 7 App. Cas. 829 at p. 838. The right of a man to do what he likes with his own does not come within "civil rights." It is connected with the subject of purchase and sale: see *Re North Perth* (1891), 21 Ont. 538 at p. 542. The time, nature and character of the legislation must be looked into in each case: *Regina* v. *Keefe* (1890), 1 Terr. L.R. 280 at p. 281; *Rex* v. *Lee* (1911), 23 O.L.R. 490; *Regina* v. *Wason* (1890), 17 A.R. 221; *Ouimet* v. *Bazin* (1912), 46 S.C.R. 502 at p. 506; *Rex* v. *Walden* (1914), 19 B.C. 539 at p. 542.

Maclean, K.C., for respondent: "Civil rights" include rights in addition to rights leading to a contest between private citizens. Racing a horse is a "civil right" and can be dealt with by the Legislature. The words are used in their broadest

sense: see *Citizens' Insurance Company of Canada* v. *Parsons* (1881), 7 App. Cas. 96 at p. 111. This legislation is approved by Idington, J. in *In re Alberta Railway Act* (1913), 48 S.C.R. 9 at p. 24. As to the legislation being of a "local and private nature" in the case of *Attorney-General of Manitoba* v. *Manitoba Licence Holders' Association* (1902), A.C. 73, it was held that dealing with prohibition was of a local and private nature; see also *Canadian Pacific Wine Co.* v. *Tuley* (1921), 2 A.C. 417; *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (1896), A.C. 348 at p. 365. There are many reasons that can be assigned to the passing of the Act besides gambling. It may be a nuisance and an expense to the community. As to the case of *Re Race-Tracks and Betting* (1921), 49 O.L.R. 339, the dissenting judgment of Riddell, J. is of value on the whole question. The principle laid down by the majority of the Court does not apply here.

Argument

Mayers, in reply.

Cur. adv. vult.

9th January, 1923.

MACDONALD, C.J.A.: The Municipal Act enables municipalities to pass by-laws for the regulation and prohibition of horse-racing within the municipality.

The by-law which it is sought to have quashed prohibits such horse-racing. Two grounds of appeal were relied upon: firstly, that the power to prohibit horse-racing is *ultra vires* of the Provincial Legislature, and secondly, that if the Legislature have such power it cannot delegate it.

As I can see no difference in substance between prohibiting a person from racing his horse or conducting a race-course within a given area and prohibiting him from trafficking in intoxicating liquors within a given area, the case, in my opinion, is governed by the decisions upon the constitutional validity of Provincial prohibition Acts. If the prohibition of horse-racing be an interference with "property and civil rights," then it is within the exclusive jurisdiction of the local Legislature, one which cannot be encroached upon by the Parliament of Canada. *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (1896), A.C. 348; *Attorney-General for*

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Manitoba v. *Manitoba Licence Holders' Association* (1902), A.C. 73. But the better opinion as expressed by Lord Macnaghten in the *Licence Holders'* case, *supra,* is that the subject in its relation to prohibition of the sale of liquor falls within those of "a merely local or private nature in the Province," and not within "property and civil rights." It has also been pointed out in the cases referred to above, that the prohibition of the liquor traffic may fall, so far as the Dominion is concerned, within the supplementary provisions of section 91 of the B.N.A. Act, but not within the enumerated classes of subjects exclusively assigned to the Dominion by the same section.

Putting it in the strongest way for the appellant, the question may therefore be dealt with upon the footing that the Dominion may have power to deal with horse-racing if it should become necessary to do so in the interest of the "peace, order and good government of Canada," but that in the absence of Dominion legislation the Province may effectually legislate upon it under its powers to do so, as being a matter of "a merely local or private nature in the Province."

If then there be no distinction between the character of the one subject and that of the other, between horse-racing and transactions in intoxicating liquor, it must, I think, follow that the decisions referred to above are authoritative upon the present appeal.

MACDONALD, C.J.A.

In *Re Race-Tracks and Betting* (1921), 49 O.L.R. 338, in the Ontario Court of Appeal, Meredith, C.J.C.P., thought that horse-racing and betting were one subject, or so inseparable that in the eye of the law they must be regarded as being one subject, but with respect, I cannot take that view of it, nor do I agree with Middleton and Lennox, JJ. that it falls within "Criminal Law." The cases in the Privy Council to which I have referred above appear to me to indicate that the subject is one upon which the Provincial Legislature may legislate, and that such legislation is operative until Parliament has effectually legislated in a manner repugnant to it, assuming that it has that power. Parliament, I think, has never legislated against horse-racing, though it has against certain forms of betting upon horse-races.

On the second branch of the appeal, that is to say, that the Legislature had no right to delegate its power to prohibit horse-racing, I do not agree with appellant's submission. The section of the statute in question in *Attorney-General for Ontario* v. *Attorney-General for the Dominion, supra,* was one delegating authority to local bodies to prohibit traffic in intoxicating liquor and it was held to be within the powers of the Province.

The by-law should be sustained.

MARTIN, J.A.: In the light of the decision of the Privy Council in *Attorney-General of Manitoba* v. *Manitoba Licence Holders' Association* (1902), A.C. 73, it is now legally impossible to deny that Provincial Legislatures, under No. 16 of section 92 of the B.N.A. Act, have the power where "the object in view is the abatement of prevention of a local evil" (apart from "property and civil rights" under No. 13) to totally suppress such an evil within their boundaries, even though it has the effect of interfering with Federal revenue or powers outside or inside the Province, as in the case of the suppression of the liquor traffic, there in question, and the valid prohibition in the Province of Saskatchewan against the employment of white women in restaurants, laundries, etc., "by any Chinaman," with the object, as stated by the Chief Justice in *Quong-Wing* v. *Regem* (1914), 49 S.C.R. 440 at p. 445; 6 W.W.R. 270, of imposing "certain restrictions in the interest of the employees' bodily and moral welfare," even though such prohibition seriously affected civil rights (p. 445), is a later illustration of a remedy applied to a "local evil" from which the public in general or a particular class may be protected by the Province from a moral point of view under said No. 16; see also Davies, J. at p. 449; Duff, J. at p. 461, and Anglin, J. in concurrence at p. 469.

MARTIN, J.A.

It is obvious that the holding of race-meetings of a certain dubious or dishonest class may be attended by, *e.g.,* such an increase from foreign parts in the undesirable element of a community (with its consequential burden of increased police protection, etc.), and the diversion of money from ordinary business to betting and speculation and the undue distraction

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of large numbers of persons from business occupations as well as being an annoyance and a nuisance to residents of the locality, as to become a "local evil" even though race-track betting in certain circumstances is legalized (as was also the general purchase of liquor before recent liquor Acts)—indeed, such a state of affairs would be more of "a local evil" than drinking, because its suppression does not trench upon Federal powers or revenue, as in the case of the liquor traffic already noted. There may, on the other hand, be properly conducted horse-races which are of such a nature as would not be inimical to the "moral welfare" of the locality and encourage the local (not foreign) breeding of horses, or otherwise, and it is for that reason, doubtless, that the Provincial Legislature has conferred upon municipalities the alternative power (under section 54, subsection (118), of 1914) of "preventing or regulating horse-racing" so as to meet the various conditions which may arise. In the case at bar the respondent Municipality has seen fit in the exercise of its local knowledge and discretion and for the protection of the "moral welfare" of its inhabitants to totally prohibit horse-racing within its boundaries, and I am clearly of the opinion that, in accordance with the principles of the two leading cases cited, it has power so to do. It must be conceded, I think, that under subsection (112), which gives a municipality the power to "prevent and regulate shows and public exhibitions," it could, for example, prohibit or control circus exhibitions if it was thought they had reached a stage which was detrimental to the welfare of the community, and what difference is there between horses performing or racing under a tent and the open sky?

MARTIN, J.A.

As to the further objection that the power should be exercised by the Legislature direct and not delegated to the local municipalities, it is to be observed that from the fact that the Legislature has passed the subsection it is apparent that it has taken cognizance of the "local evil" and adopted that way of suppressing it, *viz.*, by the local municipal authorities, thus "localizing" it as much as possible, just as it might do so by means of the local magistracy within municipalities or without in those very large areas of this Province which are still under

direct control of the Crown. No authority has been cited to us going to shew that a Province may not adopt such means or agencies in the exercise of its powers as it may think will best supply a remedy for present or future evil conditions in its various localities.

With respect to the decision of the Ontario Appellate Division in the constitutional reference case of *Re Race-Tracks and Betting* (1921), 49 O.L.R. 338, I have only to say that, with every possible respect, I am unable, even if the case were on all fours with this one, to follow the reasoning of the majority of the Bench which does not even refer to the two controlling cases already cited, which, in my opinion, settle the principle involved herein, *viz.*, the attempt to remedy a local evil by abatement under No. 16. It is impossible, upon what is before us, to say that the Municipality did not have the sole intention of exercising its powers legally (a point which I have lately dealt with in *Rex* v. *Ferguson* (1922), [*ante* p. 100]; 2 W.W.R. 473) and therefore the appeal should be dismissed.

MARTIN, J.A.

McPHILLIPS, J.A.: This appeal calls in question the validity of section 54 (118) of the Municipal Act, B.C. Stats. 1914, Cap. 52, as amended by section 3 of Cap. 46, 1915, which reads as follows:

"54. In every municipality the council may from time to time, make, alter and repeal by-laws not inconsistent with any law in force in the Province for any of the following purposes, that is to say:

"(118.) For preventing or regulating horse-racing."

It was submitted on behalf of the appellant that the enactment was *ultra vires* and transcended the powers conferred upon the Legislative Assembly of British Columbia under the British North America Act (30 Vict., Cap. 3), that the power was not one conferred under section 92 but was a power exercisable only by the Parliament of Canada under section 91, and that it could not be successfully contended that the legislation was supported by section 92, No. 8, "Municipal institutions in the Province"; No. 13, "Property and civil rights of the Province"; No. 16, "Generally all matters of a merely local or private nature in the Province."

MCPHILLIPS, J.A.

The contention made was that horse-racing in all its phases

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was a pursuit or sport that in its nature was of national importance, and that it fell within section 91 and was within the particular ambit of the powers of Parliament (Dominion) "to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces" (section 91, B.N.A. Act), that is, that the subject-matter of the challenged legislation being of national importance and being regulatory of morals, was outside the scope of the powers conferred under section 92 and was a power that resided only in the Parliament of Canada. Great reliance was placed upon the conclusion arrived at by the Ontario Court of Appeal, when this precise matter was under review (*Re Race-Tracks and Betting* (1921), 49 O.L.R. 329 at pp. 341, 350), but with the highest respect for that Court, it is to be remembered that it is not a binding opinion upon this Court, and it is further to be remarked that there was very considerable difference of opinion amongst the eminent judges who determined the matter, and I may say that the reasons of Mr. Justice Riddell, who dissented in the appeal, would appear to me to be the most convincing.

MCPHILLIPS, J.A.

If the conclusion of the majority of the Court of Appeal of Ontario was to be agreed to that would end the matter, as the question here is absolutely the same question. It was pressed that where it was found that there was Dominion legislation admitting of betting at race-meetings, *i.e.*, the pari-mutuel system, that it inferentially validated race meetings. That could not reasonably follow, because it is conceivable that there may be legislation by the Parliament of Canada which in its nature may be declaratory only and as indicating that something done will not be deemed to be within the purview of the Criminal Code, notably the pari-mutuel form of betting, and in this connection it is to be noted that there is Provincial legislation referring to the pari-mutuel system of betting in the Amusement Tax Amendment Act, 1921 (Second Session), imposing a tax upon a person attending a race-meeting where the pari-mutuel system of betting is in vogue. It follows though that the legislation, Dominion or Provincial, in this

regard is not the enactment of substantive law, authorizing the carrying on of race-meetings.

Then great stress was laid upon the line of reasoning of Sir Montague E. Smith, in delivering the judgment of their Lordships of the Privy Council in *Russell* v. *Reginam* (1882), 7 App. Cas. 829 at pp. 838-9:

"Next, their Lordships cannot think that the Temperance Act in question properly belongs to the class of subjects, 'Property and Civil Rights.' It has in its legal aspect an obvious and close similarity to laws which place restrictions on the sale or custody of poisonous drugs, or of dangerously explosive substances. These things, as well as intoxicating liquors, can, of course, be held as property, but a law placing restrictions on their sale, custody, or removal, on the ground that the free sale or use of them is dangerous to public safety, and making it a criminal offence punishable by fine or imprisonment to violate these restrictions, cannot properly be deemed a law in relation to property in the sense in which these words are used in the 92nd section. What Parliament is dealing with in legislation of this kind is not a matter in relation to property and its rights, but one relating to public order and safety. That is the primary matter dealt with, and though incidentally the free use of things in which men may have property is interfered with, that incidental interference does not alter the character of the law. Upon the same considerations, the Act in question cannot be regarded as legislation in relation to civil rights. In however large a sense these words are used, it could not have been intended to prevent the Parliament of Canada from declaring and enacting certain uses of property, and certain acts in relation to property, to be criminal and wrongful. Laws which make it a criminal offence for a man wilfully to set fire to his own house on the ground that such an act endangers the public safety, or to overwork his horse on the ground of cruelty to the animal, though affecting in some sense property and the right of a man to do as he pleases with his own, cannot properly be regarded as legislation in relation to property or to civil rights. Nor could a law which prohibited or restricted the sale or exposure of cattle having a contagious disease be so regarded. Laws of this nature designed for the promotion of public order, safety, or morals, and which subject those who contravene them to criminal procedure and punishment, belong to the subject of public wrongs rather than to that of civil rights. They are of a nature which fall within the general authority of Parliament to make laws for the order and good government of Canada, and have direct relation to criminal law, which is one of the enumerated classes of subjects assigned exclusively to the Parliament of Canada."

MCPHILLIPS, J.A.

In my opinion this reasoning in no way indicates that race-meetings, or using horses in racing, could not be within the scope of "property and civil rights." It only indicates that there may be legislation by the Parliament of Canada which may to some extent affect property and civil rights, where it

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is legislation against crime, and the use of property endangering public safety and cruelty to animate property, as legislation of that character would relate to the "peace, order, and good government of Canada." This is quite understandable, but wherein can reasoning be deduced from this decision that race-meetings and horse-racing do not properly come within "property and civil rights"? There is property in every feature of the sport—real and personal property—and there is nothing inherently wrong in owning the race-courses and the horses, nor can it be said that horse-racing is immoral.

In my opinion, the enactment authorizing the passage of by-laws for preventing or regulating horse-racing cannot be held to be other than legislation in relation to property and civil rights, and being of that nature is within the exclusive powers of the Legislature of the Province. *Rex* v. *Lee* (1911), 23 O.L.R. 490 would not appear to me to be helpful to the appellant, and I would refer to what Moss, C.J.O. said at pp. 493-4.

Here, there is no Dominion legislation in the way, the field is clear; if there is even an overlapping power that does not invalidate the impugned legislation, it is only when the field is not clear that the Dominion legislation must prevail.

MCPHILLIPS, J.A.

I cannot view the legislation as being legislation in the way of conserving public morality. What indicates this? Nothing whatever. The authority conferred upon the Municipality is given with many other powers admitting of the carrying on of municipal government and the economy thereof. The reasons actuating the Municipality in passing the prevention by-law cannot be said to be necessarily or at all in the way of the conservation of public morality. It is not the province of the Court to invade the legislative domain or define the motive of the legislation, it is sufficient to say, according to its plain reading, that the legislation and the by-law passed in pursuance of it are prohibitive of the exercise of certain civil rights, *i.e.*, horse-racing, and within the jurisdiction of the Legislative Assembly of the Province.

In *City of Montreal* v. *Beauvais* (1909), 42 S.C.R. 211, it was held that legislation authorizing a municipality to regulate the closing of shops was within the classes of matters enumer-

ated as being within the exclusive jurisdiction of Provincial Legislatures under No. 13, "property and civil rights," or No. 16, "Generally all matters of a merely local or private nature in the Province," of section 92 of the British North America Act, 1867, and not an interference with the exclusive jurisdiction of the Parliament of Canada conferred by No. 2 of section 91 of that Act, and I would refer to what Mr. Justice Duff said at pp. 213-15.

Likewise it would seem to me that race-meetings and horse-racing in the Province or in any particular municipality of British Columbia cannot be other than a matter of a merely local or private nature in the Province, and that the language of Mr. Justice Duff is applicable to the present case, *i.e.*, "is a matter which is substantially of local interest in the Province and which in itself is not of any direct or substantial interest to the Dominion as a whole" (p. 215), and is further indicated by Mr. Justice Duff: "We may leave out of consideration any of the indirect and collateral effects." One indirect and collateral effect dwelt upon at this bar was that if the legislation was *intra vires* it affected Dominion legislation, as section 6 of an Act to amend the Criminal Code, being Cap. 43, Can. Stats. 1919 (Second Session), impliedly authorized horse-racing, in admitting of the pari-mutuel system being carried out.

MCPHILLIPS, J.A.

The answer to this submission I think is complete, when it is considered that it is the enactment of criminal law and is declaratory of what shall not be held to be within the purview of the Criminal Code in regard to betting, pool-selling and book-making, and its effect is in no way trenched upon by the challenged legislation. It is true all concerned in race-meetings and horse-racing are governed by this Dominion legislation, and the provisions of the number of days of racing and the number of race-meetings in the year are obligatory, otherwise there will be an infraction of the Criminal Code, but this does not mean nor can it be said to amount to substantive legislation that horse-racing is lawful in any particular Province or municipality, its only effect is that where horse-racing is carried on the provisions of the Criminal Code apply.

Then we have the case of *Quong-Wing* v. *Regem* (1914), 49

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S.C.R. 440 (leave to appeal in this case to the Privy Council was refused). That case was a case relative to the provisions of a statute of the Province of Saskatchewan (1912, Cap. 17) containing a prohibition against the employment of white female labour in places of business and amusement kept by Chinamen, and it was held that the legislation was *intra vires*. Mr. Justice Duff at pp. 461-2 said: [The learned judge quoted from the begining of the 1st paragraph on p. 461 to the end of the 1st paragraph on p. 462, and continued].

In the present case, although in my view the legislation is supportable under section 92, No. 13, it is also supportable under section 92, No. 16.

Mr. Justice Idington, in *In re Alberta Railway Act* (1913), 48 S.C.R. 9 at p. 24, in considering the question of conflict of laws (Dominion and Provincial), indicated a governing canon for arriving at whether the legislation is *intra vires* or *ultra vires*. He said:

"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 will 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."

MCPHILLIPS, J.A.

Then upon the point of absolute prohibition, that may well be admissible owing to the local conditions prevailing. I do not say that they exist with reference to horse-racing, but that is a matter for determination by the Municipality, and in this connection I would refer to what Lord Watson said, in *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (1896), A.C. 348 at p. 365:

"It is not impossible that the vice of intemperance may prevail in particular localities within a Province to such an extent as to constitute its cure by restricting or prohibiting the sale of liquor a matter of a merely local or private nature, and therefore falling *prima facie* within No. 16. In that state of matters, it is conceded that the Parliament of Canada could not imperatively enact a prohibitory law adapted and confined to the requirements of localities within the Province where prohibition was urgently needed."

It is peculiarly a matter of local conditions that would impel

prohibitive legislation as affecting property and civil rights, or the governance of matters of a merely local or private nature in the Province, such as horse-racing, and the Legislature of the Province within the ambit of its constitutional powers is best fitted to deal with such matters, and that was the conception of the framers of the British North America Act and the Sovereign Parliament enacted the measure conferring what is in effect sovereign and exclusive powers in relation thereto, and it is not within the power of any Court to declare otherwise. Horse-racing has centuries of tradition upholding it as a noble sport and pastime, productive of the breeding and training of noble animals, yet conditions may arise which may militate against the well-being of society in particular localities and call for the intervention of Parliament. It has been said that:

"Horse-races are desports of great men, and good in themselves, though many gentlemen by such means gallop out of their fortunes":

Burton, quoted in Strutt's Sports and Pastimes, p. 106.

The head-note in *Attorney-General of Manitoba* v. *Manitoba Licence Holders' Association* (1902), A.C. 73, succinctly defines the decision, and it is a proposition that equally applies to the present case, *i.e,* if not under property and civil rights the legislation is within section 92, No. 16. The head-note reads:

"The Manitoba Liquor Act of 1900 for the suppression of the liquor traffic in that Province is within the powers of the Provincial Legislature, its subject being and having been dealt with as a matter of a merely local nature in the Province within the meaning of British North America Act, 1867, s. 92, sub-s. 16, notwithstanding that in its practical working it must interfere with Dominion revenue, and indirectly at least with business operations outside the Province."

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McGregor v. *Esquimalt and Nanaimo Railway* (1907), 76 L.J., P.C. 85 was a case where land was taken and given to another without compensation (although later compensation was given), yet it was held to be *intra vires* legislation of the Provincial Legislature and within section 92, No. 13. In the present case owners of horses are inhibited from horse-racing. It is a curtailment of the right of user of property, not the complete taking away of property. It follows that the legislation must in the present case be equally *intra vires.* I am clearly of the opinion that the impugned legislation is *intra vires,* as being a power within the exclusive jurisdiction of the Provincial Legis-

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lature relating to "property and civil rights" (92, No. 13, B.N.A. Act), but if I were wrong in that, the legislation is supportable as being within "Generally all matters of a merely local or private nature in the Province" (92, No. 16, B.N.A. Act).

My conclusion is, that the legislation is *intra vires* under both Nos. of 92, *viz.*, "Property and civil rights" (92, No. 13) and "Generally all matters of a merely local and private nature" (92, No. 16).

EBERTS, J.A.: A by-law was passed by Oak Bay and numbered 335, and by section 1 it was enacted:

"1. No person shall after the date when this by-law shall come into effect hold or carry on any horse-racing within the limits of the Municipality of the District of Oak Bay."

An application was made under the Municipal Act to quash the by-law on the ground: "(1), That is was beyond the competence of the Corporation to enact, and (2), it was beyond the competence of the Legislative Assembly of British Columbia to authorize the enactment of such a by-law."

The motion was argued before Mr. Justice MORRISON and the rule was discharged.

The grounds of appeal to this Court are similar to those as held on the rule.

EBERTS, J.A.

The Dominion Government has not declared horse-racing to be permissible, but has merely lifted the ban upon betting at horse-races conducted according to the provisions of the Act. Mr. *Mayers,* for the appellant, relied strongly on the authority of a constitutional reference case (*Re Race-Tracks and Betting* (1921), 49 O.L.R. 339). This case merely affirmed the principle that where horse-racing was permitted by Provincial authorities, it was not within the powers of the Legislature to impose a condition on the conduct thereof at variance with the conditions prescribed and permitted by the Dominion law. A Dominion statute enacted that if horse-racing be carried on it might be so carried on within the terms of the Act, but there is nothing in that Act to specifically authorize horse-racing. I do not think there is any conflict between the Dominion Act and the Provincial Municipal Act.

The Dominion Act declared that betting on horse-races by means of the "pari-mutuel" system is lawful under certain conditions. The Municipal Act does not purport to interfere with such acts or betting. It merely declares that municipalities may determine whether horse-racing may be carried on within the territorial limits of the municipality, "a matter of local or private nature in the Province," and in such a regulation of a civil right within the Municipality.

I would dismiss the appeal.

Appeal dismissed.

Solicitors for appellant: *Mayers, Stockton & Smith.*
Solicitors for respondent: *Bodwell & Lawson.*

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AND

DAVIDSON *ET AL.* v. PACIFIC COAST COAL MINES LIMITED, PACIFIC COAST COLLIERIES LIMITED, HERDMAN AND ESTATE OF H. W. JEFFERSON, AND ARBUTHNOT.

Mechanics' liens—Order for sale—Further order allowing a creditor, if purchaser, to deduct his claim from purchase price—Appeal by other creditor—Priorities—Jurisdiction—Prevailing statute—R.S.B.C. 1911, Cap. 53, Secs. 116(a) and 119; Cap. 154, Sec. 35.

Proceedings taken under the Mechanics' Lien Act are proceedings in the County Court and there is the right of appeal subject to the provisions of section 35 of the Mechanics' Lien Act.

Where the provisions of a special statute conflict with those of a general one the provisions of the special statute prevail.

Where several lien-holders' actions are consolidated and judgment is entered for the whole amount, for the purposes of appeal each claim

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is distinct and subject to the provisions of section 35 of the Mechanics' Lien Act which prevails over any conflicting provisions as to the right of appeal in the County Courts Act.

After judgment had been entered in a consolidated action of several lien-holders and the usual order for sale had been made with conditions and reservations, an order was made by the same judge at the instance of the holders of a judgment and a mortgage registered against the properties in question, that if they became the purchasers of the properties under the sale then after paying the lien-holders in the action and a further prior lien for solicitor's costs, they would be entitled to deduct from the balance of the purchase money the amount of their encumbrances. There were in all three mortgages and seven judgments registered against the properties.

Held, on appeal (at the instance of the holder of one of the registered judgments), reversing the order of BARKER, Co. J., that the order should be set aside as it is a variation of the original judgment and extends beyond the notice of motion, operating to the exclusion of the other encumbrances without the question of priorities being first properly determined.

APPEALS by defendant Arbuthnot from an order of BARKER, Co. J. of the 23rd of November, 1921, in certain Mechanics' lien actions. Judgment was given in favour of the lien-holders on the 16th of May, 1921, and on the 11th of November following the learned judge made an order for sale with conditions and reservations. Upon a certificate of encumbrances as to the title of the property of the Pacific Coast Coal Mines a judgment against the Company in favour of H. W. Jefferson for $125,118.33 was registered on the 19th of October, 1916, and a mortgage from the Company to L. C. Herdman for $60,000 was registered on the 15th of July, 1918. Two further mortgages and seven further judgments were subsequently registered against the property one of the judgments being for $175,958.88 in favour of the defendant John Arbuthnot and registered on the 17th of May, 1919. On the 21st of November, 1921, the owners of the Jefferson judgment and the Herdman mortgage gave notice of motion for an order that at the mechanics' lien sale directed to take place on the 25th of November, 1921, any encumbrancer who may become a purchaser at the sale, may, on paying into Court or to the persons entitled thereto in cash the amount of the mechanics' liens for 25 days and all costs and of a certain lien of W. J. Taylor, K.C., for the sum of $39,750 and costs

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and any other encumbrance prior to his, such purchaser, shall be entitled to deduct from the balance of the purchase-money, if any, his such encumbrance or so much thereof as may be necessary to make up the total amount of the purchase price. The motion was heard on the 23rd of November and an order was made that if the said Herdman or his assigns or the owners of the Jefferson judgment became the purchasers at the sale, after paying into Court the amount of the mechanics' liens herein and in other lien actions covering the lands in question for 25 days and costs and the amount of W. J. Taylor's lien and costs and the sheriff's costs in respect of the Jefferson judgment he or they shall be entitled to deduct the amount of the Jefferson judgment and the Herdman mortgage from the purchase price or at the option of the said purchaser to take a conveyance of the lands and premises to be sold as aforesaid subject to said judgment and said mortgage. The defendant Arbuthnot appealed mainly on the ground that the order should not have been made until after proper inquiry and the question of the priority of the various defendants had been determined.

Statement

The appeals were argued at Victoria on the 30th and 31st of January and the 1st of February, 1922, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Harold B. Robertson, K.C., for appellant.

Stuart Henderson, for respondents Pacific Coast Collieries Limited.

Martin, K.C., for respondents Herdman and Jefferson Estate, raised the preliminary objection that there was no jurisdiction to hear the appeal. The learned judge is *persona designata* in mechanics' lien proceedings. There is no reference to the County Court in the Act. The right of appeal must come precisely from the statute. The several claims were consolidated but for the purpose of appeal each claim is taken separately and there is only an appeal where it is over $250. See *Gabriele* v. *Jackson Mines, Limited* (1906), 15 B.C. 373; *Gillies* v. *Allan* (1910), *ib.* 375.

Argument

Robertson, contra: Since the *Gabriele* decision the statute has been changed: see *Baker* v. *The Uplands, Ltd.* (1913), 18

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B.C. 197 at p. 200. In any case one of the claims is for over $250 so that I have the right of appeal.

Martin, in reply: The question is whether you are in the County Court, by being in the County Court registry.

31st January, 1922.

MACDONALD, C.J.A. (oral): The Court is of opinion that the objection to jurisdiction must fail and that the proceedings in the mechanics' lien activities are proceedings in the County Court.

[*Robertson*: That means that we have an appeal against all the plaintiffs?]

No, the ruling so far is that an objection to the jurisdiction fails. The mechanics' lien proceedings are in the County Court under section 35. It is open to you to argue as to the extent to which that section goes.

Judgment

That disposes of that. Now it seems to me the next move is really yours. You have to shew that you have a right to appeal on behalf of the claimants other than those whose claims are over $250. You have taken, first, the position that you have the right to appeal without leave (we reserved judgment upon that), then you take the alternative position, that if you have not a right you should have leave.

Robertson, on application for leave to appeal: When a jurisdiction is enlarged by statute all incidents including the right of appeal remain the same: see *National Telephone Company, Limited* v. *Postmaster-General* (1913), A.C. 546 at pp. 552, 557, 562. Under section 116 (*a*) of the County Courts Act there is the right of appeal. Alternatively we may apply for leave to appeal under section 119 of the County Courts Act. We have a claim of $150,000 which justifies leave being given by the Court. Judgment in section 35 means judgment against an owner and should be so confined. It does not include an order such as this. I am not appealing against the lien-holders but only with respect to the distribution of the balance.

Argument

Martin, contra: The Mechanic's Lien Act is a special Act, section 35 of which provides for appeals in such cases and overrides any section as to appeal in the County Courts Act. The

National Telephone Company case has nothing to do with this point. There is not a word in section 116 (*a*) that helps them. There is no clause to meet the case they set up. Section 119 is of no effect in the face of the special prohibition against certain appeals in section 35.

31st January, 1922.

MACDONALD, C.J.A. (oral): I think the leave must be refused. There is no power to give leave under the section. Section 35 is a prohibition and section 119 is only applicable to the cases mentioned above, so far as it is applicable at all, and I do not think it is applicable. There is this also to be said in a general way, that where the provisions of a special statute conflict with those of a general statute, the provisions of the special statute must prevail. Now the Mechanics' Lien Act is a special Act, and section 119 of the County Courts Act is contained in the general statute. The application is therefore dismissed.

I may say with regard to the other point which we reserved, that as two of the members of the Court are in favour of dismissing, no matter what conclusion the other two should come to, the opinion of the two who are in favour of dismissing would prevail, and therefore there is really no object (except for deciding the more or less academic question, because it would be academic, if the Court were divided upon it, that is to say, there would be no binding decision) in reserving it.

MACDONALD, C.J.A.

The motion will be dismissed with costs; both motions will be dismissed with costs. That, as I understand it, leaves the question in this way, that with regard to the *Davidson* case which is not before us yet, there is one case out of 185, the larger number involved, which is for $250. All the other cases are for less than that sum. Is it desired to go on with that case, in view of the fact that there is only $250 involved?

[*Martin*: No, I do not care anything about that, only we have to argue the same question in the other case and if we argue it now, it will be argued in the other case].

MARTIN, J.A.: It is always a difficult matter, where a special procedure is injected into a general procedure, to say what may be done, where there is an apparent conflict with the

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provisions of the special Act. In trying to arrive at that, one is justified in looking at the general policy of the special Act and taking a survey of the relevant sections. Having done so in this case, after the elaborate argument we have had, I have come to the conclusion that the special prohibition against an appeal in certain classes of cases in section 35 of the Mechanics' Lien Act is not overridden by the leave to appeal in general in another section, 119, of the County Courts Act. Therefore the motion should be refused.

GALLIHER, J.A.

GALLIHER, J.A.: I have come to the same conclusion on this present application for leave. Assuming, which we are assuming in deciding this point, that there is no appeal under section 35, then I think, that being a prohibitive section, that we cannot apply this section 119 so as to override that. I say this on the assumption, which we have not decided yet, that there is no appeal under 35. Therefore I agree, as I see it, that we cannot grant this appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I cannot see how the Court can accede to the motion for leave to appeal. The Mechanics' Lien Act is the organic statute, and though the proceedings are taken in the County Court, the agency of that Court is not exercised in any way jurisdictionally. The jurisdictional power is contained in the Mechanics' Lien Act, and the practice and procedure only of the County Court is imported where there is no other guide. The right of appeal is a substantive right and not a matter of practice and procedure. The Legislature has undertaken to deal with the question of appeals in the organic statute. It seems to me it is impossible to import any of the provisions in the County Courts Act which are in their nature matters of jurisdiction; the jurisdiction is apart from the jurisdiction of the County Court.

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Argument

Robertson, for appellant: The order appealed from has the effect of depriving us of vested rights. It gave them priority

over all the other creditors without a hearing. The order is a variation from the judgment and there was no jurisdiction to make it. We are contesting their right to priority and that must be settled before they can be allowed to make the set-off they ask for. The creditors whose claims are registered are of the same class and they are being discriminated against by the order. The order exceeds what is asked for in the notice of motion. There should be an opportunity to contest those opposing claims.

Martin, K.C., for respondents Herdman and Jefferson Estate: The judgment upon which they claim reliance does not give them any vested rights. The certificate of encumbrances is *prima facie* binding on him as shewing priorities and our judgment and mortgage are prior to his and all the others. He never expressed any wish before the learned judge to contest the question of priority in the usual way by issue and the learned judge would not make the order unless he considered the priorities were settled. We gave them notice of our claim to priority in the material used on the application and served on them, which included the certificate of encumbrances. The material shews we are prior encumbrancers for $250,000.

Argument

Stuart Henderson, for respondent Pacific Coast Collieries Limited: On behalf of the lien-holders I support this order as it protects us. The order is not in conflict with the judgment or order for sale but is in conformity with them. The fact is that before the sale all priorities were settled under section 36 of the Mechanics' Lien Act. There was no specific request to try priorities.

Robertson, in reply: We relied on the clause in the judgment but this order cuts us off without a hearing. If the order stands it is not necessary to settle priorities or to pay the balance of the purchase-money into Court. If a stranger had bought the property this question would never have arisen.

1st February, 1922.

MACDONALD, C.J.A.

MACDONALD, C.J.A. (oral): I think the appeal must be allowed. Assuming that the learned County Court judge had authority to fix the priorities at the time he did, and I think

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perhaps under special circumstances he would have that power, yet the notice of motion does not contain a prayer for that. If he had made the order in the terms of the notice of motion it would have simply amounted to this, that the purchaser, if one of the encumbrancers, might pay off the lien of Mr. Taylor and other charges unquestionably prior, and then if there were no dispute as to the priority of his own claim, he could deduct his own claim from the purchase-moneys before paying into Court the balance, if any.

If, on the other hand, his priority were not admitted, then he would have to proceed before the learned judge to have that question decided, and there would be a regular issue if the other parties were disputing his priority. So that if the order were made in accordance with the notice of motion, I think it could stand. But the learned judge has gone entirely beyond the notice of motion; he not only has shut out the right of any other encumbrancer, but he has decided this question of priority *ex parte,* although by the prior order that question had been reserved.

MACDONALD, C.J.A.

It is all very well to say that the Land Registry settled the priority. The Land Registry only fixes the priority *prima facie,* so what has been done here is to adopt the presumption without contest, without a notice of motion that it was going to be brought up, and without the assent of any other party.

Such an order cannot stand; it ought to be set aside.

MARTIN, J.A. (oral): In view of what happened before the learned judge, it is quite clear that the order cannot stand, as it is contrary to and goes beyond the Court's judgment. I agree had the order been made in pursuance of the notice of motion, it would not have been contrary to the judgment—see *Geering* v. *Geering and Mockford* (1921), 38 T.L.R. 109, which is not in accordance with the practice of this Court, and *Cf. B. Wood & Son* v. *Sherman* [(1917), 24 B.C. 376]; (1918), 1 W.W.R. 177, and cases I cited at p. 180.

MARTIN, J.A.

The only way to escape from the situation would be if the respondent could say that in some way the parties before the learned judge had agreed that he should adopt the course he did adopt. But it is impossible for us to say this took place. Therefore the appeal should be allowed.

GALLIHER, J.A. (oral): It is my view that the appeal should be allowed.

MCPHILLIPS, J.A. (oral): I also am of the view that the appeal should be allowed. It seems to me the objection is an insuperable one. Had counsel opened the question of the priorities and had this been gone into without objection and the learned judge below dealt with the matter, the situation would be a difficult one. But upon turning to the judgment and the notice of motion, it seems to me there is apparent conflict; the notice of motion not being extensive enough in its terms, I cannot see how the order could be rightly made.

Further, it seems to me the order is very conflicting in its terms and not in the interest of justice, when we bear in mind all the encumbrancers. The order really operates as an exclusion of the other encumbrancers, at least it seems so to read to me, and perhaps it was drawn with that idea. Why was it so confining in its terms?

MCPHILLIPS, J.A.

The order was beyond the scope of the notice of motion and further affected the interests of the other encumbrancers detrimentally. All encumbrancers should have been left undisturbed in their priorities.

Appeal allowed.

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

Solicitor for plaintiff respondents: *Stuart Henderson.*

Solicitor for defendant respondents: *E. B. Ross.*

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MORTON v. THE VANCOUVER GENERAL HOSPITAL. (No. 2).

Negligence—Injury to patient in hospital—Liability—Jury—Misdirection —New trial.

MORTON v. VANCOUVER GENERAL HOSPITAL

The plaintiff entered the defendant Hospital as a patient and complained that hot poultices and hot-water bottles had been so improperly applied and negligently attended to that her breast was burnt and permanently disfigured. The jury found there was no negligence on the the part of the defendant and the action was dismissed.

Held, on appeal, reversing the decision of MORRISON, J. (EBERTS, J.A. dissenting), that there should be a new trial.

Per MARTIN, J.A.: The charge as a whole did not present the case fairly to the jury, particularly a direction that the whole hospital equipment and staff were charged with negligence and that unless the plaintiff could establish that charge she could not succeed.

Per GALLIHER, J.A.: A direction that the jury should take into consideration the surrounding circumstances *simpliciter* is objectionable when there are no surrounding circumstances other than the plaintiff's physical condition that entered into the case.

Per MCPHILLIPS, J.A.: The charge is erroneous in importing into it the circumstances attendant upon the influenza epidemic as constituting a matter of excuse if there was failure in any respect to comply with the legal obligations that rested upon the Hospital.

Hillyer v. *St. Bartholomew's Hospital (Governors)* (1909), 78 L.J., K.B. 958 discussed.

APPEAL by plaintiff from the decision of MORRISON, J., of the 28th of June, 1922, and the verdict of a jury, dismissing the plaintiff's action for damages for personal injuries sustained by reason of the negligence of the defendant in so negligently treating the plaintiff who was a patient receiving medical treatment at the Vancouver General Hospital, that her breast was burnt or scalded resulting in severe injury. The plaintiff entered the hospital on the 17th of January, 1919, having been taken down with influenza and broncho-pneumonia. The attending nurse applied a poultice or hot-water bottle to her breast and she complains that it was left there for so long a time and continuously, without being attended to or removed, in addition to being improperly wrapped, that her breast was badly burnt, causing much pain and suffering and leaving her permanently scarred and disfigured. This

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appeal was from the result of a second trial taken on a previous order of the Court of Appeal for a new trial. The jury found that the defendant Hospital was not guilty of negligence.

The appeal was argued at Vancouver on the 24th, 25th and 26th of October, 1922, before MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

McPhillips, K.C., for appellant: Owing to the general miscarriage we are entitled to a new trial. There was misdirection, non-direction and improper reception and rejection of evidence. The learned judge prejudiced the plaintiff's case by examination of witnesses and the jury were prejudiced by his conduct and particularly by his charge. We say 14 weeks extra time were spent by plaintiff in the hospital owing to the burn on her breast. First, it was misdirection to say counsel were trying to put it over on the judge. See *White* v. *Barnes* (1914), W.N. 74; *Dallimore* v. *Williams and Jesson* (1914), 30 T.L.R. 432. The learned judge should have told the jury the action was for breach of contract and not negligence. He did not properly define contract, or charge that the onus was on the defendant. He refused to charge that *res ipsa loquitur* applied; that the nurse was acting for the hospital and not the doctor; that the epidemic of "flu" at the time did not relieve the hospital of its duties and that the nurse should have been more particular in watching the patient. There was also rejection of evidence and discrediting plaintiff's counsel. The action was on a contract: see *Lavere* v. *Smith's Falls Public Hospital* (1915), 35 O.L.R. 98. There was substantial wrong: see *Bray* v. *Ford* (1896), A.C. 44 at p. 47; *Alaska Packers' Association* v. *Spencer* (1904), 10 B.C. 473; *Blue* v. *Red Mountain Ry. Co.* (1907), 12 B.C. 460; *Wilson* v. *City of Port Coquitlam* (1922), 30 B.C. 449. Where there are a number of errors a new trial follows: see *Lucas* v. *Ministerial Union* (1916), 23 B.C. 257 at p. 262. On burden or proof see Phipson on Evidence, 6th Ed., 30 and 32; Taylor on Evidence, 11th Ed., Vol. 1, p. 273, par. 365; *Pickup* v. *Thames Insurance Co.* (1878), 3 Q.B.D. 594 at

Argument

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p. 600. On rejection of evidence see Phipson, 6th Ed., 688. They impliedly undertake that they are possessed of a reasonable amount of knowledge and skill: see Halsbury's Laws of England, Vol. 20, par. 814, p. 330; *Lamphier* v. *Phipos* (1838), 8 Car. & P. 475 at p. 479: *Pyne* v. *Canadian Pacific Ry. Co.* (1918), 29 Man. L.R. 139; 3 W.W.R 913 at p. 914.

Argument

Reid, K.C., for respondent: This case has been dismissed by two juries. There must be certainty before setting aside the verdict of a jury a second time: see *Wells* v. *Lindop* (1888), 15 A.R. 695 at p. 703. The action although arising out of contract is really for negligence: see Beven, 3rd Ed., Vol. 1, p. 18. It is solely a question of the application of a poultice and should be left to the jury. The burden is on the plaintiff and *res ipsa loquitur* does not apply: see Smith on Negligence, Am. Ed., 1887, from 2nd Eng. Ed., pp. 245-6; also see *Hillyer* v. *St. Bartholomew's Hospital (Governors)* (1909), 78 L.J., K.B. 958 at p. 902. As to misdirection see *Harry* v. *Packers* (1904), 10 B.C. 258. As to judge giving his view of the evidence see *Jefferson* v. *Paskell* (1916), 1 K.B. 57 at pp. 74-5. As to responsibility attaching see *Degg* v. *The Midland Railway Company* (1857), 1 H. & N. 773 at p. 781. As to there being substantial wrong see *Spencer* v. *Alaska Packers' Association* (1904), 35 S.C.R. 362 at p. 371.

McPhillips, in reply: Although the action has been twice before the jury a new trial will be ordered if the case has not been properly put before the second jury.

Cur. adv. vult.

9th January, 1923.

MARTIN, J.A.

MARTIN, J.A.: A number of grounds have been raised upon which the plaintiff appellant seeks to set aside the judgment entered against him at the trial before Mr. Justice MORRISON and a jury on the 28th of June last, but it is only necessary in the view I take of the matter to consider the two most serious of them. The first is as to misdirection in the learned judge's charge, as to which, in general, I think it only necessary to repeat what I said in *Lucas* v. *Ministerial Union* (1916), 23 B.C. 257 at p. 262, *viz.*:

"Nothing is better established than that in the exercise of our grave discretion in the granting of a new trial on the ground of misdirection or non-direction, the charge of a learned judge must be read as a whole to weigh its effect upon the jury, and that isolated or detached expressions must not be fastened upon to set aside their verdict. At the same time, however, it is just as essential to bear in mind that a succession of expressions, none of which taken by itself is vital, may cumulatively result in creating such a forensic atmosphere that one of the litigants has been unfortunately, though unwittingly, prejudiced to such an extent that he has not in the fullest sense been accorded that fair trial which is his right. In order to arrive at a proper conception of the situation in the case at bar, I have endeavoured to put myself, so far as is possible, mentally, in the position of one of the jury, and I can only reach the conclusion that as a juror I would have become as affected, even if unconsciously, by certain observations in the charge and during the course of the trial that I should have been unable properly to discharge my duty, however much I desired to do so."

I have accordingly considered the charge as a whole and am driven to the conclusion that in general it did not, with all possible respect, present the plaintiff's case fairly to the jury, and in particular (for example), the direction that, in effect, the whole hospital equipment and staff were charged with negligence and that unless the plaintiff could establish that charge she could not succeed, must inevitably have misled the jury, and was a serious misrepresentation of her case, because all she complained of was the treatment she received in the ward she was in which she did not allege was in any way insufficiently equipped or understaffed, and was not affected by the influenza epidemic, and therefore the following strong and unmistakable language with which the learned judge concludes his observations on that very important matter, cannot be justified, *viz.*:

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"And why should she receive damages from the Vancouver General Hospital under the circumstances? The only reason and the only way she can possibly get it at your hands is by your holding that the Vancouver General Hospital was negligent in all that they did and it was that negligence which caused these injuries."

In so viewing the matter as a juryman I adopted in substance the expressions of Lord Chancellor Halsbury, in *Barry Railway Company* v. *White* (1919), 17 T.L.R. 644, wherein he is thus reported (p. 645):

"His Lordship felt sure that, if he had been a juryman, he should have been led to believe that all these remarks were relevant to the issue and that the negligent construction of their lines ought to be taken as evidence against the company. The form in which the judge addressed the jury—

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leaving things to them which were not proper for the jury to consider—was misleading. It was not in his Lordship's opinion, right to allow a verdict and judgment so arrived at to stand."

The second ground is that the course of conduct of the learned trial judge throughout the trial occasioned a miscarriage of justice by prejudicing and belittling the plaintiff's case in the mind of the jury in various specified ways unnecessary to detail throughout the trial. This is a matter which I deem it desirable to touch upon as briefly as possible, and I should be disposed to leave it aside altogether were it not that it was urged upon us that as this is a second appeal from the second trial of this action (before the same learned judge) we should be guided by the observations of the Ontario Court of Appeal in *Wells* v. *Lindop* (1888), 15 A.R. 695, wherein, *e.g.*, Mr. Justice Osler said, at p. 703:

"This case has been twice tried, with the same result of a verdict for the plaintiff; and conceding that not to be in itself a reason for refusing a third trial, it is certainly one for being very sure that there has been a miscarriage of justice on the second before setting it aside."

I am entirely in accord with that observation, but have only to say that I am "very sure that there has been a miscarriage of justice" herein, to which the matters complained of in the second ground have contributed, and though I am very reluctant that so beneficient an institution as the defendant should have to bear the heavy expense occasioned by these repeated abortive trials, yet on the other hand it must never be said that a plaintiff was dismissed out of this Court without having her case fairly presented to the constitutional tribunals of the country. I shall conclude with expressing the earnest hope that in the hearing of the third trial which it is our duty to order, every care will be taken to avoid any ground for further legal objection, for which (I feel competent to say from the knowledge we have acquired of the case in the two appeals, that have come before us) there is no occasion, because the case is a simple one in reality and if it had been properly left to the jury would, I feel convinced, have been likewise properly disposed of.

MARTIN, J.A.

It follows that the appeal should be allowed and a new trial ordered, the costs of the former trials to abide the result of the

new one. The costs of this appeal follow the event, but with this exception: that the inordinate prolixity of the notice of appeal, extending to sixty-seven folios, has been forced upon our notice and to mark our disapproval of such an abuse of the process of the Court we disallow three-fourths of the cost of that document.

GALLIHER, J.A.: Mr. *McPhillips* strongly contends that the doctrine of *res ipsa loquitur* applies in this case and that the burden rested upon the defendant, that the learned trial judge did not and should have so instructed the jury, and is asking that a new trial be granted upon this and 44 other grounds set out in the notice of appeal. Most of these other grounds are frivolous and are based upon discussion between counsel and the learned trial judge. I do not say that this condition might not at times create some prejudice in the minds of jurors either favourably or unfavourably to litigants, but on the whole in this case I am not disposed to take that view, having regard to what the learned trial judge said in his charge. If the doctrine of *res ipsa loquitur* applies then I think the burden is on the defendant to displace that, and the judge should have so directed the jury. But does it apply? *Res ipsa loquitur* (the thing speaks for itself) is defined in Wharton's Law Lexicon, 11th Ed., p. 740 as,—

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> "A phrase used in actions for injury by negligence where no proof of negligence is required beyond the accident itself, which is such as necessarily to involve negligence."

This cannot, I think, be applied here or if it could, it is, I think displaced by the defendant's evidence as to the condition of the patient when she entered the hospital and at the time the poultice was applied—in other words, there is evidence that the accident may have been caused by that condition, and under those circumstances it would be a question for the jury and they have found against the plaintiff.

Another objection is (and it is one of moment, if sound) that the learned judge below refused counsel the right to rebut evidence that had been introduced by the defence, upon the point as to the susceptibility of the skin of Mrs. Morton under

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certain conditions to the influence of heat. Where this evidence is introduced in the defence, Dr. MacEachern is asked:

"Can you explain the injury that happened to Mrs. Morton? Can you give any reasons for it happening? Well, my explanation is—the two explanations, sir—there is an idiosyncrasy in certain skins; some people will tan much easier than others. And there may be an idiosyncrasy in her skin to normal heat, and on the other hand with a very severe case of influenza and pneumonia as she had, she was very toxic and her system was filled with poison, and what we call septicæmia was present in the blood, and by *post-mortem* we found a large number of these cases had blood poisoning with the condition, and such a condition in her system would tremendously lower the resistance. Such a condition in her system would very much lower the resistance of all her tissues, and on the other hand I would consider that she was not able to stand the ordinary heat. It had a bad effect on her that other patients in the ward stood all right.

"You think it could have been done without anything being done wrong by the nurse? I don't think there was anything done wrong. I think it was the only thing to do to save her life."

And Dr. Hunter:

"In influenza in which there is septicæmia conditions these people are found to have areas of infection on and beneath the skin, and in obese people they are liable to have increased sugar in their blood, which predisposes to skin lesions, and the irritation of hot-water bottle or of other counter-irritants, might produce more serious results in that woman than it would in a person who was not so obese.

"Would the condition in which she was, as described by Dr. Montgomery on her admission to the hospital, give you any support in that, or do you draw anything from that? I would judge from his description that the woman had pneumonia; that she was seriously sick; that it was a fair presumption to assume that she had septicæmia. I say that as a result of experience."

GALLIHER, J.A.

It is common knowledge that the skin of one person may be more susceptible to heat than that of another, and all the doctors say in their evidence that this can only be demonstrated by testing, but the crucial feature of the evidence I have just quoted, is, that while under normal conditions the plaintiff's skin might not have been particularly susceptible to heat, her physical condition at the time she was admitted to the hospital was such that the resistance in her system was lowered so that she could not stand heat which would not produce the same results under ordinary circumstances.

Mr. *Rubinowitz,* plaintiff's counsel, sought to call evidence to rebut this. His first witness was Dr. Hall, and this question is asked:

"What would you say, Doctor, as to the susceptibility of the skin of

Mrs. Morton to heat? Anything that could be said in that regard is largely a guess, of course, but of course we can judge"——

Then the Court intervenes and says:

"We are not going to decide this case on guessing, and if the Doctor is going to guess, we had better dispense with his evidence."

Then ensues considerable discussion between counsel and the Court as to what is and what is not rebuttal evidence.

I gather from the questions asked by Mr. *Rubinowitz,* that his object was to shew the plaintiff's skin was normal, that it was not more susceptible to heat than the ordinary person, and that therefore the burning could not have been caused by reason of any particular susceptibility, but that, as I view it, misses the point.

The point raised by the defence and to which the evidence was directed was not whether, under normal conditions, Mrs. Morton's skin was peculiarly susceptible to heat or more so than that of other persons, but whether her condition was such when the poultice was applied as would account for the burning which took place and that would be a question for the jury.

Now, Mr. *Rubinowitz's* questions were not directed to that existing condition at all, and were not rebuttal of the theory advanced by the defence. Could I so consider them, I should have said the point was well taken. Mrs. Morton's evidence could only have been as to her normal condition, and would not meet the point.

GALLIHER, J.A.

The learned trial judge did not deal with the evidence *pro* and *con* as fully as he might have, but I think the main points were dealt with. There is, however, one portion of the judge's charge which has caused me considerable difficulty, that is where he impresses so forcibly upon the jury that they must take into consideration the surrounding circumstances. To my mind, there were no surrounding circumstances (other than the patient's physical condition) which enter into the case. What was done was a simple matter (the application of a poultice) and the hospital had (even under the conditions that prevailed) the necessary conveniences and help for attending to this patient. Moreover, there was no evidence adduced to shew that the conditions then prevailing contributed to the accident which took place. Again, in referring to damages, the learned judge says:

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"The only reason and the only way she can possibly get it at your hands is by your holding that the Vancouver General Hospital was negligent in all that they did and it was that negligence which caused these injuries."

Now, "in all that they did" is a more or less wide expression as applied here. First, there is the ingredients in and the preparation of the poultice. One nurse attended to that, and the jury would be amply justified in finding that was properly done. Then there was the competence of the nurse who applied it, and I would say, and the jury would be justified in saying, she was competent owing to the particular experience she had had in that respect, during the flu epidemic, and lastly, was she (though competent) negligent in applying it whether as to location or hot condition of the poultice. Thus, under the charge "negligent in all that they did" (and I think the expression is unfortunate, because if they were negligent in any one of the particulars I have mentioned, the plaintiff would be entitled to recover), the jury might, while concluding that the poultice was properly constructed as to ingredients (the nurse who applied it was competent), find that it was too hot or improperly applied, and yet, having in mind the charge "negligent in all that they did," conclude that they could not bring in a verdict for the plaintiff.

While I wish to avoid what might be termed a technical analysis of the matter, I must confess that it has created such a doubt in my mind as to what effect these two particular parts of the charge stated in this broad way might have upon the jury, when coupled with the atmosphere pervading at the hearing that I think a new trial should be granted.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I am of the opinion that a new trial must be ordered. In arriving at this conclusion I have given careful attention to the charge of the learned trial judge and considered in connection therewith the judgment of the Supreme Court of Canada in *Spencer* v. *Alaska Packers' Association* (1904), 35 S.C.R. 362. In that case Mr. Justice Nesbitt said, at pp. 371-3:

"I consider the illustrative charge given by the learned judge the best possible example of what I mean when I say the law must be applied to the facts. I do not think the judge is bound to comment upon evidence

in the sense of reviewing what the several witnesses have sworn to, or to point out for the consideration of the jury anything which may strike him as throwing light upon the credibility of the story, but I think he is bound to direct the jury as to the law and to direct their attention how that law is to be applied to the facts before them according as they find them.

"Reliance was also placed upon the judgment of Lord Justice Bramwell in *Clark* v. *Molyneaux* [(1877)], 3 Q.B.D. 237 (at p. 243) where that learned judge said:

"'I certainly think that the summing-up is not to be rigorously criticized; and it would not be right to set aside the verdict of a jury because, in the course of a long and elaborate summing-up, the judge has used inaccurate language; the whole of the summing-up must be considered in order to determine whether it afforded a fair guide to the jury, and too much weight must not be allowed to isolated and detached expressions. In the present case, however, I cannot help coming to the conclusion that the question left by the judge to the jury was put in an inaccurate shape.'

"I adopt this but it is to be observed that, in that case, the Lord Justice was of opinion that the very form of the questions left by the judge to the jury was in itself a misdirection. And I think, in this case, without, as I have said, expressing any view whatever upon the evidence, that the form of the charge must necessarily have left the jury in a confused state of mind, and that they were not directed as to the real contest between the parties and as to what should be the proper result in law according to the view they took of the facts sworn to. The plaintiff was suing upon a contract the very making of which involved certain legal obligations which obligations the plaintiff contended were added to by express representations which in any point of view he contended rendered his conduct perfectly proper and not negligent, whereas if such representations had not been made and were not relied upon by the captain of the 'Santa Clara' the jury might take a very different view of the reasonableness of his conduct under the circumstances. None of this was pointed out to the jury. If questions are answered by a jury many difficulties are avoided and the jury's attention would be directed to the points at issue.

MCPHILLIPS, J.A.

"In case of a new trial I would suggest that, particularly in actions of negligence, it is well for a trial judge to get from a jury, by questions to be answered, the grounds specifically upon which they find negligence. Lord Coleridge in the case of *Pritchard* v. *Lang* [(1889)], 5 T.L.R. 639 at p. 640, uses some strong expressions in reference to this subject, in fact saying that in pursuing the course of not asking the jury to put the specific ground upon which they found negligence was calculated to mislead them and to defeat justice."

In the present case too much was said in the nature of extraneous matter—the case here was really one of contract with legal obligations—it was not an action for negligence save that it was an ingredient in the cause of action, no doubt, *i.e.*, negligent performance. The error that I note in the charge

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was the importation of the circumstances attendant upon the influenza epidemic as constituting a matter of excuse if there was failure in any respect to comply with the legal obligations that rested upon the hospital. As to what should occur before verdicts are interfered with, I would refer to what Lord Loreburn said in *Kleinwort, Sons and Co.* v. *Dunlop Rubber Company.* (1907), 23 T.L.R. 696 at p. 697:

> "To my mind nothing could be more disastrous to the course of justice than a practice of lightly overthrowing the finding of a jury on a question of fact. There must be some plain error of law, which the Court believes has affected the verdict, or some plain miscarriage, before it can be disturbed. I see nothing of the kind here. On the contrary, it seems to me that the jury thoroughly understood the points put to them and came to a sensible conclusion. They thought that the appellants would have acted in exactly the same way if no payment had been made by the Dunlop Company at all. That is, in my opinion, what the finding means, and there is sufficient evidence to support it."

With great respect to the learned trial judge in the present case, I am of the opinion that an atmosphere was created in the case that conditions were abnormal and that that should be weighed in considering the facts and that the jury may have formed the opinion that in the light of the special circumstances then existing, the same degree of care could not be expected or could be called for if conditions were normal, and in that there was error. I do not in detail set forth the portions of the charge as I do not think that to be necessary, but taken as a whole, as it must be so read, it is capable of that construction. The case really is in its nature a simple one and I cannot wholly excuse the learned counsel for the plaintiff from creating an atmosphere of complexity. There is a duty resting upon counsel at the trial of clearly stating and clearly proving the case which is opened, and also clearly placing before the learned trial judge all questions of objection made to the charge and I cannot say that that duty was completely or wholly discharged and it led to misunderstandings between counsel and the learned trial judge. In this connection I would refer to what Killam, J. said at p. 373, in *Spencer* v. *Alaska Packers' Association, supra.*

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Now it seems to me that the present case could have been put in a very understandable way if it had been called to the

attention of the learned trial judge that the triable issue in the case was as set forth and so ably stated by Lord Justice Kennedy, in *Hillyer* v. *St. Bartholomew's Hospital (Governors)* (1909), 78 L.J., K.B. 958, at pp. 962-3:

"The legal duty which the hospital authority undertakes towards a patient to whom it gives the privilege of treatment and the boon of skilled surgical, medical, and nursing aid within its walls, is an inference of law from the facts. In my opinion it is not the ordinary duty of a person who deals with another through his servants or agents and undertakes responsibility to that other person for damages resulting from any injury inflicted upon him by the negligence of those servants or agents. In my view, the duty which the law implies in the relation of the hospital authority to a patient and the corresponding liability are limited. The governors of a public hospital, by their admission of the patient to enjoy in the hospital the gratuitous benefit of its care, do, I think, undertake that the patient whilst there shall be treated only by experts—whether surgeons, physicians, or nurses—of whose professional competence the governors have taken reasonable care to assure themselves; and, further, that those experts shall have at their disposal, for the care and treatment of the patient, fit and proper apparatus and appliances. But I see no ground for holding it to be a right legal inference from the circumstances of the relation of hospital and patient that the hospital authority makes itself liable in damages, if members of its professional staff, of whose competence there is no question, act negligently towards the patient in some matter of professional care or skill, or neglect to use, or use negligently, in his treatment the apparatus or appliances which are at their disposal. It must be understood that I am speaking only of the conduct of the hospital staff in matters of professional skill, in which the governors of the hospital neither do nor could properly interfere either by rule or by supervision. It may well be, and, for my part, I should, as at present advised, be prepared to hold that the hospital authority is legally responsible to the patients for the due performance by their servants within the hospital of their purely ministerial or administrative duties, such, for example, as attendances by nurses in the wards, the summoning of medical aid in cases of emergency, the supply of proper food, and the like. The management of a hospital ought to make, and does make, its own regulations in respect of such matters of routine, and it is, in my judgment, legally responsible to the patients for their sufficiency, their propriety, and the observance of them by their servants. In the view which I have expressed in regard to the non-liability of the governors of a hospital for the negligence of the professional staff in matters of professional care and skill, provided always that the authority has used reasonable care in selecting a competent staff and proper apparatus and appliances, I am deciding in accordance with the judgment of my brother Walton in the recent case of *Evans* v. *Liverpool Corporation*, 74 L.J., K.B. 742; (1906), 1 K.B. 160, and I entirely concur in the reasoning upon which that judgment is based."

The whole question and the only question for determination was as further stated by Lord Justice Kennedy, at p. 963:

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"If the view of the limits of the liability of the present defendants, the governors of St. Bartholomew's Hospital, is correct, Mr. Justice Grantham was justified in stopping this case at the close of the plaintiff's evidence. The plaintiff had produced no evidence that the defendants had been guilty of a breach of the duty in which consisted their only obligation to the plaintiff—the duty of using reasonable care in selecting as members of the staff persons who were competent, either as surgeons or as nurses, properly to perform their respective parts in the surgical examination, and the duty to provide proper apparatus and appliances."

Therefore upon the new trial the inquiry should be directed to the questions that are pertinent and not travel into the extraneous matter that had so much attention, as I think wrongly at the trial, already had.

MCPHILLIPS, J.A.

It is a matter for regret that this action must now go back for a third trial, with all the attendant costs. I trust, though, that a third trial upon the clear and well-defined issue will finally end the litigation.

It follows that in my opinion a new trial should be ordered.

EBERTS, J.A.

EBERTS, J.A. would dismiss the appeal.

New trial ordered, Eberts, J.A. dissenting.

Solicitor for appellant: *I. I. Rubinowitz.*

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

LARSEN v. THE GAS BOAT.

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LARSEN v. THE GAS BOAT

Shipping—Boat adrift from moorings picked up by tug—Not under circumstances apparent derelict—No allowance for salvage services—Allowance for towage services.

A gas-boat had got adrift from her moorings and was picked up by a tug and towed to a wharf. In all the circumstances of the case it was held that it could not reasonably be regarded as an apparent derelict; the element of danger was too remote and speculative to permit the service to be regarded as salvage. Remuneration was allowed for towage services.

Statement

ACTION for alleged salvage service. Tried by MARTIN, Lo. J.A. at Vancouver on the 14th of February, 1923.

Hume B. Robinson, for plaintiff.
Mellish, for defendant.

24th February, 1923.

MARTIN, LO. J.A.: This is an action for alleged salvage services rendered to a gas-boat (30 feet in length, unnamed), which the plaintiff's steam tug "Clive" picked up in passing into Vancouver on December 12th last about 2.30 in the afternoon when some three miles off Point Grey, in the Gulf of Georgia, and towed to Coughlan's Wharf, False Creek, Vancouver, arriving there about an hour and a quarter thereafter: the weather was fine with a light breeze and no sea to speak of. The tug on her approach to Point Grey from the Fraser River had sighted the gas-boat drifting about aimlessly and so ranged alongside, and finding no one on board, and some water in her and an anchor attached to a manilla rope trailing over her stem, boarded her without difficulty, pulled up the anchor and towed her to port as aforesaid. It appears that earlier in the day the owner of the gas-boat, George Thomson, in company with one John Barkley, in coming down the Fraser River had trouble with her engine and when off Sturgeon Point, near the wireless station at Point Grey, decided to anchor her at 11.35 a.m. and go ashore for assistance, but though apparently a proper length (20 feet) of cable was paid out, in some unexplained way the boat got adrift, and when later in the afternoon, shortly after four o'clock, Thomson reached the place he had anchored her, she was not there to be found.

Judgment

On behalf of the "Clive" evidence was given to the effect that with the ebb tide setting out of English Bay it was probable that the gas-boat would have been carried across the Gulf sixteen or seventeen miles away in the direction of Porlier Pass, and that as it grew dusk at about four o'clock, she would probably not be picked up that evening or night, and so would be beached and damaged, if not destroyed on some of the islands across there. And it was further submitted that in the circumstances she should be regarded as an apparent derelict within the meaning of the decision of the Supreme Court of the United States in *The Island City* (1861), 66 U.S. 121, the passage relied upon, I presume, being this (p. 128):

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"The crew had left her thus apparently abandoned. The Westernport was, therefore, justified in taking possession of her, and taking her to a place of safety in the port of Hyannis, and to have a liberal salvage compensation, even if it should turn out that the barque had not been derelict."

But the Court goes on to say:

"To constitute a case of derelict, the abandonment must have been final, without hope of recovery, or intention to return. If the crew have left the ship temporarily, with intention to return after obtaining assistance, it is no abandonment, nor will the libellant be entitled to the salvage as of a derelict."

I find it difficult, with all possible respect, to fully appreciate the effect of these apparently contradictory passages; but it is not necessary in this case to attempt to do so, because the circumstances here are of a very different nature from those perilous ones in which The Island City unhappily found herself, dismasted and rudderless and left, though temporarily, on her stream anchor only, to ride out a storm.

In the light of all the circumstances of this case I am unable to take the view that the gas-boat could reasonably be regarded as an apparent derelict; on the contrary, she had obviously drifted away from her moorings not far off and at the slow rate of progress she had made in her drift, impeded by the trailing anchor, I am unable to take the view that there was a reasonable apprehension of her being carried across the Gulf in the dark; the element of danger is too remote and speculative to permit the service to be regarded as salvage from any point of view.

Judgment

It comes then to a question of remuneration for towage services. These were of a simple kind and took not more than an hour and a half, yet the boat is admittedly worth $850, and the plaintiff lost further time in pumping her out at the wharf and in finding her owner, which was rendered unexpectedly difficult because she had no name painted on her.

No precise evidence of the value of this service was given, but the defendant offered $10, which, in my opinion, is clearly inadequate, not to say niggardly. I think if he had offered $25 this action would not have been brought, and as that would be a fair sum to allow (speaking from my long experience on these matters), judgment will be entered for that amount.

Judgment for plaintiff.

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:

CORPORATION OF THE ROYAL EXCHANGE ASSURANCE (OF LONDON), THE, AND PACIFIC MILLS LIMITED v. THE KINGSLEY NAVIGATION COMPANY LIMITED (p. 294).—Reversed by the Judicial Committee of the Privy Council, 23rd January, 1923. See (1923), A.C. 235; 92 L.J., P.C. 111; 128 L.T. 673; 67 Sol. Jo. 296; (1923), 1 W.W.R. 737; (1923), 1 D.L.R. 1048.

ENGINEER MINING COMPANY, THE AND ATTORNEY-GENERAL FOR BRITISH COLUMBIA v. FRASER *et al.* (p. 224).—Affirmed by the Judicial Committee of the Privy Council, 16th December, 1922. See 92 L.J., P.C. 65; (1923), A.C. 228; 128 L.T. 554; (1923), 1 W.W.R. 449; (1923), 1 D.L.R. 536.

GRANBY CONSOLIDATED MINING, SMELTING & POWER COMPANY LIMITED, THE v. ATTORNEY-GENERAL FOR BRITISH COLUMBIA (p. 262).—Reversed by the Judicial Committee of the Privy Council, 26th January, 1923. See (1923), A.C. 247; 92 L.J., P.C. 74; 128 L.T. 677; (1923), 1 W.W.R. 922; (1923), 1 D.L.R. 1064.

GROSS v. WRIGHT, WRIGHT ESTATES LIMITED, AND BRIER (p. 270).—Reversed by Supreme Court of Canada, 27th November, 1922. See (1923), S.C.R. 214; (1923), 1 W.W.R. 882; (1923), 2 D.L.R. 171.

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PEERS & ANDERSON v. SHIP "TYNDAREUS" (p. 312).—Affirmed by Exchequer Court of Canada, 24th December, 1921. See 21 Ex. C.R. 219; (1922), 1 W.W.R. 673.

PREMIER LUMBER COMPANY, LIMITED v. GRAND TRUNK PACIFIC RAILWAY COMPANY (p. 152).—Affirmed by Supreme Court of Canada, 27th November, 1922. See (1923), S.C.R. 84; (1923), 1 W.W.R. 473; (1923), 1 D.L.R. 649.

STANDARD MARINE INSURANCE COMPANY LIMITED v. WHALEN PULP & PAPER MILLS LIMITED (p. 1).—Affirmed by Supreme Court of Canada, 17th June, 1922. See 64 S.C.R. 90; (1922), 3 W.W.R. 211; 68 D.L.R. 269.

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COMPANY LAW — *Company incorporated in British Columbia — Companies Clauses Act—Share register—To be kept in Province —Execution—Sheriff's transfer of shares— Registration enforced — B.C. Stats. 1901, Cap. 75, Sec. 35—R.S.B.C. 1911, Cap. 40, Sec. 9—R.S.B.C. 1911, Cap. 79, Sec. 20.*] Where by the Act of Incorporation of a company in British Columbia the Companies Clauses Act applies, it must keep its register of shareholders within the Province, the proper place being the registered office of the company. The defendant Company kept its register of shareholders at an office outside the Province. The plaintiff purchased from the sheriff under execution certain shares held by a person in the Company. *Held*, that he is entitled to compel the Company to make the proper entries to make him the registered holder of the shares. *Held*, further, that the *situs* of the shares is in British Columbia in so far as the provisions of the Execution Act are concerned. OLIVER v. GRANBY CONSOLIDATED MINING, SMELTING & POWER COMPANY LIMITED. - - - - - **450**

2.——*Directors sole owners of company — Vote themselves salaries — Director as secretary of company—Right to lien—Judgment — Creditors' action to set aside — R.S.B.C. 1911, Caps. 243 and 93, Sec. 2— B.C. Stats. 1919, Cap. 92.*] Three directors constituting the whole body of shareholders of a lumber company voted themselves salaries of $5,000 a year each as president, manager and secretary-treasurer respectively. The company shut down, but under resolution the officers' salaries were to continue for the following year, the secretary-treasurer staying in charge of the works, there being evidence of his having made one small sale of lumber and doing some piling and sawing. The plaintiff who had supplied the company with logs brought action to recover the purchase price. The secretary-treasurer upon being served with the plaintiff's writ immediately filed a lien under the Woodman's Lien for Wages Act and

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obtained judgment by default. The plaintiff obtained judgment in his action some days later. An action to set aside the default judgment for a lien was dismissed. *Held*, on appeal, reversing the decision of MURPHY, J., that in the circumstances of this case the defendant was not entitled to a lien under the Woodman's Lien for Wages Act. *Per* MCPHILLIPS, J.A.: The judgment obtained by the official for the enforcement of his lien is null and void against the creditors of the company on the ground that it had been obtained by collusion with the company with the intent of defeating and delaying its creditors and giving a preference. VIPOND v. GALBRAITH AND THE BRENNAN LAKE LUMBER COMPANY LIMITED. - **58**

CONSTITUTIONAL LAW — *Intoxicating liquors — Inter-provincial trade — "Sale within the Province"—Delivery—B.C. Stats. 1921, Cap. 30, Sec. 26.*] The Gold Seal Limited carrying on business as exporter and importer of liquors had its head office at Vancouver with a branch office at Calgary, Alberta. A warehouse company had offices in the same premises in Vancouver and the Gold Seal Limited stored its liquor there. G. entered the premises in Vancouver and signed an order addressed to the defendant in Calgary for a case of rye and a case of Scotch whisky and paid the cash therefor. An employee of the warehouse company then sent the order and money to the Gold Seal office at Calgary, which office then instructed the warehouse company at Vancouver to deliver the two cases to the purchaser out of its stock in the warehouse at Vancouver, and the instructions were carried out. On a charge of selling liquor in contravention of section 26 of the Government Liquor Act the Gold Seal Limited was convicted and on a case stated by the magistrate the conviction was quashed. *Held*, on appeal, reversing the decision of HUNTER, C.J.B.C., that the defendant was guilty of unlawfully selling liquor within the Province of British Columbia within the meaning of section 26 of the Government Liquor Act. REX *ex rel.* MILLER v. GOLD SEAL LIMITED. - - **177**

2.——*Liquor—Importation from another Province—Tax on liquor so imported—Trade and commerce — Indirect taxation—B.N.A. Act, Sec. 121—B.C. Stats. 1921, Cap. 30, Secs. 54, 55 and 56.*] The plaintiff, who lived in Vancouver, imported a case of rye whisky from the Province of Alberta. On its arrival he asked the Liquor Control Board for the necessary labels prescribed by the Government Liquor Act when the

PROMISSORY NOTE—*Guarantee—Statute of Limitations.*] The wife of a maker of certain promissory notes guaranteed that the husband would pay, the guarantee being given after the liability of the husband was overdue. The guarantee was signed on the 26th of October, 1915, and this action was commenced on the 26th of October, 1921. *Held*, that the action was in time and the plaintiff entitled to succeed. *Garden* v. *Bruce* (1868), 37 L.J., C.P. 112 followed. ROYAL BANK OF CANADA V. HUMPHREYS AND HUMPHREYS. - - **81**

REAL PROPERTY—*Overlapping of surveys—Certificate of indefeasible title—Issued on later plan—"Mistake" of Registrar-General of Titles—B.C. Stats. 1906, Cap. 23, Sec. 99—B.C. Stats. 1893, Cap. 66.*] On the 5th of February, 1890, map No. 263 representing the survey of section 4 of the City of Victoria was filed in the Land Registry office. On the 4th of October, 1907, map 858 representing a survey of section 48 immediately adjoining section 4 on the east was filed pursuant to an order of the Supreme Court under the City of Victoria Official Map Act, 1893. In 1909 the city surveyor of Victoria brought to the attention of the Registrar-General of Titles that plan 858 encroached on plan 263 but after some correspondence and investigation the Registrar-General decided both maps were properly filed. The land in question under plan 858 was purchased by Lee Mong Kow in January, 1910, and on the 20th of June following a certificate of indefeasible title was issued by the Registrar-General of Titles to him. In an action in 1915, between the plaintiff, Lee Mong Kow and the British Columbia Electric Railway Company it was held that map number 858 was wrongfully filed in the Land Registry office and null and void in so far as it conflicted with map number 263. In an action against the Registrar-General of Titles for damages under section 99 of the Land Registry Act, 1906:—*Held*, that the Registrar-General of Titles was guilty of a "mistake" within the meaning of said section in issuing a certificate of indefeasible title to the plaintiff of certain lots according to a certain registered plan after becoming aware that it was at least doubtful as to whether or not said plan failed to correspond with another plan already filed and there being an overlapping whereby the plaintiff sustained loss he could maintain an action against the Registrar-General of Titles (who as he acted *bona fide* was protected from individual liability

REAL PROPERTY—*Continued.*

under the Act) as nominal defendant and recover damages from the assurance fund. The provision in section 105 of said Act that the assurance fund should not be liable "for any error or shortage in area of any lot, block or subdivision according to any map or plan filed or deposited in the office of the registrar" held not to apply to a case such as this. LEE MONG KOW AND CHETHAM V. REGISTRAR-GENERAL OF TITLES. - - - - - - - - - - - - **287**

2.——*Conditional sale agreement—Assignment with promissory notes—Holders in due course — Onus of proof.*] The plaintiff purchased a 1916 model motor truck from the Giant Motor Truck Company under a conditional sale agreement. A cash payment was made on account of the purchase price and 15 promissory notes given for the balance. On the following day the Giant Motor Truck Company assigned the agreement with the notes to the defendant Company for valuable consideration of which the plaintiff had due notice. Two months later the plaintiff found the truck was a 1913 model but continued to use the truck for three months longer. He then brought action for repudiation of the contract, cancellation of the notes and damages and obtained judgment on the trial. *Held*, on appeal, reversing the decision of CAYLEY, Co. J., that the defendant was a holder of the notes in due course and discharged any *onus* that may have been thrown upon it for the fraudulent conduct of the Giant Motor Truck Company of which it had no notice. FRASER V. MCGREGOR, JOHNSTON & THOMAS LIMITED. - - - - - - - - **306**

3.——*Conditional sale agreement — Repossession—Authority to sell—Mercantile agent—52 & 53 Viet. (Imperial), Cap. 45, Secs. 2 to 6—R.S.B.C. 1911, Cap. 203, Sec. 69.*] A motor-truck sold under a conditional sale agreement (duly registered) which was assigned to the defendant, was seized by the defendant who notified the defaulting purchaser that if the amount due was not paid within the statutory period the truck would be sold. Defendant left the motor pending sale under seizure and for the purpose of having certain repairs with a company whose business it was

STATUTES—*Continued.*

STATUTES—*Continued.*