THE
BRITISH COLUMBIA REPORTS

BEING

REPORTS OF CASES

DETERMINED IN THE

COURT OF APPEAL, SUPREME AND COUNTY COURTS AND IN ADMIRALTY,

WITH

A TABLE OF THE CASES ARGUED
A TABLE OF THE CASES CITED

AND

A DIGEST OF THE PRINCIPAL MATTERS

REPORTED UNDER THE AUTHORITY OF

THE LAW SOCIETY OF BRITISH COLUMBIA

BY

E. C. SENKLER, K. C.

VOLUME XXXII.

VICTORIA, B.C.
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1924.

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

ATTORNEY-GENERAL:

THE HON. ALEXANDER MALCOLM MANSON, K.C.

TABLE OF CASES REPORTED

IN THIS VOLUME.

TABLE OF CASES CITED

A

B

C

D

G

H

K

L

M

S

T

Y

Z

CRIMINAL APPEAL RULES, 1923.

MADE UNDER THE AUTHORITY OF "AN ACT TO AMEND THE CRIMINAL CODE," CHAPTER 41 OF 13-14, GEORGE V., 1923.

1. Appeals and applications for leave to appeal under the said amendment shall be brought or made within one month from the pronouncement of the conviction or sentence complained of.

2. Notice of appeal or of application for leave to appeal shall specify the grounds thereof and the proposed place of hearing, and shall, if the appeal is proposed to be heard in Victoria, be sent to the Registrar of the Court of Appeal at Victoria; if in Vancouver, to the Registrar of the Court there. Three copies shall be forwarded to the Registrar with the notice.

3. The Registrar shall file the notice and send by registered mail or deliver to the Attorney-General of the Province one of said copies; he shall also send a copy in the same manner to the Judge or Magistrate appealed from.

4. If the application is for leave to appeal and the leave be granted, no other notice of appeal shall be necessary.

5. When the appeal is by the Attorney-General or the counsel for the Crown at the trial, against sentence, the practice and procedure in the Court of Appeal in criminal matters shall be followed.

6. Applications for extension of time shall be in the form set out in the Schedule hereto, and shall be accompanied by a notice of appeal or of application for leave to appeal.

7. Applications to the trial Court for a certificate that the case is a fit one for appeal shall be made on three clear days' notice to the Attorney-General, unless he or the counsel who acted for the Crown shall waive the same.

8. The Court or a Judge may, notwithstanding that the time and place of hearing have been specified in the notice of appeal or notice of application for leave to appeal, fix any other time or place for the hearing thereof.

9. The Judge or Magistrate appealed from shall furnish to the Court of Appeal the report giving his opinion upon the case or

any point arising in the case, and a copy of his notes of the trial, with all due expedition.

10. Where the evidence or part thereof has been taken in shorthand, the stenographer shall furnish, if requested, a certified transcript thereof to any of the parties interested upon payment of the fees hereinafter specified.

11. The appellant or applicant for leave to appeal shall be permitted to make copies of the said notes and report, but if he shall require copies of the same to be furnished to him, he shall pay for them in accordance with the last preceding rule.

12. On receipt of the notice of appeal or upon the granting of leave to appeal, the Registrar shall enter the appeal upon the list for the current or next sitting of the Court at the place fixed for the hearing thereof.

13. The written case or argument of the appellant shall be filed with the said Registrar three clear days before the day fixed for hearing; but the Court may receive the same at any time upon such terms as the Court shall think fit.

14. Any documents, exhibits, or other things connected with the proceedings on the trial shall be kept in the custody of the trial Court, subject to the order of the Court of Appeal or of a Judge thereof.

15. If the appellant desires to be tried by a jury, should a new trial be ordered, he shall give notice thereof in his notice of appeal or before the hearing of the appeal.

16. The forms to be supplied by the Registrar of the Court under this Act to those having the custody of accused persons and to others shall be those set out in the Schedule to these rules, and the instructions shall consist of copies of these rules to be supplied with the forms.

17. The fees payable for copies of documents, exhibits, evidence, or other things shall be those allowed under the tariff in civil cases.

18. In matters not herein provided for the Rules of Court in civil cases shall, *mutatis mutandis,* apply wherever possible.

19. These rules may be cited as "The Criminal Appeal Rules, 1923," and shall come into force on the first day of January, 1924.

Promulgated at Victoria, British Columbia, on the 31st day of December, A.D. 1923.

(Sgd.) J. A. MACDONALD, C.J.A.
(") ARCHER MARTIN, J.A.
(") W. A. GALLIHER, J.A.
(") A. E. McPHILLIPS, J.A.
(") D. M. EBERTS, J.A.

SCHEDULE MENTIONED IN RULE 16 OF THE CRIMINAL APPEAL RULES.

COURT OF APPEAL.

REX vs. .

Take notice that hereby appeals to the Court of Appeal at the sittings thereof commencing or which commenced on the day of , 192 , at the City of , from his conviction at by on the day of ,192 , upon the following grounds involving a question or questions of law only:—

Dated at this day of , 192 .

To the Registrar of the said Court at .

COURT OF APPEAL.

REX vs. .

Take notice that a motion will be made on behalf of to this Court at the Law Courts, in the City of , on the day of , 192 , at the hour of eleven o'clock in the forenoon, or at such other time and place as the Court or a Judge may direct, for an order granting leave to appeal to this Court from the conviction pronounced on the day of , 192 , upon the following grounds of fact or mixed law and fact:—

Dated at on the day of , 192 .

To the Registrar of the said Court at .

COURT OF APPEAL.

REX vs. .

Take notice that an application will be made before a Judge of the Court of Appeal at the Law Courts, in the City of , at eleven o'clock in the forenoon, or so soon thereafter as counsel can be heard, for leave to appeal from the sentence passed by the trial Court upon , of , on the day of , 192 , upon the following grounds:—

Dated at on the day of , 192 .

To the Registrar of the said Court at .

COURT OF APPEAL.

REX vs. .

Take notice that an application will be made to at the Law Courts, in the City of , at the hour of o'clock in the noon, for an extension of the time limited for appeal against the conviction or sentence made or passed upon on the day of , 192 , by , upon the following grounds:—

Dated at this day of , 192 .

To the Registrar of the said Court at .

CANADA:
PROVINCE OF BRITISH COLUMBIA
COUNTY OF .
CITY OF .
TO WIT:

Take notice that an application will be made on behalf of to , of (the Judge or Magistrate), before whom was, on the day of , 192 , tried, for a certificate that the said conviction furnishes a fit case for appeal to the Court of Appeal.

Dated at on the day of , A.D. 192 .

To the Registrar of the Court of Appeal at .

SUPREME COURT RULES

HIS HONOUR the Administrator in Council has been pleased to order that, under authority of the "Court of Appeal Act," "Revised Statutes of British Columbia, 1911," chapter 51, Marginal Rule 867A, being Rule 3A, Order 58, of the "Supreme Court Rules, 1906," be repealed, and the following substituted therefor:—

867A. "3A. Notice of appeal from any interlocutory judgment, order, or decree (made in any suit or matter, whether in the Supreme Court or any County Court) may be given for any sitting of the Court of Appeal during such sitting or for the next following sitting, and every such appeal may be entered for hearing at any time before or during the sitting for which notice of appeal shall be given; such notice shall be in the form prescribed by any Act or Rules of Court in that behalf, and shall be filed in the proper registry and be served not less than six clear days before the said appeal shall be entered for hearing."

And that this rule be published in three consecutive issues of the British Columbia Gazette and shall come into force on the expiration of such publication.

A. M. MANSON,
Attorney-General.

Attorney-General's Department,
Victoria, B.C., January 11th, 1924.

REPORTS OF CASES

DECIDED IN THE

COURT OF APPEAL, SUPREME AND COUNTY COURTS

OF

BRITISH COLUMBIA,

TOGETHER WITH SOME

CASES IN ADMIRALTY

B.C. MILLS TUG AND BARGE CO. LIMITED v. KELLEY.

COURT OF APPEAL

1923

Jan. 9.

B.C. MILLS TUG AND BARGE CO. v. KELLEY

Contract—Shipping — Charterparty — Towage of rafts — Non-fulfilment— Impossibility of performance—Stress of weather—Judgment of master —Recovery of payment of charter money.

Under the terms of a charter of a tug for towing three rafts it was held that the charter money was payable although owing to weather conditions and in the exercise of proper judgment by the master of the tug the rafts were never towed.

APPEAL by defendant from the decision of MACDONALD, J. of the 5th of June, 1922 (reported 31 B.C. 199), in an action to recover $803.98, the balance of charter-money payable in respect of the hiring 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 Dana Inlet a short distance south of Cumshewa and a third at Atli Inlet further south. The plaintiff owned the "Commodore" and under the contract it was to take the tug-boat from Nanaimo and tow the rafts across Hecate Strait (about 30 miles with a

Statement

COURT OF APPEAL

1923

Jan. 9.

B.C. MILLS TUG AND BARGE CO. v. KELLEY

Statement

30 hours haul), and was to receive $300 a day from the time the tug left Nanaimo until the 31st of December following, 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 tow the rafts across the strait but without success, all the actual towing done being the towing of one raft from Dana 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 plaintiff.

The appeal was argued at Vancouver on the 26th to the 31st of October, 1922, before MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Argument

Stockton, for appellant: The rafts were never towed across the strait. The plaintiff says it was impossible to do so within the time agreed upon owing to stress of weather, and the plaintiff had collected $10,000 under the contract. It failed to deliver and is entitled to nothing. It is an entire contract and no conditions are implied, and if there is an implied term it must have been an actual physical impossibility to take the rafts across and the onus is on the plaintiff to establish that position and it has not done so. Alternatively if it is relieved then both parties are relieved, and the last payment by the Union Bank should not have been made. The counterclaim is for a refund of that payment, *i.e.*, $6,748.

Davis, K.C., for respondent: From the beginning there was grave doubt as to whether the towing could be done, so we had to have security. The case of *Taylor* v. *Caldwell* (1863), 3 B. & S. 826, does not apply here. We rely on the contract itself; it is only a question of construing the terms thereof. It is an agreement to place the tug at the disposal of the charterers. The evidence shews the captain was justified in not attempting to cross owing to stress of weather. On the ques-

tion of liability see *Price & Co.* v. *Union Lighterage Co.* (1904), 1 K.B. 412; *Joseph Travers and Sons (Limited)* v. *Cooper* (1913), 30 T.L.R. 93; *Pyman Steamship Company* v. *Hull and Barnsley Railway* (1915), 2 K.B. 729. If it is found he was justified in refusing to attempt a crossing that ends the case. The trial judge found in our favour as to this and he should be upheld: see *Vancouver Milling Co.* v. *Farrell* (1922), 67 D.L.R. 237; *Lodge Holes Colliery Company, Limited* v. *Wednesbury Corporation* (1908), A.C. 323 at p. 326. The judge finds the master honest, then the log is most important. The American cases on going out in rough weather are: *The Nannie Lamberton* (1898), 85 Fed. 983; *The Allie & Evie* (1885), 24 Fed. 745 at p. 748; *The Wilhelm* (1891), 47 Fed. 89; see also *Neville Canneries, Ltd.* v. *"Santa Maria"* (1917), 36 D.L.R. 619; *Neno* v. *Canadian Fishing Co.* (1916), 22 B.C. 455; *Patterson, Chandler & Stephen, Ltd.* v. *The "Senator Jansen"* (1919), 30 B.C. 97.

Argument

Stockton, in reply.

Cur. adv. vult.

9th January, 1923.

MARTIN, J.A.: In the way I view it this is a simple case if the contract contemplated and provided for delay or prevention in its performance by stress of weather to a degree which forced the tug to tie up, then the only remaining question is one of fact, *viz.,* did that state of the weather exist?

After considering the contract carefully in the light of the very full argument (wherein all the circumstances attendant upon navigation in those waters at that stormy season of the year were elaborately gone into) I can only reach the conclusion that the contract provides for what might well have been expected to happen; and as to the existence of weather conditions the learned trial judge has accepted the evidence of the master of the tug, who is unquestionably a competent and prudent mariner, that during the times in question it would, in his honest opinion, have not only been imprudent but dangerous to attempt to tow the raft across Hecate Straits from Cumshewa Inlet to Beaver Passage (in Browning Entrance)

MARTIN, J.A.

COURT OF APPEAL

1923

Jan. 9.

B.C. MILLS TUG AND BARGE CO. v. KELLEY

during the times in question, and I see no reason to disturb that finding, therefore the appeal should be dismissed.

GALLIHER, J.A.: Outside the construction of the contract, there is really only one short point to decide in this case. I think the evidence shews that during the time the tug and its crew were up at the place from which towing was to be done, the weather conditions were such as to prevent a reasonably prudent man from undertaking the towing across Hecate Straits, except at the risk of losing the logs and perhaps the tug. The severe weather conditions at this point during that period of the year, is a matter of common knowledge, and is in fact, amply supported by evidence. That such conditions prevailed and are commonly known to prevail, were known to both parties, in fact the defendant was anxious to secure the services of this particular Captain Frank Johnson, in order that he might the more easily secure insurance on his boom of logs, the captain being known as a reliable man to the insurance company. When we consider all these circumstances, and that all these conditions were known to both parties, in my view, the true contract between them was that within the stipulated time for a stipulated price, the towing was to be performed if it were deemed possible to do so without incurring unnecessary risk to life and property. This tug and captain were known and appreciated by the defendant, were set apart for this particular work, and who better than he could judge of the fitness of weather conditions? It is not to be presumed against him that he would shirk his duty and lie up for weeks through timidity. On the other hand, he had performed towing contracts across these very waters for the defendant. It would not be in the interest of his own company, which was engaged in this kind of work, nor to his own credit, or advantage, if it could be brought home to him that he had funked the job.

GALLIHER, J.A.

Certain evidence which I will not go into in detail, was given that on one or two occasions during this period, small craft had crossed the straits. This may be so, but it might be quite another thing for a tug with a heavy tow to accomplish in safety. Moreover, we find that he did on one or two occa-

sions make a start but was forced back into shelter by reason of weather conditions, and that he was on the watch for favourable conditions.

Taking the view of the contract which I do, unless it can be shewn that the captain's judgment was bad, or that he neglected to take advantage of conditions, which were reasonably safe, and of neither of these facts does the evidence convince me, I fail to see how this judgment can be set aside.

MCPHILLIPS, J.A.: In my opinion the appeal fails. It was strenuously contended in a very careful argument by the learned counsel for the appellant that the action which was for the balance due under the contract sued upon could only be sustained if it was demonstrated that there was actual physical impossibility to tow the rafts within the time fixed by the contract. On the other hand the learned counsel for the respondent contended and, I think, rightly, that under the terms of the contract it was not a contract to tow the rafts within the time of the contract, but a contract to tow dependent upon weather conditions, *i.e.,* that stress of weather absolved the Company. Nevertheless the moneys called for, for the supply of the tug were payable if by reason of the stress of weather it became impossible to tow the rafts.

MCPHILLIPS, J.A.

It was frankly admitted by the learned counsel for the respondent that the onus of establishing the stress of weather was upon the Company, but that it was not and could not be an obligation upon the Company to demonstrate that it was a physical impossibility as to prove that would mean disaster, *i.e.,* the loss of the tug and rafts. It was common ground and an admitted fact that the waters upon which it was in contemplation to tow the rafts were at the time of the year covered by the contract stormy waters, calling for careful navigation, the very nature and form of the contract emphasises this. It is true that at first sight it would look strange that such a very considerable sum of money should be payable productive of no result, that is, that the whole time of the contract should be consumed and the moneys payable thereunder, a debt due by the appellant to the respondent notwithstanding the failure to

COURT OF APPEAL

1923

Jan. 9.

B.C. MILLS TUG AND BARGE CO. v. KELLEY

tow the rafts, but that would appear to be the plain reading of the contract, and the learned judge in the Court below has so held, a conclusion with which I agree. If the contract could be said to be one that called upon the Company to tow the rafts within the prescribed time without any provision entitling the Company to be excused therefrom then certainly there would be liability upon the Company to perform the contract, or pay damages for the breach thereof.

The evidence is somewhat voluminous and evidence was led from both sides as to the state of the weather, and there was rival and contending evidence from navigators, but the preponderance of evidence in my opinion was, that the stress of weather throughout the whole time of the contract did not admit of the rafts being towed and that the master of the tug had exercised proper judgment in all that he did. Attempts were made to tow and shelter had to be taken. The master of the tug was a navigator of experience, well accustomed to the waters and the tug was sound and powerful, well known to the appellant, and was specificially taken under charter, the tug to be at the disposal of the appellant for the defined and special purpose, namely, to tow the rafts and subject to this at the disposal of the appellant, the charterer. The learned counsel for the respondent submitted that the principle of law as laid down by *Taylor* v. *Caldwell* (1863), 3 B. & S. 826, did not properly enter into the consideration of the present case, that it was not a positive contract to tow the rafts, that it was the case of known dangerous waters, and both parties contracted with the knowledge that the rafts might not be capable of being towed within the allotted time of the contract, but the moneys payable under the contract were nevertheless to be paid. That it was reasonable that that should be a term of the contract is punctuated by the fact that the tug was taken from its home port to distant waters fully manned, coaled and well found in every respect with steam up throughout the whole time, ready at all times to tow the rafts, weather permitting. It was for the master of the tug to decide as to whether weather conditions admitted of the rafts being towed. Who else could determine this? Therefore the honesty of the master of the tug is

MCPHILLIPS, J.A.

in the circumstances the turning point of the case. That he was a skilful and careful navigator is beyond question upon the evidence and the learned trial judge believed in him and gave full credence to his testimony. Lord Atkinson in *Horlock* v. *Beal* (1916), 1 A.C. 486 at p. 496 dealt with *Taylor* v. *Caldwell, supra,* and referred to Blackburn, J.'s judgment. At p. 506, Lord Atkinson said:

"Moreover, the judgments of Grose, J. and Lawrence, J., especially that of the latter, rather indicate that they treated the contract to carry the goods to Leghorn as a positive and absolute contract to do so within a reasonable time—the dangers of the seas only excepted. The latter learned judge says they 'absolutely engaged to carry the goods, "the dangers of the seas only excepted"; that therefore is the only excuse which they can make for not performing the contract; if they had intended that they should be excused for any other cause, they should have introduced such an exception into their contract.'

"Of course, if the contract of the parties be thus positive and absolute, they are bound by it, however impossible the performance of it may become."

Here, however, we have not a contract which can be said to be "positive and absolute" (the stress of weather was in contemplation of the parties) and it is inconceivable to think that there ever was the intention to contract that notwithstanding what the weather might be the rafts would be towed. That would be contracting to do the impossible, yet of course if that could be said to be the contract it would be idle for the respondent to dispute liability.

MCPHILLIPS, J.A.

The contract in the present case was a time charterparty, *i.e.,* the tug was under charter for a stipulated time, and within the stipulated time the tug was continuously kept ready to tow the rafts but the evidence shews that no navigator would have been justified at any time throughout the life of the contract in doing more or attempting more than the master of the tug did. This is not a case in which any condition can be implied in favour of the appellant, or admit of the return of the moneys paid, or a declaration that the balance sued for in this action is not under the circumstances, payable in that the rafts have not been towed; that is not the effect of the contract, the moneys payable are payable as consideration for the charterparty, and there has been no failure of consideration. The tug was placed at the disposal of the charterer for the carrying out of the

COURT OF APPEAL

1923

Jan. 9.

B.C. MILLS TUG AND BARGE CO. v. KELLEY

specific purpose, *i.e.*, the towing of the rafts, but there was no warranty that the rafts would be towed within the stipulated time. Lord Parker of Waddington in *F. A. Tamplin Steamship Company, Limited* v. *Anglo-Mexican Petroleum Products Company, Limited* (1916), 2 A.C. 397 at p. 423, used an illustration which is apposite in this case. Here we have the case of the required payment for services of the tug, but that which was in contemplation was not accomplished. Lord Parker said:

"A contract under which A. is to have the use of B.'s horse for two days' hunting might well be defeated by the death of the horse before the two days commenced. It would be easy to imply a condition precedent to that effect. But the case would be very different if the horse died at the end of the first day, and it was sought to imply a condition subsequent relieving A. in that event of liability to pay the sum agreed for the hire."

In the present case the contention is that the sum sued for in amount $803.98, being the claimed balance due under the charterparty, is not now payable because the rafts were not towed within the time of the charterparty, and the claimed sum covers a period of time when it was then patent that no sufficient time remained to tow the rafts even were the weather propitious, and that the appellant notified the respondent that the services of the tug were no longer required. This notification could not affect the position—the charterparty was subsisting throughout the whole of the stipulated time. The situation was somewhat analogous to what Lord Parker drew attention to in the *Tamplin* case, *supra*. At p. 425, he said:

MCPHILLIPS, J.A.

"My Lords, the contract in the present case is contained in the charterparty of May 18, 1912, whereby the owners of the steamship F. A. Tamplin agreed to provide her with a full complement of officers, seamen, engineers, and firemen, and hold her at the disposition of the charterers for the voyages and other purposes therein mentioned for a period of sixty calendar months from December 4, 1912. . . . . The charterers were to pay the owners monthly in advance for the first twelve calendar months 1750*l.*, and thereafter 1700*l.* per month by way of freight."

And at p. 426, Lord Parker continuing, said:

"As I read this contract, the parties are not contemplating the prosecution of any commercial adventure in which both are interested. They are not contemplating the performance of any definite adventure at all. The owners are not concerned in the charterers doing any specific thing beyond the payment of freight as it becomes due. They are only concerned that the charterers shall pay the freight and shall not use the

ship contrary to the provisions of the charter-party. It would be to the interest of the owners that the charterers should not make any use of the ship at all. They would thus save the cost of repairs due to wear and tear. On the other hand, the charterers only stipulate that the vessel shall be at their disposal for certain defined purposes. If they so desire, they retain fully liberty not to use the vessel for any purpose whatever. Further, the contract contemplates that, though the charterers desire to use the vessel, it may for intermittent periods of indefinite duration be impossible for them so to do."

At pp. 427-8:

"Under these circumstances it appears to me to be difficult, if not impossible, to frame any condition by virtue of which the contract of the parties is at an end without contradicting the express provisions of the contract and defeating the intention of the parties as disclosed by those provisions. . . . . My Lords, having regard to the difficulty of framing any condition which can be implied without contradicting the express terms of the contract, having regard to the nature of the contract, which is a time charter only and does not contemplate any commercial adventure in which both parties are interested, or indeed any definite commercial adventure at all, and finally, having regard to the fact that the condition which is sought to be implied is a condition defeating a contract already part performed and not a condition precedent to a contract which remains purely executory, I have come to the conclusion that the decision of the Court of Appeal was right and ought not to be disturbed."

Therefore, in the present case proceeding upon what Lord Parker said, it is clear that the moneys sued for are moneys payable under the time charterparty and that time charter-party was subsisting throughout the whole stipulated time and cannot be said to have ended save by effluxion of time, and for the whole time the moneys called for by the time charterparty were due and payable it was not within the power of the appellant to bring the time charterparty to an end.

MCPHILLIPS, J.A.

Now, reverting to the conduct of the master of the tug, and his discretion and judgment the evidence amply demonstrates that the weather conditions were absolutely unfavourable throughout the whole of the period of the time charterparty—heavy seas and a low barometer. In this connection and as to the exercise of judgment under the circumstances, I would refer to what Mr. Justice Brown said in *The Allie & Evie* (1885), 24 Fed. 745 at p. 748:

"Navigation cannot escape dangers. If it could, there would be no place for insurers. There are very certain and very peculiar dangers that attend navigation on such a route as this,—a route that combines the navigation of a shallow river with a passage of from 12 to 15 miles

COURT OF APPEAL

1923

Jan. 9.

B.C. MILLS TUG AND BARGE CO. v. KELLEY

across a broad bay liable to high and dangerous seas in sudden squalls, with boats that, if the testimony is to be credited, are unmanageable under such circumstances. All that can be done in such navigation is to take every reasonable precaution that prudence and good judgment can suggest, —precautions proportionate to the dangers involved,—and to start out only when there is no reasonable probability of bad weather."

In *The Wilhelm* (1891), 47 Fed. 89, it was held that:

"Where circumstances are evenly balanced, which indicate a choice of action in time of danger, the master's decision in the matter of navigating the vessel is conclusive, and, although he may err in judgment, it is not negligence, if the master be competent.

"Hypercritical scrutiny into the conduct of the navigation, after the event of the disaster and in the light of that which has happened, is not the test of negligence, but prudent judgment is to be tested by the circumstances as they appeared to the master at the time he was called to act, and not as they appear to the Court after the more critical scrutiny than the master could have given to them."

That the master of the tug was honest in all that he did and exercised proper discretion, was the opinion of the learned trial judge, and in that I agree. Upon this point I would refer to *The Nannie Lamberton* (1898), 85 Fed. 983. The judgment was that of Wallace, Lacombe, and Shipman, Circuit Judges, at pp. 984-5, and this was said (reasoning pertinent in its nature in the present case), in view of the contention of the appellant that the master of the tug should have gone out and towed the rafts, notwithstanding the weather conditions:

MCPHILLIPS, J.A.

"These actions were brought by the owners and masters of the vessels to recover their damages occasioned by the loss, upon the theory that the tugs were negligent in prosecuting the voyage in the weather conditions prevailing when and after the flotilla left the Kills, and in failing to render necessary assistance to the vessels when they were in distress. The Court below condemned the tugs upon the ground of their negligence in leaving the Kills with the tow in the then state of the weather. The evidence in the record is very conflicting, and consists almost wholly of the testimony of those who were on board the vessels. The case presents the issue of fact whether, in view of the storm indications, it was consistent with the exercise of reasonable discretion on the part of those in command of the tugs to proceed beyond the shelter of the Kills to the exposed waters of the bay. The disaster which befell the voyage supplies the knowledge that comes after the event, but it does not necessarily impeach the judgment of those who decided previously that it was safe to start. They are not to be charged with negligence unless they made a decision which nautical experience and good seamanship would condemn as presumably inexpedient and unjustifiable at the time, and under the particular circumstances. On the other hand, they are not to be vindicated merely because they may have erred honestly. They are to be exonerated if they acted with an honest intent to do their duty, and in

the exercise of the reasonable discretion of experienced navigators. *The Hercules* [(1896)], 19 C.C.A. 496, 73 Fed. 255. Applying this rule of liability, we are not justified in disturbing the conclusion of the Court below. All the witnesses were examined in the presence of the district judge, and, as to all questions of fact depending upon the credit to be given to their observations, we should defer to his judgment, and better opportunity to criticize their intelligence and apparent veracity. All the witnesses for the libelant were boatmen, who were familiar with the voyage, and had many times made voyages with vessels in tow of tugs across the bay. They testified that the wind had been blowing 25 miles an hour during the afternoon,—sometimes harder, and sometimes less,—but that, when the flotilla was about leaving the Kills, it was blowing 30 miles an hour, that the bay was rough with white caps, and, as the flotilla entered it, the boats jumped and rolled heavily. According to the record of the weather bureau, shewing the velocity and direction of the wind in the vicinity, it was blowing from the west or northwest during the preceding afternoon, and throughout the night,—between 10 and 11 o'clock of the preceding evening, at 22 miles an hour; between 11 and 12 o'clock, at 16 miles an hour, and between 12 and 1 a.m., at 31 miles an hour. Storm signals had been displayed in the afternoon, and were maintained throughout the night. These signals were visible across the bay. The district judge was of the opinion that a wind of 31 miles an hour was a dangerous one for such a tow to meet upon the waters of the bay, and in this opinion we coincide. We cannot accept the theory of the tugs, that the wind had abated when they put out from the Kills. It did abate temporarily during the following hour, and then increased again; but it was more violent when the flotilla started than it was when the vessels foundered, or at any other period of the voyage."

In the present case it is put forward by the appellant that there were times when the master of the tug could have reasonably taken the rafts in tow, but as against this the preponderance of evidence is the other way, and in my opinion, the master would not have acted as a prudent navigator if he had disregarded the low barometer and other evidence of tempestuous seas, or imminent storms. MCPHILLIPS, J.A.

The duty of the master of the tug was undoubtedly the exercise of an honest intent to tow the rafts, but this could not be disassociated from the exercise of the reasonable discretion of a prudent and experienced navigator. That that honest intent was present cannot be gainsaid, the evidence amply shews it, and the learned trial judge has found it. In *The Julia* (1860), 14 Moore, P.C. 210 at p. 235, Lord Kingsdown, delivering the judgment of their Lordships, said:

"The Court below had the advantage which their Lordships have not had, of seeing the principal witness, the Pilot, and hearing his examination, and of judging how far his evidence was to be depended upon.

COURT OF APPEAL

1923

Jan. 9.

B.C. MILLS TUG AND BARGE CO. v. KELLEY

"They who require this Board, under such circumstances, to reverse a decision of the Court below, upon a point of this description, undertake a task of great and almost insuperable difficulty. In all cases, as we have frequently observed, we must, in order to reverse, not merely entertain doubts whether the decision below is right, but be convinced that it is wrong."

There is the highest authority for not disturbing a judgment upon the facts (*Coghlan* v. *Cumberland* (1898), 1 Ch. 704; *Lodge Holes Colliery Company, Limited* v. *Wedensbury Corporation* (1908), A.C. 323 at p. 326; *Union Bank of Canada* v. *McHugh* (1911), 44 S.C.R. 473 at p. 492; *McIlwee* v. *Foley Bros.* (1919), 1 W.W.R. 403 at p. 407). In *Ruddy* v. *Toronto Eastern Railway* (1917), 86 L.J., P.C. 95 at p. 96, we find Lord Buckmaster saying:

"But upon questions of fact an Appeal Court will not interfere with the decision of the judge who has seen the witnesses and has been able, with the impression thus formed fresh in his mind, to decide between their contending evidence, unless there is some good and special reason to throw doubt upon the soundness of his conclusions."

The case is not one in which a Court of Appeal in my opinion, should differ from the decision arrived at by the learned trial judge. There is sufficient evidence to establish reasonably, in truth I think conclusively, that the master of the tug conducted himself throughout as an honest and prudent navigator, with the honest intent to tow the rafts, but owing to weather conditions this became impossible within the time charterparty, but this result in no way affects the right of recovery of the moneys due and payable under the time charterparty. The tug was throughout the continuance of the time charterparty at the disposal of the charterer, and it would certainly be highly inequitable that the risk the charterer undertook should be shifted to the shoulders of the Company, the owners of the tug, and that the moneys due under the time charterparty should not be legally enforceable. In my opinion the cases known as the Coronation cases (*Krell* v. *Henry* (1903), 72 L.J., K.B. 794, and *Chandler* v. *Webster* (1904), 73 L.J., K.B. 401, were referred to) have no application to this case; this case is not a case of total failure of consideration. The Company complied with the terms of the time charterparty, and the charterer had the tug at his disposal for the specific purpose, namely, to tow the rafts and that condition

MCPHILLIPS, J.A.

of things existed throughout the currency of the time charter-party—the appellant cannot effectually claim failure of consideration. Further, it is not a necessary matter for consideration in the present case, as the contract itself is the determining factor, yet apart from it, how inequitable it would be that the appellant should not be required to pay for the supply of the tug with all its costs of up-keep, because of the fact that weather conditions in the end rendered it impossible to tow the rafts.

MCPHILLIPS, J.A.

For the foregoing reasons, I am of the opinion that the judgment under appeal should not be disturbed but affirmed.

EBERTS, J.A.

EBERTS, J.A. would dismiss the appeal.

Appeal dismissed.

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

DOUGLAS *ET AL.* v. MILL CREEK LUMBER COMPANY LIMITED *ET AL.*

Woodmen's liens—Consolidation—Right of appeal—Affidavit—Reswearing without rewriting jurat—Form of lien—Indian—Status of—R.S.B.C. 1911, Cap. 53, Sec. 116; Cap. 78, Sec. 62; Cap. 243, Secs. 4, 5, 10 and 13.

Separate claimants for liens under the Woodman's Lien for Wages Act joined together in issuing one writ of attachment under sections 10 and 13 of the Act, each claim being under $100 but more than that sum in the aggregate. The claims were consolidated for trial and judgment was given setting out the respective amounts to which each claimant was entitled.

Held, there was no appeal from the judgment on said claims.

The affidavits of claim under said Act were resworn without the jurat being rewritten and were received and acted upon in the Court below but no memorandum of their acceptance was made on them under section 62 of the Evidence Act.

COURT OF APPEAL

1923

Jan. 9.

DOUGLAS v. MILL CREEK LUMBER CO.

Held, that section 62 of the Evidence Act is merely directory and the affidavits having been received and acted upon they should not be disturbed.

In the case of objection to the form of the statement of claim under the Woodman's Lien for Wages Act with respect to the statement of "claimant's residence," the "kind of logs and timber and where situate," the "name and residence" of the owner of the logs, the "name and residence of the person upon whose credit the work was done," it was *held*, that a substantial and not meticulous compliance with the statute is required, the test being, whether the parties concerned were misled.

Where in the statement under Schedule A all the information given of "work" is "to two months and ten days at $70 per month $160":—

Held, not to be a sufficient compliance within section 5 of the Act; there must be something to shew in what capacity the "labour or service" was performed so that an interested inquirer could decide whether the claim comes within the Act.

An unenfranchised Indian may claim a lien under said Act though the lien is upon property of some person other than the one who employed him to work and without the Crown being made a party.

Statement

APPEAL by defendant Company from the decision of GRANT, Co. J. of the 23rd of May, 1922, in a woodmen's lien action. There were nine claims, four of them being brought by writ of attachment and five by plaint, they subsequently being consolidated. The actions were brought by a number of Indians who did work at Mill Creek off Howe Sound, and the claim was against two swifters of cedar logs of the defendant Company. The further facts revelant to the issue are set out in the reasons for judgment.

The appeal was argued at Vancouver on the 14th and 15th of October, 1922, before MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Argument

Wilson, K.C., for appellant.

Dickie, for respondents, raised the preliminary objection that an appeal on the items under $100 was barred by section 116 of the County Courts Act and referred to *Baker* v. *The Uplands, Ltd.* (1913), 18 B.C. 197 at p. 200.

Wilson, contra: There is a marked distinction between the Mechanics' Lien Act and the Woodman's Lien for Wages Act, and under section 119 of the County Courts Act the Court of Appeal may grant leave to appeal in any cause or matter. Under

section 31 of the Woodman's Lien for Wages Act the claims may be consolidated: see *Gabriele* v. *Jackson Mines Limited* (1906), 15 B.C. 373.

Wilson, on the merits: Section 4 of the Woodman's Lien for Wages Act provides that the lien shall not attach until certain things are done and the affidavits are defective in a number of particulars and should have been declared a nullity. The affidavits were taken before DeBeck, who is a member of the firm acting for the claimants. The name of the owner and address are not given and the position of the logs are not precisely stated; "North Vancouver" is not sufficient. The claim must be set out with reasonable precision: *Wolverhampton W. Co.* v. *Hawkesford* (1859), 6 C.B. (N.S.) 336. Indians are wards of the Dominion and there is no debt between Indians and the defendant.

Dickie: Under the Act any "person" may have a lien. An Indian comes within the word "person." This timber was outside the reserve: see *Rex* v. *Hill* (1907), 11 O.W.R. 20; *Reg.* v. *White* (1870), 5 Pr. 315; *Attorney-General for Canada* v. *Giroux* (1916), 53 S.C.R. 172; *Robock* v. *Peters* (1900), 13 Man. L.R. 124 at p. 139. Section 3 of the Act is the operative section: see *Mallett* v. *Kovar* (1910), 14 W.L.R. 327; *Bank of Montreal* v. *Haffner* (1884), 10 A.R. 592 at p. 598; *Truax* v. *Dixon* (1889), 17 Ont. 366 at pp. 374-5; *Coughlan* v. *National Construction Co.* (1909), 14 B.C. 339 at p. 349; *Montjoy* v. *Heward School District Corporation* (1908), 10 W.L.R. 282 at p. 285. On the question of waiver see *Hoefner* v. *Canadian Order of Chosen Friends* (1898), 29 Ont. 125; *John Hing Co.* v. *Sit Way* (1917), 25 B.C. 153; *J. A. Flett, Limited* v. *World Building Limited and John Coughlan & Sons* (1914), 19 B.C. 73; *Polson* v. *Thomson and Watt* (1916), 10 W.W.R. 865 at p. 873; *Bickerton & Co.* v. *Dakin* (1891), 20 Ont. 695 at p. 702; *Crerar* v. *Canadian Pacific R.W. Co.* (1903), 5 O.L.R. 383; *Beaton* v. *Sjolander* (1903), 9 B.C. 439. As to the swearing of the affidavit before a member of the firm see *Columbia Bitulithic* v. *Vancouver Lumber Co.* (1915), 21 B.C. 138. The affidavits were accepted by the learned judge below.

Argument

COURT OF APPEAL

1923

Jan. 9.

Wilson, in reply, referred to *In re Cloake* (1891), 61 L.J., Ch. 69 and *Joe* v. *Maddox* (1920), 27 B.C. 541.

Cur. adv. vult.

9th January, 1923.

DOUGLAS v. MILL CREEK LUMBER CO.

MARTIN, J.A.: This is an appeal by the defendant Company from a judgment of the County Court of Vancouver, declaring that nine separate claimants for a lien under the Woodman's Lien for Wages Act, Cap. 243, R.S.B.C. 1911, against two swifters of cedar logs of the defendant Company, are entitled thereto. Only five of the claims are "for the sum of one hundred dollars or over," to quote section 115 (*a*) of the County Courts Act, which allows an appeal from judgments upon claims for that amount, and it is objected that no appeal lies here against the judgment in favour of those claims which are below $100, in accordance, it is submitted, with the decisions in *Gabriele* v. *Jackson Mines Limited* (1906), 15 B.C. 373; *Gilles* v. *Allan* (1910), *ib.,* 375; and *Baker* v. *The Uplands, Ltd.* (1913), 18 B.C. 197, because though there is only one judgment the claims are individual and the adjudication thereupon is separate though for purposes of convenience and economy they may have been consolidated for trial. But the appellant submits that these decisions do not apply to this case because subsection (*d*) of 116 allows an appeal in "interpleader replevin, or attachment proceedings when the subject-matter shall equal or exceed one hundred dollars," and it appears that here the first four claimants on the 20th of January, 1922, joined together in issuing one writ of attachment under sections 10 and 13 against the two swifters of cedar logs in question, and the sheriff seized the logs which were later released by order of the Court, on the 1st of February, 1922, by consent of all the present nine claimants, after the sum of $900 had been paid into Court; after the seizure the five later claimants began one action by writ of summons in the ordinary way (section 8) joining their claims under section 32, and when the two sets of claims came on for trial they were tried together by consent and one judgment given as aforesaid.

MARTIN, J.A.

It must be conceded that apart from the attachment proceedings the claims below $100 are not appealable according to our said decisions, and the question is does the fact that the "subject-matter" was attached before the ordinary proceedings alter the principle? After careful consideration I am unable to take the view that it does; I apprehend that a mechanic's lien for the "work or service" he does upon the "subject-matter" of his employment is upon the same plane as the lien for "labour or service" that the woodman acquires upon the logs or timber he is working on, and I am unable to take the view that because (to meet the case of the removal of the logs) an additional and speedy remedy of attachment is provided so as to secure the subject-matter pending the hearing, thereby the principle of appeal from individual claims is altered; and hence I am of opinion that we have no jurisdiction to entertain the four appeals from claims under $100, and as to them the appeal should be dismissed.

This leaves five claims to be considered, *viz.*, those of Achill Mack, Moses Antone, Bobbie Baker, Moses William and Ellen Joe. These claimants are Indians living in the Capilano Reserve, Burrard Inlet, and several objections are taken to the statements to support their liens, as required by sections 4 and 5 of the Act. The first objection which merits attention is that the jurat of the affidavits verifying the statement have not been sworn anew, but assuming such to be the case, still the affidavits were in fact received and acted upon by the learned judge below under section 62 of the Evidence Act, and though he did not direct a memorandum of his reception to be made on the affidavit as he "may" do under said section, yet that provision is, in my opinion, merely directory and would only go to the surer proof of the fact of reception in case that were disputed.

MARTIN, J.A.

With respect to the statement of the claimants' residence, as required to the form in Schedule A; the claimants are all Indians, and they are stated to be "of North Vancouver, Capilano Reserve, in the Province of British Columbia," which is a proper address for such persons.

The required statement of the "kind of logs and timber. . . .

COURT OF APPEAL

1923

Jan. 9.

DOUGLAS v. MILL CREEK LUMBER CO.

and where situate" is satisfied by the statement that they are "composed of two swifters of cedar sawlogs or bolts now situate at North Vancouver, in the Province of British Columbia, marked 40j"; there could be no practical difficulty in identifying such logs so marked and boomed in the water in that locality.

As to the "name and residence" of the owner of the logs not being stated; it is to be observed that the form only requires it "if known," and here as the name of the Company is given without more it is to be presumed that its "residence" was not known to the deponent.

As to the "name and residence of the person upon whose credit the work was done," that is stated thus: "which work was done for Chief Mathias Joe, William Baker, and Isaac Jacob at North Vancouver in the Province aforesaid." This may well be read as meaning that said persons are "at" that place, and is therefore sufficient.

It is now well established that in cases of this sort at least a substantial and not a meticulous compliance with the statute is what the Court will require, the test being, were the parties concerned misled in the circumstances? This general principle has recently been applied to caveats by the Manitoba Court of Appeal, in *Union Bank of Canada* v. *Turner* (1922), 3 W.W.R. 1138.

MARTIN, J.A.

There is, however, one objection of a substantial kind to the lien of Ellen Joe, *viz.*, that though section 5 requires the "nature of the debt, demand or claim" to be "set out briefly," and the form requires "a short description of the work done for which the lien is claimed," yet there is a total lack of anything of that kind, all the information given of the "work" being: "To two months and ten days at $70 per month. . . . . $160." Now while "any person performing any labour or service" is given a lien by section 3, and the definition of a person in section 2 is extended to include "cooks, blacksmiths, artisans, and all others usually employed in connection with such labour and services," yet there must obviously be something to shew the "nature" of the claim, *i.e.*, in what capacity the "labour or service" was performed, so that an interested

inquirer could inform himself from the face of the claim if it *prima facie* can be founded on the Act. It is impossible, however, to tell from the language here employed what was the "nature" or "description" of the work upon which the claimant founds her claim, and therefore I am constrained to find that the statement does not comply substantially with the statute and hence the lien ceased to have any validity as provided by section 4.

As to the merits, I am of opinion that the claims have been sufficiently found.

There remains one general objection to the claims of all the plaintiffs, that as they admittedly are unenfranchised Indians, from the said Capilano Reserve, they cannot maintain these actions. And it is submitted that though section 103 of the Indian Act, Cap. 81, R.S.C. 1906, confers upon Indians "the right to sue for debts due to them, or in respect of any tort or wrong inflicted upon them, or to compel performance of obligations contracted with them," yet it does not extend to the obtaining of a lien upon property which belonged to some person other than the one who employed them to work. But this is a misconception of the situation because the lien was conferred by section 3 of the Woodman's Lien for Wages Act, *supra,* and though Indians are wards of the Crown yet they are also citizens of Canada and entitled, unless prevented by legislation, to enjoy civil rights in common with their fellow citizens, whether such rights are acquired at common law or by statute. No one would contend that an Indian was not entitled to a possessory lien at common law for the value of his work upon an article given to him to repair, such as a fish net, and I see no difference in principle between that lien and a statutory lien upon logs out of the woods by his labour. In order to preserve his right as a lien-holder under the statute, he is required (sections 4-7) to record his lien by filing a statement in the County Court within 30 days, and to "enforce the same by suit" in that Court within 30 days thereafter, which he may do, as already noted, by writ of attachment or by writ of summons, giving particulars of his claim, and the case proceeds to trial in the usual way. If his claim for wages be

MARTIN, J.A.

COURT OF APPEAL

1923

Jan. 9.

DOUGLAS v. MILL CREEK LUMBER CO.

against the owner of the logs he may obtain a judgment against him *in personam* as well as in establishment of his lien—sections 8, 23, 26, 31, but only the latter remedy against the owner where he was not employed by him.

The judgment and lien are enforced "by sale under the execution" (section 9), and even though no lien is declared yet the plaintiffs may obtain judgment as in an ordinary case.

It will thus be seen that all these proceedings are founded upon the debt that is due to the claiming lien-holder, and it is the existence of that debt and the necessity for suing upon it

MARTIN, J.A.

which enables him to obtain satisfaction of his lien or other appropriate judgment to recompense him for his "labour or service" according to the facts established at the trial; hence it becomes manifest that he is within the scope of said section 103 in the assertion of his rights to sue for his debt and in so doing obtain also the benefit of his statutory rights as a lien-holder.

It follows that the appeal is dismissed save as to the claim of Ellen Joe as to which it is allowed.

GALLIHER, J.A.: This is an appeal from GRANT, Co. J., who gave judgment in favour of certain unenfranchised Indians who had performed services in connection with the taking out of timber for the Mill Creek Company, who had let the contract to the defendant Chief Mathias Joe, William Baker and Isaac Jacob.

Four of these plaintiffs, Achill Mack, Moses Antone, Moses Joseph and Bobbie Baker took attachment proceedings under the Woodman's Lien for Wages Act, R.S.B.C. 1911, Cap.

GALLIHER, J.A.

243, and the remaining plaintiffs brought action in the County Court.

Two swifters of logs were seized under the attachment proceedings, and then all the claims were consolidated and tried in one action, and judgment given, setting out the respective amounts found due each of the claimants.

The Mill Creek Company whose property the logs were, and in order that they could market same, paid $900 into Court and called upon the claimants to establish their claims. The

logs being released the matter went on to judgment as above stated. Mr. *Dickie* took the preliminary objection that all claims under $100 are not appealable. That point was settled by the old Full Court in *Gabriele* v. *Jackson Mines, Limited* (1906), 15 B.C. 373; with which I agree. This excludes from appeal the claims of William Billy, $48.08, Moses Joseph, $76.17, Gus Douglas, $21.08, and Dominick Charles, $88.03, and as to the amount awarded them by the learned trial judge, the judgment stands.

As to the balance of the claims, Achill Mack, $187.98, Moses Antone, $118.80; Bobbie Baker, $228.78; Moses Williams, $115.74, and Ellen Mathias Joe, $160. Mr. *Wilson,* for the appellant Company, objects first: That unenfranchised Indians cannot claim a lien under the Act, and if they can, it can only be established by making the Crown a party. I cannot assent to either of these submissions. Under the Indian Act, R.S.C. 1906, Cap. 81, Indians and non-treaty Indians are given the right to sue for debts due them, or to compel the performance of obligations contracted with them (section 103). This right is given without qualification and there is nothing excluding this right in the Woodman's Lien for Wages Act, or in our County Courts Act. But Mr. *Wilson* says an Indian is not a person within the Act.

GALLIHER, J.A.

Our Woodman's Lien for Wages Act, Sec. 3, says: "Any person performing any labour, service," etc., "shall have a lien," etc., and the word "person" therein referred to is defined in section 2, as follows:

> "'Person' in section 3 of this Act shall include cooks, blacksmiths, artisans, and all others usually employed in connection with such labour and services. . . . ."

No exclusion there, but rather an inclusion in the words "all others," etc.

Since the hearing Mr. *Wilson* has (by leave) cited the following cases: *Atkins* v. *Davis* (1917), 38 O.L.R. 548, and *Re Caledonia Milling Co.* v. *Johns* (1918), 42 O.L.R. 338. Neither of these cases, as I read them is in point here. Mr. *Wilson* then takes exception to the affidavits filed. With regard to these affidavits, three of them, Achill Mack, Moses

COURT OF APPEAL

1923

Jan. 9.

DOUGLAS v. MILL CREEK LUMBER CO.

Antone and Bobbie Baker were originally sworn before their solicitor, and afterwards sworn before Charles M. Woodworth, a commissioner, on the date on which the writ of attachment was issued, *viz.*, January 26th, 1922.

Mr. *Wilson's* first objection to these affidavits is that a new jurat should have been written out or the prefix *"re"* placed before the word "sworn."

I notice that the name of the claimant in each was struck out and re-signed both as to the claim and the affidavit verifying same, and in my opinion where that is done it is not necessary to rewrite the jurat or add the prefix *"re."* And further, the trial judge is by section 62 of the Evidence Act, empowered to receive these affidavits. This Mr. *Wilson* does not contest, but says that a memorandum that they were so received should be indorsed on the affidavit. That provision I consider directory.

Mr. *Wilson* takes the further ground that all these affidavits are defective.

Section 5 of the Woodman's Lien for Wages Act, is as follows:

"Such statement [referring to the statement in section 4] shall set out briefly the nature of the debt, demand or claim, the amount due to the claimant, as near as may be, over and above all legal set-offs or counterclaims, and a description of the logs or timber upon or against which the lien is claimed, and may be in the form in Schedule A to this Act, or to the like effect."

GALLIHER, J.A.

First, supposing there had been no Schedule A, I would hold that section 5 had been complied with. That Schedule is no doubt given as a guide and if it has to be strictly followed then in one or two particulars, especially as to residence it has not been so followed. I attach no weight to the objection that the amounts are incorrectly stated in this case.

Now, there may be Acts where the very wording of the Act compels us to adopt a strict construction and require strict compliance, but I do not regard this as one of them, and in dealing with the objections *seriatum,* in all cases except Ellen Mathias Joe, I would hold (a) sufficiently stated; (c) sufficiently stated; (d) sufficiently stated; (e) sufficiently stated, leaving only (b) that the residence of the owner is not stated,

and with regard to that even Schedule A says, state if known. In the case of Ellen Mathias Joe, the nature of the debt, demand or claim (following the words of the statute) are not stated. I take it something must be set out which shews that she comes within the class entitled to a lien and this is not done. As stated, the services rendered might have been entirely outside the contract. I am of course considering these cases under the wording of this particular Act.

The only remaining point argued was as to the sufficiency of proof of the claims, and I think that sufficient.

GALLIHER, J.A.

In the result the appeal succeeds as to the claim of Ellen Mathias Joe and is dismissed as to the others.

McPHILLIPS and EBERTS, JJ.A. agreed in dismissing the appeal except as to the claim of Ellen Joe, which is allowed.

MCPHILLIPS, J.A.

EBERTS, J.A.

Appeal dismissed
except as to Ellen Joe, which is allowed.

Solicitor for appellant: *A. Whealler.*
Solicitors for respondents: *Dickie & DeBeck.*

MCDONALD, J. (At Chambers)

1923

Jan. 10.

IN RE CARLSON

IN RE HILMA CARLSON.

Husband and wife—Wife leaves home—Not heard from for seven years—Search made—Presumption of death.

Where a wife has left her home and her husband has endeavoured to locate her but has been unable to find any trace of her for seven years the Court will presume that she is dead.

PETITION of Ernest Carlson for an order declaring that his wife, Hilma Carlson, be presumed dead, not having been heard of for seven years. The petitioner and the said Hilma Carlson were married at Vancouver, B.C., on October 16th, 1912, and lived together at Bella Coola, B.C., from that time until March 8th, 1914, when the wife left Bella Coola. The petitioner received a letter from her a short time afterwards written at Seattle, Washington, and later in 1914 received a further letter from Chicago, Illinois. He never heard from her again and could get no information as to her whereabouts, or as to whether she was dead or alive, although he wrote friends residing at her former home in Sweden, and in 1918 went to Chicago and Minneapolis where he made personal search for her. The petition was presented in anticipation of the petitioner's remarriage. Heard by MCDONALD, J. at Chambers in Vancouver on the 10th of January, 1923.

Statement

Winifred McKay, for the petitoner cited *Willyams* v. *Scottish Widows Fund Life Assurance Society* (1888), 52 J.P. 471 and *Wills* v. *Palmer* (1904), 53 W.R. 169.

Argument

MCDONALD, J. ordered that the prayer of the petitioner be granted, and that the petitioner be allowed to remarry.

Judgment

Order accordingly.

HARRIS v. THE ALEXANDRA NON-SECTARIAN ORPHANAGE AND CHILDREN'S HOME OF VANCOUVER *ET AL.*

MCDONALD, J. (At Chambers)

1923

Jan. 11.

HARRIS v. ALEXANDRA NON-SECTARIAN ORPHANAGE

Will—Codicil—Bequest to "orphanages of the City of Vancouver in proportion to the number of children under their care."

By codicil a testator left his residuary estate to "the orphanages of the City of Vancouver in proportion to the number of children under their care respectively at the time of such distribution." On application for directions—

Held, that the intention was to provide assistance to those institutions within the city by whatever name called which on the date of distribution were providing homes for destitute, abandoned, neglected or orphaned children. It was not the testator's intention to give the word "orphanage" the narrower construction, nor was he concerned with charters of incorporation or statutory powers, but with the work actually carried on among children who were intended to be the objects of his bounty, nor was he concerned with the question of whether an institute carried on other relief or rescue work in addition to its work among children.

Held, further, that a charitable institution whose work is entirely in New Westminster, helpful as it is to Vancouver, does not come within "orphange of the City of Vancouver," and its claim must be denied.

APPLICATION for advice and directions as to the distribution of the residuary estate of George E. Magee, deceased. By codicil to his will dated March 13th, 1912, he bequeathed his residuary estate to "the Orphanages of the City of Vancouver in proportion to the number of children under their care respectively at the time of such distribution." Heard by McDONALD, J. at Chambers in Vancouver on the 10th of January, 1923.

Statement

A. E. Bull, for plaintiff.
T. E. Wilson, for Alexandra Orphanage.
McTaggart, for Children's Aid.
G. E. Martin, for Sisters of Refuge.
McPhillips, K.C., and Gilmour, for Catholic Children's Aid.
Harper, for Salvation Army.
Housser, for Sisters of Charity.
Davis & Co., for Magee.

MCDONALD, J. (At Chambers)

1923

Jan. 11.

HARRIS v. ALEXANDRA NON-SECTARIAN ORPHANAGE

11th January, 1923.

McDONALD, J.: By a codicil to his will, which codicil bears date the 13th of March, 1912, George E. Magee bequeathed his residuary estate to "the orphanages of the City of Vancouver, in proportion to the number of children under their care respectively at the time of such distribution." By other terms of such codicil, it was provided, in the events which have happened, that such distribution should take place on the 8th of August, 1922. There being various claimants to a share in the fund, the executor and trustee applied to the Court for advice and directions, and pursuant to order, an originating summons was issued in which the various claimants were made defendants. Upon the return of the summons evidence was taken, and the facts relating to each of the claimants appear to be as follows:

The Alexandra Non-Sectarian Orphanage and Children's Home of Vancouver (being the only claimant bearing the name "Orphanage"), was incorporated under the Benevolent Societies Act, 1891, one of its objects being "to establish and maintain rescue homes for children." This is the only work it has carried on and on the 8th of August, 1922, it had under its care in its institution in the City of Vancouver some 79 children of whom some were orphans in the generally accepted sense, *i.e.*, they had been bereaved of either one or both parents, and some had been abandoned or neglected by their parents.

Judgment

The Children's Aid Society of Vancouver, B.C., was incorporated under The Children's Protection Act of British Columbia, its sole object being "the protection of children from cruelty, and caring for and protecting neglected, abandoned or orphaned children, and the enforcement by all lawful means of the laws relating thereto." On the 8th of August, 1922, the Society had under its care in its institution in the City of Vancouver some 166 children, a large number of whom were orphans and the Society carried on no other work.

The Children's Aid Society of the Catholic Archdiocese of Vancouver was incorporated under the Act mentioned in the next preceding paragraph, and its sole object was identical with that of the Children's Aid Society of Vancouver. On

August 8th, 1922, this Society had under its care some 39 children in its institution in Vancouver, a large number of whom were orphans; and the Society carried on no other work.

The Sisters of Our Lady of Charity of Refuge were incorporated under the Benevolent Societies Act, the objects being "the promotion of moral reform amongst women, and the establishment and maintaining of refuge homes for the same, and the safe-guarding of the young." On the 8th of August, 1922, these claimants had under their care in their institution in the City of Vancouver some 26 children, many of whom were orphans, and they also had, as they have throughout their existence as a Society, a considerable number of adult women in the same institution and under their care.

The Salvation Army was incorporated under a special Act of the Dominion of Canada, one of its numerous objects being to "manage and operate homes for children." On the 8th of August, 1922, it maintained in the City of Vancouver a home for children having under its care several children of whom some were orphans. At the same time, it carried on in Vancouver its many other activities in the way of relief and rescue work.

The Sisters of Charity of Providence in British Columbia were incorporated by a special Act of the Province of British Columbia. Their work is carried on, and their institution is situate, in the City of New Westminster, B.C., and its operations are confined to the care of destitute children. By the Act of Incorporation, New Westminster was named as the place where the head office should be situate, power being given to change same by by-law. A by-law was passed in 1920 changing the head office to Vancouver, B.C. The Society owns St. Paul's Hospital in Vancouver, and all matters relating to property and the like are attended to there, but the work of admitting, and caring for children is entirely done in New Westminster. On the 8th of August, 1922, this Society had in its care 150 children, a great number of whom had come from the City of Vancouver, and many of whom are orphans.

Judgment

With the above facts before me, I have considered the submissions of counsel, and have endeavoured to ascertain as best

MCDONALD, J. (At Chambers)

1923

Jan. 11.

HARRIS v. ALEXANDRA NON-SECTARIAN ORPHANAGE

I can what was the intention of the testator when he made the bequest in question. It seems to me that his object was to provide assistance to those institutions within the City of Vancouver by whatever name called which on the date of distribution were providing homes for destitute, abandoned, neglected or orphaned children. It is true that, strictly speaking, an "Orphanage" is a home or asylum for orphans, but as appears from the above statement of facts not one of the claimants confines its work to "orphans." In fact I doubt if there is a single institution in the world which does confine its work to "orphans." The testator must be taken to have known that all these institutions do care for other children than orphans, and this taken in conjunction with the fact that the distribution is to be made in proportion to the number of children, not in proportion to the number of orphans, convinces me that the testator did not intend to give to the word "Orphanage" the narrower construction.

It was contended before me that only two of the claimants could qualify, in the sense that their sole object of incorporation was "caring for and protecting neglected, abandoned or orphaned children." In my opinion, the testator was not concerned with charters of incorporation or statutory powers but was concerned with the work actually being carried on among children, who were intended to be the objects of his bounty. It seems to follow logically from the above that neither was the testator concerned with the question of whether an institution carried on other relief or rescue work in addition to its work among children.

Judgment

In my opinion, therefore, all of the claimants whose institutions are situate within the City of Vancouver are entitled to share in proportion to the number of children, whether orphans or not, respectively under their care.

With regard to the Sisters of Charity of Providence, whose work is entirely carried on in New Westminster, helpful as it is to the City of Vancouver, this Society cannot so far as I can see, be said to be an "Orphanage of the City of Vancouver," and its claim must be denied. *In re Pearsons' Estate* (1896), 45 Pac. 849.

One other point argued was in respect to children not actually under a claimant's roof but living with a parent or some other person, and actually maintained and sustained by the institution. I think such children are children under the care of the institution within the meaning of the bequest.

If counsel cannot agree as to the actual number of children, for the purposes of distribution, there will be a reference to the registrar to ascertain such numbers in accordance with the above findings.

Costs of all parties out of the estate.

Order accordingly.

CANADIAN WESTERN COOPERAGE LIMITED v VERNON GROWERS LIMITED.

Sale of goods—By "sample" and "description"—Purchaser examines goods—No reliance on seller's skill or judgment—Fitness for purpose—R.S.B.C. 1911, Cap. 203, Sec. 22 (1) and (2).

The defendant purchased wooden kegs to be used as the seller (plaintiff) knew for holding cider made by the defendant by a special process. The defendant alleged they were not up to sample and not fit for the purpose intended.

Held, that the sale was by "description" as well as by "sample," the kegs supplied were up to "sample" and whether or not the kegs were fit for the purpose intended the purchaser undertook a thorough examination and did not rely upon the seller's skill or judgment, he did not exercise the diligence he should have to ascertain that the alleged defective condition existed and that the kegs supplied would not properly hold the cider, and it further appeared that the process of manufacture of the cider had an effect different from what was represented to the plaintiff and this with the manner of filling the kegs caused the loss complained of.

ACTION to recover $1,235.67, the sum due on two bills of exchange, one for $288.50, dated February 28th, 1922, and the other for $947.17 dated March 20th, 1922, and for damages for breach of contract in regard to two consignments of wooden

Statement

MACDONALD, J.

1923

Jan. 22.

CANADIAN WESTERN COOPERAGE CO. v. VERNON GROWERS ASSOCIATION

kegs sold by the plaintiff to the defendant, the purchase price of which was represented by the said bills of exchange. The defendant alleged that the kegs were not up to sample and were not fit for the purpose intended and counterclaimed for damages in excess of the sum claimed by the plaintiff. Tried by MACDONALD, J., at Vancouver on the 11th of December, 1922.

Davis, K.C., and *Hossie*, for plaintiff.
Reid, K.C., and *Gibson*, for defendant.

22nd January, 1923.

MACDONALD, J.: Plaintiff seeks to recover the amount of two bills of exchange, accepted by the defendant, for $288.50 and $947.17, dated respectively the 28th of February, 1922, and 20th of March, 1922.

Defendant admits its liability, as to such bills of exchange, but, by its defence and counterclaim, asserts a claim for damages, for an amount, far exceeding the claim of the plaintiff.

The bills of exchange represent the purchase price of two consignments of wooden kegs, sold by the plaintiff to the defendant. These kegs were, to the knowledge of the plaintiff, intended to be used by the defendant for holding cider, which the defendant was, by a special process, pasteurizing and producing at Vernon, B.C. On October 22nd, 1921, plaintiff wrote defendant, inquiring if the defendant "was now in a position to place order for cider kegs" and informed defendant that, it was now in good shape to handle its business satisfactorily and "give good service and strictly number one keg." The correspondence produced does not shew that there was any reply to this letter, but defendant alleges that, on October 26th, 1921, it wrote the plaintiff, without referring to the letter of October 22nd, stating that it had practically decided to purchase a car of 10-gallon kegs, but that they had not yet convinced themselves that plaintiff's kegs were as good as "Muellers' No. 1 or their gum-wood keg, which they are now offering to the trade at a low price." Plaintiff denies receiving such letter, but I allowed a copy to be given in evidence, upon being satisfied that the original had been mailed, in due course,

Judgment

to the plaintiff. Such letter then refers to the defendant, not taking any action in the matter until it is advised by return mail, as to the very best price plaintiff can make on the kegs, f.o.b. Vernon and "with your [meaning plaintiff] usual guarantee as to workmanship and their tightness for holding contents of pasteurized cider." In the meantime, the defendant had received, and was testing two sample kegs sent by the plaintiff for that purpose. It had full opportunity of determining as to the fitness of such sample kegs for holding the cider it was manufacturing. The evidence shews that it made a thorough test of these kegs. This fact was emphasized by the letter of October 26th, 1921, shewing that it was not then convinced as to the fitness of such sample kegs for the purpose intended. After such testing had taken place, for a period, that the defendant, presumably considered sufficient, it then, on the 2nd of November, 1921, gave its first order to Harvey, a representative of the plaintiff, for a carload of 10-gallon fir kegs. Such order was accepted by the plaintiff and purported to have been filled during the month of December, 1921. Defendant now alleges, that the kegs were not up to the sample and were not fit for the purpose intended.

Plaintiff contends that the sale was only by "sample" and that this question should alone be considered and, if the bulk of the goods corresponded with the sample, that the defendant has no cause of complaint. While the defendant submits that the sale was also by "description" and, in that event, the fitness of the goods, for the purpose intended, requires consideration. The intention of parties governs in the making and in the construction of all contracts: see Erle, C.J. in *Bannerman* v. *White* (1861), 31 L.J., C.P. 28 at p. 32. Here, there is no doubt, that the intention of the parties was, that the kegs, supplied by the plaintiff, should hold the cider manufactured by the defendant and enable its products thus to be marketed to advantage. I am also quite satisfied that the first consignment of kegs was intended to be as good as the samples that had been forwarded by the plaintiff for test and inspection though, by arrangement, they were not varnished and thus would not have as favourable an appearance upon a casual

MACDONALD, J.

1923

Jan. 22.

CANADIAN WESTERN COOPERAGE CO. *v.* VERNON GROWERS ASSOCIATION

examination. When this consignment of kegs arrived, they were unloaded by the defendant and, after being coopered, where it was deemed necessary, were, except as to eighteen which were culled, shortly afterwards utilized by defendant. The filling with cider commenced in December, 1921, and continued for some months. Defendant, except as to the eighteen kegs rejected for apparent defects, by its acceptance and use of these kegs, indicated that it was satisfied, at the time, with the manner in which the order had been filled and that the goods were equal to sample. While some of the kegs produced in Court were not equal to the sample, being a selection from the culled kegs, I am satisfied that the bulk of the first consignment corresponded with the sample in quality.

Plaintiff contends that sale being only by sample was not affected by the fitness or unfitness of the goods for the purpose intended, if the bulk corresponded with the sample, and submits that this finding, as to the bulk so corresponding, would destroy any redress on the part of the defendant, but I think the sale was by "description" as well as by "sample." If this be a fact then, it involves consideration of the question, as to whether either the sample kegs or the bulk answering the description, had a latent defect not discoverable by due diligence on part of defendant and rendering the kegs unfit for the purpose intended. Further, even if the sale had been only by sample, there would be an implied condition, that the kegs should be free from any defect rendering them unmerchantable which would not be apparent on reasonable examination of the sample.

Judgment

Assuming then, that the sale was by "description" as well as by "sample," did the kegs correspond with goods of the description, which the plaintiff, as a manufacturer, in the course of its business, was required to supply and were they reasonably fit for the purpose intended? Further, was the contract of sale entered into, in such a manner, that the defendant can successfully contend that, expressly, or by implication, it made known to the plaintiff not only the particular purpose, for which the kegs were required, but did so, in such a manner "as to shew that the buyer relies on the seller's skill or judgment," that the

goods supplied are reasonably fit for the purpose intended. If this were established, then, the provisions of subsection one of section 22 of the Sale of Goods Act would be applicable, reading as follows:

"Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to shew that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose. . . . ."

A warranty or condition, as to the quality or fitness of the kegs, would thus attach to the sale. Then subsection (2) of the said section 22, dealing with sales by description, also requires consideration. It reads as follows:

"Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality: Provided that if the buyer has examined the goods there shall be no implied condition as regards defects which such examination ought to have revealed."

There are two questions then to be considered. In the first place, did the defendant rely upon the plaintiff's skill or judgment, as to the kegs being reasonably fit for holding cider, and, in the second place, did the defendant, by its examination of the sample kegs, not only shew that it was exercising its own skill or judgment, but also should have pursued such examination in a manner which should, if any existed, have revealed any defects in the kegs, rendering them unfit for holding cider. The fact that goods were sold, corresponding with the sample, would not, in the case of a latent defect, not discoverable by due diligence, relieve the plaintiff from liability. This situation was fully discussed in *Drummond* v. *Van Ingen* (1887), 12 App. Cas. 284. There the cloth supplied by the manufacturer was the same as the samples, on which the order had been based, but a defect existed in the cloth which was not apparent, upon the ordinary and usual inspection, which would take place in a purchase of material of that nature. Here, even if it be assumed that the kegs in question were not reasonably fit for holding cider, did not the defendant, presumably understanding its business, not have as good an opportunity of determining the fitness of the kegs for such purpose as the plaintiff possessed?

Judgment

MACDONALD, J.
1923
Jan. 22.

CANADIAN WESTERN COOPERAGE CO. v. VERNON GROWERS ASSOCIATION

The manufacture of fir kegs is a simple matter as compared with the intricate and complicated manufacture of mixed worsted coatings. The material, which formed the sample kegs, as well as the bulk supplied, was quite capable of observation, as to its nature. Defendant was well aware that the kegs, before being used, required coopering, in order to render them more capable of holding cider and that the hoops should be securely held in place. The general principles of the law, relating to sales by sample and description, is stated by Lord Herschell in *Drummond* v. *Van Ingen, supra,* pp. 290-1 as follows:

"It was laid down in *Jones* v. *Bright* [(1829)], 5 Bing. 533 that where goods are ordered of a manufacturer for a particular purpose, he impliedly warrants that the goods he supplies are fit for that purpose. This view of the law has been constantly acted upon from the time of that decision, and was not impeached by the learned counsel for the appellants. It is equally well settled that upon a sale of goods of a specified description, which the purchaser has no opportunity of examining before the sale, the goods must not only answer that specific description, but must be merchantable under that description. This doctrine was laid down in *Jones* v. *Just* [(1868)], L.R. 3 Q.B. 197, where all the previous authorities on the point were reviewed. In the case of *Mody* v. *Gregson* [(1868)], L.R. 4 Ex. 49 in the Exchequer Chamber, the decision in *Jones* v. *Just* was approved of and acted upon and it was further held that the implied warranty that the goods supplied are merchantable was not absolutely excluded by the fact that the goods were sold by sample, and that the bulk precisely corresponded with it, but was only excluded as regards those matters which the purchaser might, by due diligence in the use of all ordinary and usual means, have ascertained from an examination of the sample. I think that the law enunciated in these cases is sound and not open to doubt."

Judgment

Here then, as I have found that the bulk corresponded with the sample, was the implied warranty excluded, through the defendant not having exercised due diligence in examining and determining, as to the fitness of the kegs, for the purpose required? I think, whether such kegs were unfit or not, for the purpose intended, that the defendant did not rely upon the plaintiff's skill or judgment, as to the fitness of the kegs for the purpose intended nor, if the kegs were defective, did it exercise due diligence to ascertain that such condition existed and that the fir kegs sought to be supplied by the plaintiff would not properly hold the pasteurized cider it was manufacturing. If the plaintiff had simply supplied sample kegs for inspection, and, without close inspection or testing them, as occurred

here, the defendant had ordered a consignment of kegs and they had proven defective, then, in that event, the plaintiff would not be relieved from liability. This result is outlined by Lord Herschell in *Drummond* v. *Van Ingen, supra,* at p. 294 as follows:

"When a purchaser states generally the nature of the article he requires, and asks the manufacturer to supply specimens of the mode in which he proposes to carry out the order, he trusts to the skill of the manufacturer just as much as if he asked for no such specimens. And I think he has a right to rely on the samples supplied representing a manufactured article which will be fit for the purposes for which such an article is ordinarily used, just as much as he has a right to rely on manufactured goods supplied on an order without samples complying with such a warranty."

The facts here presented are, however, quite different and defendant is not in the same position as the purchaser would have been in that hypothetical case. It did not trust to the skill of the manufacturer and made a thorough examination. It should make payment for the kegs so ordered and supplied, whether defective or otherwise. This liability exists, as to both consignments and in fact the position of the defendant is weaker with respect to the second order, given in February, 1922, as, at that time, it had obtained even greater opportunity to determine the fitness of the plaintiff's goods.

Plaintiff, however, contends that the kegs supplied were not defective and that there should be no finding to that effect. There was a great mass of evidence adduced on both sides on this point. Plaintiff Company was a large manufacturer of fir kegs and contended that they answered the purpose of holding properly pasteurized cider. While the defendant adduced evidence tending to shew, that such kegs were not as good as oak kegs, and that it was only induced to purchase them, under the belief that they would answer the same purpose as oak kegs, which it had been previously using. There was some evidence to shew that oak kegs did prove more efficient than fir kegs. The matter more fully ventilated was as to the sufficiency of the pasteurization of the cider manufactured by the defendant. There was a conflict on this point and a number of the witnesses stated that complete pasteurization was impossible, so that the liability of fermentation still existed in cider, even when sub-

Judgment

MACDONALD, J.

1923

Jan. 22.

CANADIAN WESTERN COOPERAGE CO. v. VERNON GROWERS ASSOCIATION

jected to such treatment. If liability to fermentation thus remained in the cider, then, if any amount of air remained in the keg, after it was filled, fermentation would follow and gases form, which would seek, and in course of time obtain, an outlet. This would result in leakage of the cider and have been the cause of the loss, claimed by the defendant. I think the manner in which the kegs were filled, as described by witnesses for the defendant, allowed a small quantity of air still to remain in the kegs and that pasteurization not being complete fermentation followed and kegs thus, which would otherwise have been fit to hold fully pasteurized cider, proved ineffective for that purpose and resulted in the loss. In my opinion, the kegs were sold on the representation that the process in use by the defendant, and termed "pasteurization" would eliminate any of the ingredients in the cider calculated to cause fermentation and that such representation was not borne out by the facts and loss consequently ensued. It follows that the plaintiff, while willing at one time apparently to compromise with the defendant, as its customer, should not bear the loss suffered by the defendant. The counterclaim is dismissed with costs and the plaintiff entitled to judgment for the amount of its claim with costs.

Judgment

Judgment for plaintiff.

EDGETT LIMITED v. PACIFIC GREAT EASTERN RAILWAY COMPANY.

MACDONALD, J.

1923

Jan. 25.

EDGETT LTD. v. PACIFIC GREAT EASTERN RY. CO.

Carriers—Railway—Shipment of goods—Delivery—Bill of lading later—Damage by frost in meantime—Special contract excusing liability—Applicability—Negligence—Onus of proof—R.S.B.C. 1911, Cap. 194, Sec. 215.

Some days after the defendant had taken delivery of four carloads of potatoes bills of lading were issued therefor, and it was found on the evidence that in the meantime the potatoes had been damaged by frost.

Held, that the defendant was not excused from liability by a special contract contained in the bills of lading and having failed to relieve itself of the onus cast upon it by section 215 of the British Columbia Railway Act by shewing the damage was not caused by the fault or neglect of it or its agents, servants or employees, it was liable in damages.

ACTION for damages owing to the loss of four carloads of potatoes damaged by frost after delivery to the defendant for shipment from Glen Fraser, B.C., to Vancouver, B.C. The loss was alleged to be due to the neglect and default of the defendant. Tried by MACDONALD, J., at Vancouver, on the 28th of November, 1922. Statement

Bourne, and *DesBrisay*, for plaintiff.
Brown, K.C., and *Ellis, K.C.*, for defendant.

25th January, 1923.

MACDONALD, J.: Defendant received four carloads of potatoes for carriage from Glen Fraser, B.C., to the plaintiff at Vancouver, B.C. Plaintiff alleges that, through neglect and default, on the part of the defendant, the potatoes were damaged by frost and loss ensued. Judgment

On the 2nd of December, 1919, defendant Railway Company took delivery at a siding, situate at Glen Fraser, B.C., which was a non-agency point, of four cars. Three of the cars were fully loaded with potatoes and one of them only partly so. The loading of the latter car had ceased on account of the cold weather having set in. It was stated, that the potatoes

MACDONALD, J.

1923

Jan. 25.

EDGETT LTD. *v.* PACIFIC GREAT EASTERN RY. CO.

were all in first-class condition when loaded and remained so until the cars were so delivered to the defendant. In the ordinary course, these cars would have remained over night at Lillooet and, in the morning, have formed a portion of the regular train for Squamish *en route* to be thence taken by barge to Vancouver. This was rendered impossible through the cave-in of a tunnel at an intervening point. The result was, that, for some reason, which was not explained, the defendant Company did not issue bills of lading until the 9th of December, when it was quite apparent that some of the potatoes were frost-bitten and thus damaged. The questions then arise, whether the damage occurred while the potatoes were so in the possession of the defendant Company, and, if so, whether it arose in such a manner, as to render it liable? I accept the statement, as to the loading of the potatoes being stopped on account of impending cold weather and that the quantity loaded were in good condition when delivered to the Railway Company. I find that they were damaged by frost between that time and the issuance of the bills of lading. In fact, prior to such issuance, the result of the frost was so apparent and well known to all locally concerned that the cars had, to some extent, been picked over and a portion of the potatoes discarded, as being worthless. The result was that it only required three cars to carry the consignment to Vancouver.

Judgment

While the plaintiff, and his shipper, Wo Hing, were doubtless well aware of the custom as to shipments of potatoes being subject to conditions in bills of lading exempting the Railway Company from liability, still, it is contended, on behalf of plaintiff, that, until the bills of lading were actually issued, the liability of the defendant Company existed as common carriers. Further, that it was not excused from liability by any special contract, such as "the owner of the goods accepting the risk of frost, detention and weather." If the bills of lading, subsequently issued, did not become retroactive and affect the liability of the Railway, then what was its position and, in what respect, if any, was it in default, as to the goods received by it under such circumstances?

Defendant is subject to the British Columbia Railway Act

(R.S.B.C. 1911, Cap. 194) and subsection (1) of section 215 of such Act provides, *inter alia*, that no Company shall make any contract, which purports to throw upon a shipper the necessity of onus of proving as against the company, negligence, in the event of loss or damage to any goods conveyed for the company. Subsection (2) of said section 215 provides that,

"Every company shall be liable for the loss of or damage to goods intrusted to such company for conveyance, except that the company shall not be liable when such loss or damage happens,—

"(*a.*) Without actual fault or privity of the company, or without the fault or neglect of its agents, servants, or employees; or

"(*b.*) By reason of fire or the dangers of navigation; . . . ."

Then subsection (4) provides that

"Every company shall be liable for loss or injury to live-stock or merchandise in the receiving, forwarding, or delivering thereof occasioned by neglect or default, notwithstanding any notice, condition or declaration in anywise limiting such liability; every such notice being hereby declared to be null and void."

Such subsection further provides that,

"no special contract in anywise respecting the aforesaid receiving, forwarding, and delivering shall be binding upon or affect any shipper or consignee unless signed by him or the person delivering the traffic."

It assumes that a special contract may be entered into and that it may become binding, if so signed by the shipper or consignee, but as there was no special contract between the parties until the 9th of December, then, I think the onus rests upon the defendant Company of shewing that it took reasonable precautions to prevent injury to the goods loaded in its cars. It had been arranged with the plaintiff that its shipper should line the cars and heat them, to avoid injury through frost. The Company had also given free transportation to employees, who might be employed by the plaintiff, to accompany the cars and look after the heating. It was presumably contemplated, when this arrangement was entered into, that the cars would not be unreasonably delayed at any point, after they were taken possession of by the Railway Company. The situation, however, was altered by the caving in of the tunnel, though there was no evidence afforded as to how it occurred. There was contradictory evidence, as to whether the station, at Lillooet, was protected from cold weather, and, as to the prevailing winds in that locality, still, I have no doubt that

MACDONALD, J.

1923

Jan. 25.

EDGETT LTD. v. PACIFIC GREAT EASTERN RY. CO.

severe cold weather, accompanied by winds, prevented the parties, looking after the cars, from keeping them sufficiently heated to avoid damage by frost. This condition of affairs must have been apparent to all concerned, and the risk of injury to such perishable goods, quite apparent. Loss having ensued, did the defendant Company, under such circumstances, act without any fault or neglect on the part of its "agents, servants, or employees." I think as there was not a special contract, which became effective between the parties, until the bills of lading were actually issued, the defendant became liable to the plaintiff, unless it relieved itself from the onus cast upon it by the statute. In my opinion, it failed, in this respect, and there was fault and neglect, on the part of the agents and employees of the defendant Company. While not being insurers of the safety of the goods received, as ordinarily a common carrier would, still, to get the benefit of the statute and be relieved, it should have satisfied its requirements. It should have taken, or assisted in taking, every reasonable precaution to protect such goods from injury. It was suggested that the employees of the defendant Company could either have moved the cars to some more favourable point on its line of railway, or utilized its round-house, which would be less affected by the frost, through affording protection from the cold winds. On the contrary, they did not take any steps, during the prevailing cold weather to prevent, or even mitigate, the damage, which it was apparent would ensue. The Railway Company should not have protected its rolling stock and other equipment and left the potatoes exposed to the cold weather and liable to be damaged, through inability to keep the cars sufficiently heated. Defendant thus became liable to the plaintiff for the loss it sustained.

Judgment

In this view of the case, it is not necessary to consider the effect of the bills of lading, as no damage occurred to the goods, while they were being carried under special contract. Defendant contended, that they applied, while plaintiff submitted that, in any event, even if applicable, they did not exempt the defendant from liability.

The plaintiff had leave, at the trial, to increase the amount

of its claim but the evidence was unsatisfactory as to such increase.

There should be judgment for plaintiff for $1165.87 and costs.

Judgment for plaintiff.

MACDONALD, J.

1923

Jan. 25.

EDGETT LTD. v. PACIFIC GREAT EASTERN RY. CO.

REX v. WONG CHONG QUONG.

MURPHY, J.

1923

March 27.

REX v. WONG CHONG QUONG

Criminal law—Autrefois acquit—Appeal by Crown—Case stated—Criminal Code, Secs. 761 and 762—Criminal Rules, 1906, r. 14.

The recognizance required by section 762 of the Criminal Code and rule 14 of the Criminal Rules, 1906, is a condition precedent to the right of appeal and this rule applies to the Crown when appellant.

CASE stated by William W. Northcott and Dr. Lewis Hall, two justices of the peace for the County of Victoria.

The accused was on the 21st of December, 1922, convicted under Part XV., of the Criminal Code by police magistrate Jay at Victoria, B.C. on an information charging him with unlawfully having in his possession certain drugs, to wit, opium without first obtaining a licence from the minister presiding over the department of health contrary to the provisions of The Opium and Narcotic Drug Act. The prisoner appealed to the County Court of Victoria and the conviction was quashed by LAMPMAN, Co. J. on the 25th of January, 1923, on the ground that the accused was not shewn to have been knowingly in possession of said opium—the opium having been found in a false bottom of a trunk belonging to the accused but the prisoner denied knowledge of the presence of opium in the trunk.

Statement

On the 23rd of February, 1923, the Crown laid another information against the prisoner that he did, "unlawfully import into Canada without lawful authority certain drugs, to wit, opium without first obtaining a licence therefor from the minis-

MURPHY, J.

1923

March 27.

REX v. WONG CHONG QUONG

ter presiding over the department of health contrary to the provisions of The Opium and Narcotic Drug Act, being subsection 2(*a*) of section 5A as amended by Cap. 31, 1920, and amending Acts."

The said justices of the peace dismissed the second charge on the 23rd of February, 1923, on the ground of the plea of *autrefois acquit* as the prisoner had been already acquitted on the same acts as those on which the subsequent prosecution was founded.

Statement

The Crown (in right of the Dominion) then applied to and obtained from the said justices of the peace a case stated for the opinion of the Supreme Court of British Columbia as to whether or not the said justices were right in giving effect to a plea of *autrefois acquit*.

The case stated was heard by MURPHY, J. at Victoria on the 27th day of March, 1923.

O'Halloran, for the Crown.

Lowe, for accused, raised the preliminary objection that the Crown, the appellant, had not entered into or furnished a recognizance as required by section 762 of the Criminal Code or in accordance with r. 14 of the Criminal Rules, 1906. He cited section 761 of the Criminal Code; *Rex* v. *Geiser* (1901), 8 B.C. 169; and r. 36, Crown Office Rules (civil).

Argument

O'Halloran: The Crown is not bound to furnish or enter into a recognizance under section 762 of the Code; neither this section nor the Criminal Rules applies to the Crown.

MURPHY, J.: The Crown is bound to comply with the provisions of sections 761 and 762 of the Criminal Code and the Criminal Rules. Having failed to enter into the recognizance which is a condition precedent to the hearing of the case stated under the rules it is dismissed with costs against the Crown.

Judgment

Case stated dismissed.

STODDARD *ET AL.* v. WILLIAMS

MACDONALD, J.

1923

Jan. 25.

STODDARD v. WILLIAMS

Will—Agreement to devise—Contained in lost correspondence—Enforceability—Evidence of correspondence — Conversation with deceased — Statute of Frauds—Devise of the property to another—Election.

The plaintiff alleged that under an agreement contained in correspondence which was lost she transferred certain property in Vancouver to her then husband in consideration of his paying off all encumbrances thereon and devising the property by will to their daughter. The husband became sole owner of the property free from encumbrances and made his daughter sole beneficiary under his will but later by codicil specifically devised the property in question to the defendant. In an action for specific performance or in the alternative that the defendant holds the property in trust for the plaintiff's daughter:—

Held, that the devisee who is forced to give up the property is entitled to the application of the doctrine of election and may thus be compensated out of the other property of the devisor giving under the will to the person favoured by the agreement, and compensation should be made to the defendant before her interest in the property should be affected by any judgment, declaratory or otherwise, and an order directing such compensation was rendered impossible through the trustee under the will not being a party to the action. The action was therefore dismissed without prejudice to further action being taken.

An agreement by a grantor of property, in consideration of the conveyance, to devise the property to a certain person, is enforceable against another person to whom said grantor has devised the property as a gift; and where such agreement was contained in correspondence which has been lost the contents of the correspondence can be proved by satisfactory evidence thereof and the agreement be thereby established, notwithstanding that the Statute of Frauds is pleaded, and evidence is admissible of a third party giving an account of a conversation with the deceased grantee (the devisor) as to the agreement made in the correspondence.

Statement

ACTION to obtain specific performance of an agreement by a deceased person to devise a certain property in Vancouver to the plaintiff's child or in the alternative for a declaration that defendant (to whom deceased had later devised the property as a gift) holds the property in trust for the child as beneficial owner. The facts are that on May 4th, 1912, G. H. Bacchus (now deceased) purchased the property in question in his wife's (plaintiff) name under agreement for sale and in 1917 under

MACDONALD, J.

1923

Jan. 25.

STODDARD v. WILLIAMS

Statement

agreement the wife transferred the property to her husband who then made all payments due thereon and became sole owner free from encumbrances. The plaintiff claims there was correspondence which constituted an agreement between herself and her husband that in consideration of her transferring the property to him he would free the property from encumbrances and by his will devise the property to their daughter, and in 1918 by will he made his daughter sole beneficiary. In 1919 he made a codicil devising to the defendant his automobile, and in February, 1921, made a further codicil in which he specifically devised to the defendant the property in question. He died on March 17th, 1921. The correspondence proving the agreement between herself and her husband with relation to this property was lost. Tried by MACDONALD, J., at Vancouver, on the 6th of December, 1922.

A. E. Bull, and *T. Edgar Wilson,* for plaintiffs.
J. A. MacInnes, and *Aubrey,* for defendant.

25th January, 1923.

MACDONALD, J.: Plaintiff, Theodora V. Stoddard, seeks, for the benefit of her daughter, Virginia Betty Bacchus, to obtain specific performance of an agreement, with respect to subdivision A, lots 1 and 2, block W, D.L. 526, in the City of Vancouver, alleged to have been made between the late G. Howard Bacchus and herself, and which was entered into at the time, when she was his wife.

Judgment

In the alternative, she seeks to obtain a declaration that defendant holds the said land in trust for her daughter, Virginia, as beneficial owner thereof.

It appears, that on the 4th of May, 1912, G. Howard Bacchus, generally known under his stage name of George Howard, while pursuing with his wife a theatrical life in Vancouver, purchased the property in question in his wife's name, intending her to be the owner. He bought from William Ellis and William Chaytor under an agreement for sale, the purchase price being $7,000, of which, at the time, $1,500 was paid in cash. Then a mortgage of $3,000, given by the vendors to Thos. W. Williams, was assumed and the balance was payable in deferred

payments. Bacchus paid interest on the mortgage regularly, but, in 1917, the taxes on the property had fallen in arrears and payments under the agreement for sale were overdue. His wife, now plaintiff Stoddard, had gone with him, sometime before, to reside in California accompanied by their only child Virginia. She remained in that State with the child while her husband returned to Vancouver. In the Fall of 1917, the vendors of the property were pressing for overdue payments. Then plaintiff Stoddard, by a quit-claim deed, dated 28th December, 1917, assigned to her husband, at his request, all her interest in the property. He registered the conveyance and shortly afterwards completed the purchase of the property and became sole owner free from encumbrances. He remained such owner up to the time of his death on the 17th of March, 1921.

Plaintiffs now allege that, prior to the execution of the said quit-claim deed, it was agreed, in writing, between the plaintiff Stoddard, then Betty Bacchus, and the said G. H. Bacchus that, upon her thus conveying all her interest in the property, that her husband would pay the said mortgage, as well as the taxes on the property, and, after registration of the title in his own name, would keep the premises in repair. Then that he would, by his will, devise the property to his daughter, Virginia Betty Bacchus.

Judgment

If plaintiff Stoddard parted with her interest in the property, under such an agreement, then it is enforceable: see *Bligh* v. *Gallagher* (1921), 29 B.C. 241 and cases there cited. Compare Fry on Specific Performance, 6th Ed., 109:

"Contracts to devise lands have been enforced against persons claiming them under the party contracting to make the will."

In *Synge* v. *Synge* (1894), 1 Q.B. 466 at pp. 470-71, Kay L.J., in referring to land that was proposed to be left by will and failure to so dispose of it, said:

"We have no doubt of the power of the Court to decree a conveyance of that property after the death of the person making the proposal against all who claim under him as volunteers."

On the 22nd of January, 1918, George H. Bacchus made his will, appointing his friend, Fletcher B. Bishop, his executor and trustee under the will. He devised and bequeathed all

MACDONALD, J.

1923

Jan. 25.

STODDARD v. WILLIAMS

his real and personal property to such trustee in trust "for the use of my daughter Virginia Betty Bacchus, she to receive the same on arriving at the age of twenty-one years." Provision was also made by the testator that the income of the estate, or as much thereof as might be requisite, should be utilized for the proper maintenance, education and support of his daughter. The trustee was also empowered to encroach upon the corpus of the estate for the advancement or benefit of his daughter should the trustee, in his discretion, deem it advisable so to do. It is now contended, that this will was executed, in pursuance of the agreement referred to, between the testator and his wife, and should have remained, at any rate, as to the property in question, unaffected by any future acts on the part of the testator and thus become fully effectual, upon his death, in favour of his daughter. The testator, by a codicil to the will, on the 27th of October, 1919, shewed his good will towards the defendant by bequeathing her any automobile which he might own at his death. Then on the 1st of February, 1921, by a further codicil, he specifically devised to the defendant the property in question, describing it as property "known as 196, 12th Ave. W. Vancouver, B.C., where I now live." He was occupying the house with the parents of the defendant, as well as the defendant herself. He was then, according to her examination for discovery, engaged to her but no marriage could have been consummated, as she was still a married woman though living separate from her husband. Such codicil contained a clause as follows: "In all other respects I confirm my will as above." The will, with its codicils, was duly probated and defendant, asserting ownership to the house and lot, has since resided there. There can be no question that any rights, defendant may have acquired to the property, arose through gift from Bacchus. She was a volunteer and possessed the property subject to any prior rights of third parties.

Judgment

By her amended statement of defence, the defendant, while disputing that any binding agreement had been entered into by G. H. Bacchus, as to the disposition by will of the property in question, set up non-compliance with the provisions of the Statute of Frauds and, in any event, failure of election or com-

pensation should it be held that a valid agreement existed. Should then the contention of the plaintiffs prevail, that there was such an agreement, which formed the basis, upon which the plaintiff Stoddard, then Betty Bacchus, executed the quit claim referred to in favour of her husband. There was no formal agreement to that effect but it is asserted that there was correspondence in 1917 between the parties which constituted such an agreement. The difficulty is that any correspondence, which took place, at the time, has been lost. Oral evidence is now submitted, which it is contended fully covers the ground and describes correspondence, which should be held to form an agreement sufficient for the purpose. Did any correspondence, tending in the direction indicated, take place and, if so, was it of a nature to satisfy the essentials of a binding agreement? I readily assume that there was correspondence between the parties, at the time of the execution of the quit-claim deed, but must rely as to its contents upon oral evidence. The peculiar situation, then arises, that while the Statute of Frauds requires that any contract affecting any interest, in land, in order to support an action thereon, should be in writing signed by the party chargeable therewith, still where it is asserted that such an instrument existed, and has been lost, oral evidence is sought to be given as to its nature. A contract would not only be thus created, founded on verbal testimony, but no opportunity would be afforded of scrutinizing and considering its terms. This course is, however, permissible. Sir J. Hannen in *Sugden* v. *Lord St. Leonards* (1876), 1 P.D. 154 at p. 176, refers to a similar difficulty arising, as to the lost will, referred to in that important case, as follows:

Judgment

> "It is undoubtedly a great misfortune that, in order to arrive at a conclusion as to what the contents of the will really were, I have to rely upon secondary evidence; but I have already had occasion to remark that there is not, in my judgment, any difference in the principles of law applicable to the case of a lost will and to the case of any other lost document."

If a draft of the lost document were produced, the secondary evidence offered in its support would be greatly strengthened, but this only affects the value of the evidence. It necessitates closer scrutiny in determining the nature of the oral evidence

MACDONALD, J.

1923

Jan. 25.

STODDARD v. WILLIAMS

offered in lieu of the lost document. This precaution and the necessity at the same time for allowing such evidence, if worthy of credit, was referred to in *Sugden* v. *Lord St. Leonards, supra,* at p. 177 as follows:

"It imposes upon me, however, the duty of exercising the utmost possible caution in dealing with evidence of this character. But if, notwithstanding the disadvantage I labour under, I arrive at a clear conclusion as to any of the contents of this will, it is my duty to find as a fact that such contents were a portion of the missing document. . . . . Undoubtedly there is great danger in accepting evidence derived from the recollection of any person as to the contents of an instrument of this kind; that danger is greatly enhanced when such evidence is derived from a person deeply interested in establishing the instrument in the form in which that person alleges it existed. But, on the other hand, there would be very great danger if a Court were to lay down an arbitrary rule that in the event of a document, however important in its character, being missing, whether as the result of fraud or accident, it should be impossible to establish its contents by parol testimony. That might lead to the defeating of justice in many, if not in as many, instances as might arise from the Court acting upon such testimony."

Then in appeal in the same case, Cockburn, C.J., in referring to *Brown* v. *Brown* (1858), El. & Bl. 876; 27 L.J., Q.B. 173, as being a perfectly sound authority, and quoting Lord Campbell therein as follows (p. 220):

"Parol evidence of the contents of a lost instrument may be received as much when it is a will as if it were any other,"

concurs with such decision. He refers to the mischievous consequences that might follow a contrary ruling and adds:

Judgment

"No doubt the absence of the will is a serious fact, and one which may place the Court, which has to decide whether the parol evidence of the contents is right or wrong, in a position of considerable difficulty."

There the Court, in determining, as to the contents of the will, was assisted by the oral evidence of Miss Charlotte Sugden, whose integrity was undoubted. Though she was interested in the result, her integrity was unquestioned and not even challenged by the opposite side. Shortly after the death of her father, she gave a written statement as to the contents of the lost will. It was a wonderful exhibition of memory, but she had exceptional opportunities for acquiring a knowledge, not only of the will itself, but of the intentions of the testator as to disposing of his property. The trial judge in accepting her evidence said:

"She was the daily companion for many years of one of the greatest lawyers that ever lived."

She was his assistant and amanuensis in the preparation of the later editions of his works and was with him upon many occasions when he dealt with his testamentary papers. Having this means of knowledge, and in view of her superior ability and education, coupled with her integrity, her evidence could be the more readily accepted, even when reciting the contents of a complicated will. Farwell, L.J., in *Read* v. *Price* (1909), 101 L.T. 60 at p. 64, after referring to the cases holding that parol evidence may be given of a lost document and that in the light of such authorities "it was really hardly worth while taking the point" adds:

"The only other point is, the question whether the secondary evidence being admissible, is it sufficient? . . . . You get knowledge of the contents of the document of which you have received parol evidence as you cannot get the document itself, and it is on the construction of that document that it depends," etc.

Here then, is the evidence sufficient? Can I properly construe the instrument alleged to be created by correspondence? I am asked to find an agreement, of the nature outlined, through the acceptance of oral evidence, as to such correspondence, given by the plaintiff under commission, and corroborated in like manner by her sister, Miss Elsa Schroer and her friend, Mrs. Fred Doyle. This evidence was so taken in California and I thus had no opportunity of seeing such witnesses, considering their demeanour and forming an opinion, as to whether they could be relied upon. It was admitted, by counsel for the plaintiff, that the first letter, in connection with the proposed execution of the quit-claim deed, was only an expression of intention and did not constitute an agreement, but that further correspondence served that purpose. I was satisfied that, asuming some correspondence existed, it had been lost in the meantime. While I arrived at this conclusion, I should state that in view of the relations existing between the parties in the Fall of 1917, and the early part of 1918, the likelihood of a mother losing such valuable letters caused me to do so with some hesitation and only after careful consideration. It is worthy of comment, in this connection, that she was living in California separate from her husband. It is a fair inference, from the only letter produced, dated February 27th,

Judgment

MACDONALD, J.
1923
Jan. 25.

STODDARD v. WILLIAMS

1918, that she had been contemplating, for some considerable time, obtaining a divorce. It is even suggested that, her residence in Nevada was to assist in that direction, by establishing a domicil in that State. Her letter shewed she was not in a sympathetic mood, to say the least, towards her husband and if the relinquishment of her interest in the land in question, was in consideration of his eventually leaving it to her daughter, one would have expected that she would have been very careful to safeguard correspondence shewing such an agreement. However, her explanation, as to the loss of whatever letters were written, being accepted, I revert to a consideration of their contents. Plaintiff Stoddard, in her examination-in-chief under commission, did not outline a definite agreement between the parties of a nature sufficient to support her contention, but, in re-examination, she was practically taken over the ground again so that, in the end, if her evidence be accepted, a sufficient agreement was proved. The witnesses called to corroborate her statements possessed a remarkable memory and could recollect what occurred, in connection with property, about five years ago. It is fair to state that the transaction was out of the ordinary and anything relating to it might be imbedded in the minds of people who were bright and clever. According to their evidence, the matter was considered of sufficient importance, not only to discuss the letters received from G. H. Bacchus but the replies sent to him as well. While I feel assured, that there was correspondence, as to plaintiff Stoddard releasing her interest in the property to her husband, still, I think it unsafe, as the onus rests upon the plaintiff of establishing a binding agreement, to decide only on the evidence taken under commission, that there was a definite agreement of the nature contended and which complied with the essentials of the Statute of Frauds. There is great danger, in placing dependence upon the memory of a witness as to a transaction which occurred so many years ago, also as to witnesses being able, at this late date, to give the contents of letters, sufficient to create an agreement within the Statute of Frauds. A test of the frailty of memory became evident in the taking of the evidence under commission, when another quit-claim deed was

Judgment

produced to the plaintiff Stoddard and she admitted its execution at Las Vegas, Nevada. She apparently thought at first that this document was the quit-claim deed to her husband and then she appeared nonplussed when it became apparent that it was intended to release her interest in the property to Thos. W. Williams, the mortgagee. The origin of this document could not be explained by her and was not disclosed during the trial. It was evident that she had then no recollection of its existence nor the purpose for which it was executed. It bears the same date as the quit claim to her husband. Still, she had no recollection of having executed two quit-claim deeds affecting the property in question. Under these circumstances, I would, as I have mentioned, have hesitated to accept the evidence, taken under commission, as sufficient to shew that there was a binding contract entered into in 1917, but the evidence of Mrs. Margaret Duker afforded material support to the plaintiff's position. She was a friend of the family and a bright, intelligent woman, whose independence and integrity I have no reason whatever to doubt. She was proceeding to relate a particular conversation with G. H. Bacchus, two or three months before his death, when objection was taken to the admissibility of such evidence. In *Sugden* v. *Lord St. Leonards, supra,* at p. 229, the difference, as to evidence being admissible, as to the declarations of the testator, with reference to the execution of a lost will and his statements as to its contents, was discussed. The authorities were referred to and after overruling *Quick and Quick* v. *Quick* (1864), 3 Sw. & Tr. 442; 33 L.J., P. 146, Cockburn, C. J. states the law, on the point, to be as follows:

Judgment

"I am, therefore, of opinion that the various statements of Lord St. Leonards, whether before or after the execution of his will, are admissible to prove its contents."

So I allowed evidence of the conversation to be given and quote the important part as follows:

"There was some correspondence——? Between Betty and I.

"What did Mr. Howard say as to how this arrangement was arrived at? He said he wrote and asked Betty for a quit claim for the property and he would pay off the mortgage and would still keep the property, if she would give him a quit claim to the property he would pay off the indebtedness on it and when he had paid off the indebtedness he was to make it over to Virginia, and that was the understanding that Betty gave him the quit claim on, he said, and I said, yes, I realized it was."

MACDONALD, J.

1923

Jan. 25.

STODDARD v. WILLIAMS

While Mrs. Duker did not say that the property was to be "given" to the daughter by will and uses the expression, that it was to be "made over" to Virginia, I think the distinction is unimportant. In accepting this evidence, it supports the alleged agreement in 1917, and shews that G. H. Bacchus, at that time, considered he was bound to convey the property to his daughter, and that, in the meantime, until the making of his will, which would have rendered the agreement capable of becoming operative, he held it subject to the condition under which he had become owner. He had no right then, in strictness, after making his will, to subsequently devise the property to the defendant. He, however, did so and thus emphasized his additional good will towards her. He had sufficient other property at the time to have changed his will and not dealt specifically with the house. He might have given the defendant an amount equal in value to that of such property. According to his recent conversation with Mrs. Duker, he most probably was well aware at the time that, while it would be convenient to give such property to the defendant, so that in the event of his death, it would leave her with her parents in undisturbed possession, still, he might not be able to do so, in view of the manner in which he had acquired the property. It is now contended, that the daughter, Virginia, should, not only receive the property in question from the father, under his will, but also all other property possessed by the testator at the time of his death, except the automobile he referred to. This contention involves the question of election.

Judgment

When G. H. Bacchus executed the codicil, devising the property to the defendant, he expressly made it a portion of the original will. He then, in effect, made a new will disposing of his property. "The will and all the codicils are construed together as one testamentary disposition": Halsbury's Laws of England, Vol. 28, p. 579. Is the desire of the testator so plainly expressed then to be destroyed and the plaintiffs to succeed in depriving the defendant of the benefit sought to be bestowed by the testator? Or should the daughter not be required, in the event of thus asserting her rights, to have the property in question devised to her, to make compensation to

the defendant out of the balance of the estate for the loss that would ensue to the defendant? Would not the result sought to be attained by the plaintiffs be inconsistent with the will and amount to a decision that the intention of the testator was that the daughter should receive all the estate to the detriment of the defendant?

The doctrine of election is purely an equitable one and finds its most frequent illustration in the case of wills. Here the testator saw fit to dispose of property with respect to which he had not, as against his daughter, any right to devise to a third party. Was not the property virtually in the same position, as if the daughter had acquired a right or interest therein by the terms of a marriage settlement and then the father, having other valuable property, had ignored such interest and specifically devised the property to another person, expecting that the daughter would be satisfied with the other property she might acquire under the will? Would she not, in that event, be required to conform to the intention of the testator as far as possible, and relinquish a portion of the estate if she sought to sustain her rights under the settlement? This situation, in exercising a power of appointment by will, is referred to in *White* v. *White* (1882), 22 Ch. D. 555 at p. 559 as follows:

"It has been stated by Sir W. M. James, when Vice-Chancellor, in *Wollaston* v. *King* [(1869)], L.R. 8 Eq. 165, 174 in these terms, adopting the words of the judgment in *Whistler* v. *Webster* [(1794)], 2 Ves. 367 that no man shall claim any benefit under a will without conforming, as far as he is able, and giving effect to everything contained in it, whereby any disposition is made shewing an intention that such a thing should take place."

Judgment

In construing the original will, coupled with the codicil and applying the doctrine of election, under the circumstances, it should be borne in mind, that such doctrine is founded on the presumption of a general intention, that effect should be given to every part of the instrument, unless such general intention is rebutted by a particularly inconsistent intention apparent in the instrument. In *Brown* v. *Gregson* (1920), 89 L.J., P.C. 195 at pp. 198-9, the foundation of the doctrine of election is referred to and its application, in giving full effect to a will, as follows:

"It is a principle which the Courts apply in the exercise of an equitable

MACDONALD, J.

1923

Jan. 25.

STODDARD v. WILLIAMS

jurisdiction enabling them to secure a just distribution in substantial accordance with the general scheme of the instrument. It is not merely the language used to which the Court looks. For instance, a testator may, obviously, have failed to realize that any question could arise. But the Court will none the less hold that a beneficiary, who is given a share under the will in assets, the total amount of which depends on the inclusion of property belonging to the beneficiary himself which the testator has ineffectively sought to include, ought not to be allowed to have a share in the assets effectively disposed of, excepting on terms. He must co-operate to the extent requisite to provide the amount necessary for the division prescribed by the will either by bringing in his own property, erroneously contemplated by the testator as forming part of the assets, or by submitting to a diminution of the share, to which he is *prima facie* entitled, to an extent equivalent to the value of his own property if withheld by him from the common stock. As was said by Lord Cairns, L.C. in *Cooper* v. *Cooper* [(1874)], 44 L.J., Ch. at p. 13; L.R. 7 H.L. at p. 67, this condition arises, not as on a 'conjecture of a presumed intention, but it proceeds on a rule of equity founded upon the highest principles of equity, and as to which the Court does not occupy itself in finding out whether the rule was present or was not present to the mind of the party making the will.'"

I think that here, under all the circumstances, the clear intention of the testator was that the house and lot in which the defendant was residing should become her property. Then, if the daughter complains of such disposition and by action asserts her rights under the agreement, made between her father and mother, she should, out of the balance of the estate acquired by her, make compensation to the defendant, who would otherwise be not only deprived of the property which her father sought to give her but any substantial benefit under the will. As she has chosen, through her mother, now to assert her claim she should, but would not even at the trial, agree to compensate the defendant. Her position is unfair and inconsistent. If it were sustained, it would, in my opinion, destroy the intention of the testator.

Judgment

"The intention being assumed, the conscience of the donee is affected by the condition (though destitute of legal validity), not express but implied, annexed to the benefit proposed to him. To accept the benefit, while he declines the burthen, is to defraud the design of the donor": *Dillon* v. *Parker* (1818), 1 Swanst. 359 at p. 396.

It is, however, contended that the doctrine of election has no application in this Province, on account of the provisions of the Testator's Family Maintenance Act, B.C. Stats. 1920, Cap. 94. Whatever weight might be attached to this conten-

tion, under a different set of facts, I do not think it is a tenable position in this case. Plaintiff Stoddard, after her divorce from G. H. Bacchus, married again and the daughter, Virginia, continued to live with her and apart from her father, though, in the meantime, he was in the habit of making her an allowance of $50 a month. There was no evidence to shew, whether this was under an order of Court, or whether it simply arose through affection or sense of duty on his part. By his will, before he decided to give the house and lot to the defendant, it was apparently intended that all his property, at his death, should go to his daughter. Aside from the question, as to whether a Court would have held that the Act applied, where a daughter was living, with a mother divorced from the father, and whether she was obtaining adequate provision for her proper maintenance and support, the father did not, by the codicil, devising the property to the defendant, ignore his daughter nor seek to deprive her of a reasonable share of his property. The probate of the will shews that the property of G. H. Bacchus, in this Province, consisted of real estate $7,000, and personal estate $10,599.38. Then, in addition, there was property in the State of Virginia, which was devised to the daughter and was of the gross value of $10,000, subject to a life interest, which would not materially affect the value of this portion of the estate.

Judgment

It was submitted by the defendant that plaintiffs, even if successful in establishing an agreement, as to the disposition of the property in question by G. H. Bacchus, should, before action, or, at any rate, by the statement of claim, have offered compensation, if desirous of retaining the house and property, in lieu of other substantial benefits received under the will. Further, it was contended, that, without Fletcher P. Bishop, the trustee to the will, being added as a party to the action an order could not be made directing such compensation. Although this contention was fully discussed, no application was made to add the trustee. The plaintiffs, even during the argument, still adhere to their contention, that, if successful in establishing the agreement, as to the disposition of the property, the doctrine of election did not apply and no com-

MACDONALD, J.
1923
Jan. 25.
STODDARD v. WILLIAMS
Judgment

pensation should be ordered to be made by the plaintiff, Virginia Bacchus, in lieu of the property so specifically devised to the defendant.

The action remained in this position, when judgment was reserved. So while I think compensation should be made to defendant before her interest in the house and lot be affected by any judgment declaratory or otherwise, still this is rendered impossible through the trustee not being a party to the action. The result is, that the action must be dismissed with costs against plaintiff Stoddard without prejudice to any further action the plaintiffs may take.

Action dismissed.

MURPHY, J. (At Chambers)
1923
Jan. 11.
IN RE NIPPON KINYU SHA LTD.

IN RE NIPPON KINYU SHA LIMITED; *EX PARTE* FUJINO.

Bankruptcy—Company empowered to receive deposits of money—Power later taken away—Deposits received after power was withdrawn—Ranking of depositors—Appropriation of withdrawal payments.

Where a company is deprived of its power to receive money on deposit, in subsequent bankruptcy proceedings the depositors claiming for moneys on deposit prior to its losing such powers will be paid in full before depositors claiming for deposits made after the power was withdrawn.

In the case of a person having two demands one recognized by law, and the other arising on a matter forbidden by law, and an unappropriated payment is made to him the law will afterwards appropriate it to the demand which it acknowledges and not to the demand which it prohibits.

Statement

APPLICATION in bankruptcy, heard by MURPHY, J., at Chambers, on the 5th of January, 1923. The Company carried on a private banking business and was authorized to carry on a trust business and receive money on deposit. On the 15th of April, 1920, the Company became bankrupt and

its powers were taken away. Then, notwithstanding the receipt of money on deposit being illegal the Company continued to accept money on deposit and allowed depositors to make withdrawals. The trustee in bankruptcy divided the creditors into two classes, the first being those who were creditors on April 15th, 1920, and entitled to payment in full, and the second those whose claims arose out of deposits made after April 15th, and who were entitled to share in the surplus after the first class were paid in full. The appellant Fujino after the 15th of April withdrew more than he had to his credit on that date although by subsequent deposits he was still a creditor. The trustee listed him in the second class and this application was by way of appeal from the trustee's decision.

Statement

Hossie, for trustee.

Wilson, K.C., and *Griffin,* for the creditors.

11th January, 1923.

MURPHY, J.: In my opinion, the decision of the trustee is correct and distribution should take place in accordance with Exhibit D, called Exhibit 2 at the hearing. I have already held on the authority of *Sinclair* v. *Brougham* (1914), 83 L.J., Ch. 465 that no debt could be created by deposit of money in the bankrupt concern after April 15th, 1920. If that is correct then this application seems determined by the decision in *Wright* v. *Laing* (1824), 3 B. & C. 165. It is there laid down that where a person has two demands one recognized by law the other arising on a matter forbidden by law and an unappropriated payment is made to him the law will afterwards appropriate it to the demand which it acknowledges and not to the demand which it prohibits. There is no qualification of this principle as I read the decision in *The Mecca* (1897), 66 L.J., P. 86.

Judgment

GREGORY, J. (At Chambers)

1923

Feb. 8.

WILLIAMS v. RICHARDS.

Practice—Judgment—Sheriff a defendant — Execution — Writ of fi. fa. directed to coroner—R.S.B.C. 1911, Cap. 210.

WILLIAMS v. RICHARDS

A writ of *fieri facias* against the goods of a sheriff issued in his own county may be directed to and executed by the coroner. This practice is not affected by sections 8 or 9 of the Sheriffs Act or by the fact that there is a deputy sheriff appointed by the Crown.

APPLICATION by the defendant to set aside a writ of *fieri facias* directed to the coroner, the sheriff being interested in the action as a party defendant. On July 6th, 1917, a judgment was obtained by the plaintiffs against the defendant, who, at that time was sheriff of the County of Victoria, and has had that positon ever since. One of the plaintiffs assigned all his interest in the judgment to the other, and on February 2nd, 1923, issued a writ of *fieri facias* to the coroner, who, on the following day seized the goods and chattels at defendant's place of residence. Heard by GREGORY, J. at Chambers in Victoria, on the 8th of February, 1923.

Statement

Bullock-Webster, for the application.
N. W. Whittaker, contra.

GREGORY, J.: This application must, I think, be dismissed. Although apparently we have no direct statutory authority authorizing the writ to be directed to the coroner, the English practice has always been, so far as I have been able to learn, to direct the writ to the coroner when the sheriff is one of the litigants, and I do not think this practice is changed by virtue of the provisions of section 9 of the Sheriffs Act, which provides that it shall be directed to the coroner in the case there referred to. Boys on Coroners, 4th Ed., 61, and *Gilchrist* v. *Conger* (1854), 11 U.C.Q.B. 197, to which I have been directed by Mr. *Whittaker,* are, I think, in point. I do not think that the reference to Halsbury's Laws of England, Vol. 8, p. 248, and *Letsom* v. *Bickley* (1861), 5 M. & S. 144, are any answer

Judgment

to the case. Those references deal with the condition where there are two sheriffs, each of whom is, of course, independent of the other, but notwithstanding the alteration in position of the sheriff of Victoria since the amendment of 1918, whereby his deputy is appointed by the Crown and not by himself, I think the old practice would still prevail, for although the deputy is appointed by the Crown, he is still only a deputy of the sheriff himself and his acts must be done in the name of the sheriff, and it is only natural to think that a deputy who has for years been closely associated with his chief will be more or less influenced by his chief. In any case he has not that position of absolute independence that the coroner or another sheriff would have. Nor do I think that the provisions of section 8 of the Sheriffs Act destroy the recognized practice which enables a Court to appoint a person to act as sheriff when no sheriff or person acting under his authority shall be in readiness to act.

It is quite possible that an application might have been made under this section and an appointment made, but it is not in any sense obligatory, nor is the language, I think, of the statute clear enough to say that the practice prevailing for many years is vacated.

The application will be dismissed with costs.

Application dismissed.

GREGORY, J.

1923

Feb. 27.

CHARTERED BANK OF INDIA v. PACIFIC MARINE INSURANCE CO.

CHARTERED BANK OF INDIA v. PACIFIC MARINE INSURANCE COMPANY.

Marine insurance — Policy — Provision that deviation be covered at premium to be arranged—Deviation by ship—Loss of ship—No additional premium arranged or paid.

A policy of marine insurance was issued by the defendant to cover 318 crates of veneer on a voyage from Vancouver to Yokohama. A deviation clause provided that "such deviation or change shall be held covered at a premium to be arranged, provided due notice be given by the assured on receipt of advice of such deviation or change." The ship was partially loaded at Vancouver and then sailed for Portland to complete her cargo, intending to sail from there direct for Yokohama but was lost on Willapa Spit at the mouth of the Columbia River. Notice of deviation was not given until after the vessel was lost but neither the insured nor its agent knew of the deviation or intention to deviate until after the loss.

Held, that the notice of deviation given was within the terms of the policy and the fact that no arrangement was made fixing the additional premium did not affect the contract as the Court could fix a reasonable premium to cover the deviation. The policy therefore attached and damages were recoverable thereon.

ACTION on a policy of marine insurance to recover $17,000 for the loss of 318 crates of veneer shipped on the "Canadian Exporter," sailing from Vancouver. The policy was taken out on July 18th, 1921, and the vessel sailed from Vancouver on the 29th of July following. Two days later the ship was lost on Willapa Spit, off the mouth of the Columbia River. The policy was issued for a voyage from Vancouver to Yokohama. It appeared from the evidence that it was the Company's intention that the vessel should first call at Portland before going straight across to Yokohama. The policy provided that in case of deviation or change of voyage the deviation or change should be covered by a premium to be arranged provided due notice be given by the assured on receipt of advice of such deviation or change. No notice of deviation was given nor did the insured or its agents know of the deviation until after the vessel was lost. Tried by GREGORY, J. at Vancouver, on the 17th, 18th and 19th of May, 30th November and 1st December, 1922.

Statement

A. H. MacNeill, K.C., and *Housser*, for plaintiff.
McPhillips, K.C., for defendant.

27th February, 1923.

GREGORY, J.: This is an action upon a marine policy of insurance purporting to cover a voyage "at and from Vancouver, B.C., to Yokohama, Japan." It contains the usual clause covering "deviation" and "change of voyage." The ship was partially loaded at Vancouver, B.C., and then sailed for Portland, Oregon, to complete her loading, intending to sail from there direct to Yokohama, but was lost on her voyage to Portland, and at a position where she would not have been if she had travelled the usual course of navigation to Japan.

The evidence established what is well known to everybody on this coast who has the slightest acquaintance with marine matters, that a voyage to Portland has peculiar risks owing to the necessity of crossing the Columbia River bar, etc.

During the argument I was much impressed with Mr. *McPhillips's* contention that the policy never attached but he referred to it as one "from Vancouver," etc., whereas the policy actually reads "at and from Vancouver," etc. But in view of the decision of *Brown* v. *Tayleur* (1835), 4 A. & E. 241, I feel that I must hold that the policy attached. That was a case much like the present. The policy read "at and from her port of loading," etc. She took in part of her cargo at K. then sailed to B. seven miles distant, on the same bay of the sea, there completed her cargo, and returned to K. to receive provisions, sailed from there and was lost on the voyage. *Held*, the insurers were not liable as there had been a deviation. The judges all stated that "port of loading" meant one place and not two or more, and Patterson, J. says (p. 248): "When she had once begun to take her cargo at Cocagne, that was her place of lading."

Judgment

The same judge says at p. 249, there was a "deviation . . . . the policy would attach when the vessel began to load." The report does not state whether there was a deviation clause in the policy or not, but I assume there was not. Apart from this, and other cases to which I will refer later, I would have thought it quite inaccurate to speak of the voyage to Portland

GREGORY, J.

1923

Feb. 27.

CHARTERED BANK OF INDIA v. PACIFIC MARINE INSURANCE CO.

as a "deviation," for I do not see how it is possible to call that a "deviation" which was always intended and the language of the Court in the earlier case of *Wooldridge* v. *Boydell* (1778), 1 Dougl. 16 *a* gives much support to this view.

During the trial there was a great deal of discussion and some evidence of a usage in the past of Canadian Government Merchant Marine ships to proceed from Vancouver on trans-Pacific voyages by way of various ports, while I do not think in the result it affects this case, I may with propriety refer to it.

The usage whatever it was, could hardly affect the voyage in question, as this service was only inaugurated in July, 1921, and the vessel was lost on the second trip after inauguration and on the first trip where it had been attempted to make Portland.

The evidence too, such as it was, only referred to ships when they were unable to obtain a full cargo at one port. It would be idle, I think, to attempt to shew that the usual course of navigation from Vancouver to Yokohama would take them to Seattle, Portland, Ocean Falls or Prince Rupert, etc. The sole object of going to any of these ports would be to complete their load if they had not a full one.

Judgment

Although the ship had not proceeded from Vancouver to Japan in a direct course according to the usual course of navigation, and her owners always intended her to go to Portland, her *termini* remained the same, and the intention to deviate does not prevent the policy from attaching. In *Kewley* v. *Ryan* (1794), 2 H. Bl. 343, the ship sailed with the full intention of deviating but it was held that the intention to deviate, not effected, would not vitiate the policy. Here the deviation actually took place but it is covered by the deviation clause which was evidently absent in that case. The case also explains the cases of *Wooldridge* v. *Boydell, supra,* and *Way* v. *Modigliani* (1787), 2 Term Rep. 30, upon which Mr. *McPhillips* so strongly relied.

It is argued that even if the policy attached it was rightly declared void for non-disclosure of the intention to go to Portland, and several cases were referred to and the first reference is to the language of Lord Halsbury in *Blackburn, Low & Co.*

v. *Vigors* (1887), 12 App. Cas. 531 at p. 537, where he says:

"'The insurer is entitled to assume as the basis of the contract between him and the assured, that the latter will communicate to him every material fact of which the assured has, or in the ordinary course of business ought to have knowledge.'"

And Lord Watson to the same effect at p. 540, and he illustrates the application of this rule by the cases of *Wooldridge* v. *Boydell,* already referred to, *Ionides* v. *Pender* (1874), L.R. 9 Q.B. 531, and *Middlewood* v. *Blakes* (1797), 7 Term Rep. 162, but a consideration of these cases shews them to be much stronger than the present one. In the first the policy read, "at and from Maryland to Cadiz." The ship never intended to go to Cadiz. Lord Mansfield says at p. 18: "That was never the voyage intended, and consequently is not what the underwriters meant to insure." Such a policy, he says, on the face of it "purports to be a direct voyage to Cadiz." The case was not decided upon the question of non-disclosure, but upon the ground that the voyage insured was not the voyage undertaken, the *terminus ad quem* was different.

In the second case there was excessive valuation of the goods insured and the jury found that it should have been disclosed.

In the last case, *Middlewood* v. *Blakes,* the owner had taken away from the master his discretion as to which of two courses he should take and it was held that that circumstance should have been disclosed to the insurer, and Ashhurst, J., at p. 167, says that had the disclosure been made a larger premium might have been demanded. In the present case that larger premium is provided for by the deviation clause.

Judgment

If non-disclosure of the intention to deviate cancelled the liability on the policy, the decision in *Kewley* v. *Ryan, supra,* would have been just the reverse of what it was.

The policy sued on provides that in case of deviation or change of voyage, "such deviation or change shall be held covered at a premium to be arranged, provided due notice be given by the assured on receipt of advice of such deviation or change."

There was great delay in giving the notice of deviation, in fact it was not given until some weeks after the policy was

GREGORY, J.

1923

Feb. 27.

CHARTERED BANK OF INDIA *v.* PACIFIC MARINE INSURANCE CO.

cancelled, but neither the plaintiff nor its agent who effected the insurance knew of the deviation or intention to deviate until after the vessel was lost.

It is urged by the defendant that due notice was not given and in any case no arrangement was made fixing the additional premium, and the Court cannot do it now. In support of this contention, I was referred to the language of Lord Mansfield in *Hotham* v. *The East India Company* (1779), 1 Dougl. 272 at p. 277, where he says:

"A court of equity cannot make an agreement for the parties; it can only explain what their true meaning was; and that is also the duty of a court of law."

Reference was also made to *Godson* v. *Burns & Co.* (1919), 58 S.C.R. 404, where it was held that a provision in a lease for a renewal "upon such terms as shall be mutually agreed upon" is not enforceable—no matter how unreasonable either of the parties may be. The Court would not make the new lease. That, I think, is a very different case from the present one, for there would be many terms to settle. While here the sole thing to be done is to fix a reasonable premium to cover the increased risk. In the *Hotham* v. *East India Company* case, Lord Mansfield says that,—

"Charterparty is an old instrument, informal, and, by the introduction of different clauses, at different times, inaccurate and sometimes contradictory. Like all mercantile contracts, it ought to have a liberal interpretation."

Judgment

This language is, I think, equally applicable to a marine-insurance policy.

Mr. *MacNeill* on the other hand, cited *Greenock Steamship Company* v. *Maritime Insurance Company* (1903), 1 K.B. 367, and *Hyderabad (Deccan)* v. *Willoughby Company* (1899), 2 Q.B. 530. In both of these cases the premium in case of deviation was as here "to be hereafter arranged" and Mr. Justice Bigham, who tried both cases in the Commercial Court, held that the Court could fix the premiums if the parties could not agree and in the first case, at pp. 374-5, he says:

"But what is to happen if the breach is not discovered until a loss has occurred? I think even in that case the clause still holds good, and the only question would be, what is a reasonable premium for the added risk?"

In neither of these cases did the policy sued on contain the

"due notice" clause, but in *Mentz Decker & Co.* v. *Maritime Insurance Company* (1910), 1 K.B. 132, there was the same "due notice" clause as here, which Hamilton J., says was added to policies since the decision in the *Greenock* case, and he follows that decision and says, at p. 135:

"The premium is to be calculated as it would have been calculated by the parties, if they had known of the deviation at the time that it happened."

In that case there were two deviations—the plaintiffs gave notice of the deviation when they learned of it, which was two months after the vessel was lost. Later they received notice of the first deviation, but thinking it of no importance, did not give notice of it "till many months later." At p. 135 of the report, Hamilton, J., says:

"I do not think the words 'due notice' can be read as meaning that no notice is to be considered as 'due' unless it is given at a time when the underwriter can still protect himself by reinsurance. I think the clause must be read as an agreement to hold the assured covered subject to a proviso which is satisfied by the giving of such a notice as the assured could give after advice of the deviation, and that, there being nothing practicable to be done on the receipt of the notice under the circumstances of the present case, the notice was given sufficiently early at the time when it was in fact given."

Judgment

In view of these cases I feel that I must hold that due notice of the deviation was given and that there is no difficulty about fixing the amount of the additional premium for the deviation. It is not a case of the Court making a contract for the parties, but simply one of ascertaining the amount of a reasonable additional premium, and any marine-insurance agent can tell in a few minutes what that should be.

There must be judgment for the plaintiff with costs. As to the damages, I think, it was agreed that there should be a reference in case the plaintiff succeeded, but there will be liberty to apply with reference to that.

Judgment for plaintiff.

MACDONALD, C.J.A. (At Chambers)

1923

Feb. 26.

CANADA LAW BOOK CO. v. ST. JOHN

CANADA LAW BOOK COMPANY, LIMITED v. ST. JOHN.

Practice—Appeal from County Court—Order for security for costs—Not furnished—Application in Chambers to strike out appeal—R.S.B.C. 1911, Cap. 51, Sec. 10.

On application to a judge of the Court of Appeal in Chambers on February 26th, 1923, to strike out an appeal on the ground that security for costs had not been furnished as ordered by the County Court judge from whom the appeal was taken, it was ordered that the security for costs be furnished on or before the 1st of March, 1923, and that in default a motion be made to the Court of Appeal at its next sittings to strike out the appeal.

Langan v. *Simpson* (1919), 27 B.C. 504 applied.

Statement

APPLICATION to strike out an appeal on the ground that an order of GRANT, Co. J., for security for costs of the appeal from the judgment in the action had not been furnished. Heard by MACDONALD, C.J.A., at Chambers in Victoria on the 26th of February, 1923.

St. John, in person, for the application.
Langley, contra.

Judgment

MACDONALD, C.J.A.: This is an appeal over which a judge of the Court of Appeal in Chambers has jurisdiction under section 10 of the Court of Appeal Act as applied in *Langan* v. *Simpson* (1919), 27 B.C. 504. The order will be that security for costs be furnished in accordance with the order of the Court below on or before the 1st of March, 1923, and that in default the respondent move at the next sittings of the Court of Appeal to strike out the appeal.

Order accordingly.

REX v. ROCK.

CAYLEY, CO. J.

1923

Feb. 3.

REX v. ROCK

Criminal law—Sale of beer—"Distributing"—Whether included in word "sale"—B.C. Stats. 1921 (Second Session), Cap. 28, Sec. 2.

The members of a club on purchasing beer from a Government vendor may store it at the club and the club is entitled to charge a fee for storage and service.

When the member of a club receives a token from the secretary for which there is no evidence of his having paid anything, and on presentation of the token to a servant of the club he receives a bottle of beer:—

Held, that the servant is not "distributing" beer within the meaning of section 2 of the Government Liquor Act Amendment Act, 1921.

APPEAL from a conviction by the police magistrate at Vancouver for selling beer. The accused was a servant of a Club known as The Great War Veterans' Association, a body incorporated centrally at Ottawa under a Dominion charter, and at Vancouver holding locally a charter from the parent body. The facts are that accused was behind a counter, back of which were some 60 open receptacles, in each of which were bottles of beer. Members received tokens from the secretary, and when a member handed accused a token he gave the member a bottle of beer and accounted for the tokens to the secretary at the end of each day. There was no mention of members paying anything for the tokens. Argued before CAYLEY, Co. J., at Vancouver, on the 4th of January, 1923. Statement

Ian A. Mackenzie, for appellant.
W. M. McKay, for respondent.

3rd February, 1923.

CAYLEY, Co. J.: This is an appeal from a conviction by the police magistrate of Vancouver for selling liquor (beer in this case), the accused being a servant of a Club known as The Great War Veterans' Association, a body incorporated centrally at Ottawa under a Dominion charter, but locally holding only a charter from the parent body. Counsel for the Crown admitted that this was a Club in good standing and repute but the system adopted by the Club, in allowing its servant to wait Judgment

CAYLEY, CO. J.

1923

Feb. 3.

REX v. ROCK

on the Club members with intoxicants was, in the opinion of the Crown, contrary to the provisions of Cap. 28, B.C. Stats. 1921 (Second Session) Sec. 2, inasmuch as that to bring a bottle of beer to a member was "distributing" beer, "distributing" being included in the word "sale" or "sell" in the section mentioned.

The word "distributing" ordinarily means to divide or allot among a number and is used in this section as an extension of the word "sale." The evidence was that of the police who, on the occasion in question, went to the Club and took notes of what they saw. The evidence of police constable Ward was as follows:

"On Monday, June 5th, 1922, on instructions from Inspector Sutherland, we got a search warrant for The Great War Veterans' Association and (1) entered the premises at 11 p.m. with police constable Reilly. There were, say, 8 men, members, sitting at tables drinking beer. Accused was behind a counter. There were in a room at the back about 60 open receptacles containing beer in bottles. There was a desk at which accused receives 'tokens' for a bottle of beer. A man came up to the counter who knew Reilly. He said: 'Reilly have a bottle of beer with me,' and he threw down 2 tokens, each representing 20 cents.

"Rock told me and Reilly that when a member came up with a token he was given a bottle of beer in exchange for the token. Some receptacles are numbered and some have only names and some without names or numbers. There was beer in each kind.

"The procedure was when a token was put on the counter the members would receive a bottle of beer which had come from one of the receptacles and the tokens would be accounted for to the secretary at the end of the day. All this happened in the City of Vancouver.

Judgment

"Cross-examined. None received tokens but *bona fide* members. This is not a proprietary club. It is a *bona fide* club, the central organization is incorporated at Ottawa, but the local branches only operate under a charter from the central organization."

There is nothing in the Government Liquor Act which forbids members of a Club from purchasing beer, individually, from the Government vendor, nor from storing it, individually on the Club premises. The Act says nothing about storing it in any particular manner. Difficulties no doubt arise as to the various ways of dealing with liquor so stored so as to comply with the Act, and it was not suggested that this Club was trying to evade the Act. The questions involved in the case seem to be two in number, one, as to whether a Club member has to

wait on himself; the other, as to whether the Club is entitled to charge a fee for storage and service.

Taking these questions in order, suppose a member has a dozen bottles of beer, purchased from the Government vendor by himself and delivered at the Club to be stored in his name and under his permit, has he a right to the service of the Club servants in bringing his liquor to him, or has he personally to go and get his beer out of the cellar or wherever else it may be stored, locker or otherwise? It is not usual for Club members to wait on themselves and if they pay for service why should they not have it? In this case, one of the Club servants waits behind a counter and takes orders. A member hands him a check or slip shewing that he has beer on the premises subject to his call and the Club servant goes and fetches him his beer. If it were an umbrella, the Club servant on receiving the check would hand the umbrella to the member and no one would call that "distributing" an umbrella, much less selling it. If I sit at a table and call a waiter and hand him a check for a bottle of beer, is the waiter not to fetch it? Or is it the counter that makes the difference? I think the member is entitled to have his beer brought him by a waiter or handed to him over a counter.

Now the second question is, as to whether the Club is entitled to charge a fee for storage and service. Why not? One Club may charge 5 cents, another 20 cents. There is no difference. In one Club the members may store their beer in a common store-room or cellar; in another it may be stored in a locked locker. Where the Act is silent on the subject it is difficult to say that the one method is any less a compliance with the Act than the other. One Club may charge 5 cents for storage and service; another may charge 20 cents. Who is to interfere with a Club's privileges in that respect? I do not want to lay down any general propositions about beer in Clubs. The whole question is involved in difficulties. If, for instance, these "tokens" were sold to members and the Club itself bought the beer in the names of the members, all sorts of evasions of the Act might occur.

Judgment

In this individual case, the police saw nothing but the pre-

CAYLEY, CO. J.

1923

Feb. 3.

REX v. ROCK

sentation of a check and the delivery of a bottle of beer to the member. They sought an explanation and were told by the accused that the members receive their "tokens" from the Secretary; that he himself handled no money and that "when a member came up with a token he was given a bottle of beer in exchange for the token." This, counsel for the Crown argues, is "distributing" beer and "distributing" means "selling."

I think it depends upon whose beer the members receives in exchange for his "token." The prosecution gave no evidence on this point. If it is the member's own beer, then the accused was simply waiting on him, not distributing. If it were beer bought by the Club itself under camouflage of members' names, then it was "distributing."

Judgment

If the Club is not breaking the law, then the accused is not; unless his action in waiting on members who call for their beer on presenting their "title deeds" (if I may use the expression), is in itself a breach of the law. But this would mean a finding that Club servants are not (in such cases) to wait on the members. I do not think I can make any such finding.

The appeal will, therefore, be allowed and the conviction set aside.

Appeal allowed.

CALLOW v. HICK: LIQUOR CONTROL BOARD GARNISHEE.

COURT OF APPEAL

1923

March 6.

CALLOW v. HICK

Garnishment—Debtor a servant of 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 plaintiff having obtained judgment against the defendant, who was an employee of the Liquor Control Board, obtained an order for the attachment of his salary under the Attachment of Debts Act. An application to set aside the order was dismissed.

Held, on appeal, reversing the decision of MCDONALD, J., that the Liquor Control Board is not a corporate body either actually or by implication, it being merely an agent of the Government in the carrying out of the Government Liquor Act.

APPEAL by the garnishee from the decision of MCDONALD, J., of the 9th of November, 1922 (reported in 31 B.C. 399), dismissing an application to discharge an attachment order made by MORRISON, J. on the 25th of October, 1922. The plaintiff recovered judgment for $1,488.50 from an employee of the Liquor Control Board and then obtained an order attaching all debts from the Liquor Control Board to the defendant. The appeal was argued at Victoria on the 30th and 31st of January, 1923, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Statement

Carter, D.A.-G., for appellant: The Board is not a "person" within the meaning of the Act, it being merely a department of the Government and not attachable. The defendant is a public servant. For these reasons the order should be set aside. That the Board is not a "person" see Halsbury's Laws of England, Vol. 8, p. 315. *The Conservators of the River Tone* v. *Ash* (1829), 10 B. & C. 349; *Ex parte The Newport Marsh Trustees* (1848), 16 Sim. 346. Garnishee clauses do not extend to the Crown: see *The Queen* v. *Benson* (1858), 2 Pr. 350; Robertson's Civil Proceedings by and against the Crown, p. 611; *In re Mirams* (1891), 1 Q.B. 594.

Argument

P. R. Leighton, for respondent: This man is not a civil

COURT OF APPEAL

1923

March 6.

CALLOW v. HICK

servant. The power to sue and be sued is an incident of incorporation. This is a corporation which can sue and be sued whether it expressly states so or not. The Board, under section 109 of the Act, makes regulations, but this does not make the Board the Crown: see Dicey's Law of the Constitution, 8th Ed., 321; *In re Wood's Estate* (1886), 31 Ch. D. 607. The Board's powers are exercised by authority from Parliament and is not entitled to the prerogative of the Crown: see *Hodge* v. *Reginam* (1883), 9 App. Cas. 117 at p. 132; *Graham* v. *Commissioners of His Majesty's Works, &c.* (1901), 85 L.T. 96 at p. 98; *Rex* v. *Special Commissioners of Income Tax—Ex parte Dr. Barnardo's Homes* (1919), 35 T.L.R. 684 at p. 686; *Cannon Brewery Company* v. *Central Control Board (Liquor Traffic)* (1918), 2 Ch. 101 at p. 122. The Legislature has no control over salaries. Hick is an employee of the Board and is not exempt on the ground of public policy: see *Davis* v. *Duke of Marlborough* (1818), 1 Swanst. 74; *Picton* v. *Cullen* (1900), 2 I.R. 612; *Hollinshead* v. *Hazleton* (1916), 1 A.C. 428; *Hall* v. *Pritchett* (1877), 3 Q.B.D. 215. In any case the rule only applies to officers of importance for the purpose of maintaining their dignity: see Halsbury's Laws of England, Vol. 4, p. 400; *In re Combined Weighing and Advertising Machine Co.* (1899), 43 Ch. D. 99.

Argument

Carter, in reply, referred to *Central Bank* v. *Ellis* (1893), 20 A.R. 364 at p. 369.

Cur. adv. vult.

6th March, 1923.

MACDONALD, C.J.A.

MACDONALD, C.J.A: It was argued on behalf of the Board that it was not a corporate body either actually or by implication, and I think this argument must prevail.

In my opinion it is merely the agent of the Government in the carrying out of a Government Liquor Act. This being so, it is unnecessary to inquire whether or not the salary of the judgment debtor was subject to any other species of execution. That is a question which I do not decide, since it is unnecessary to do so.

The appeal should be allowed.

MARTIN, J.A.: This appeal, I think should be allowed, and for the present, pending an opportunity to give my reasons in a more extended form, I shall content myself by saying briefly, that the Liquor Control Board is not a corporation and that the cases which were relied upon below to support that view, clearly shew the contrary when carefully examined.

While the Board is not one of the ordinary departments of the Government, it is, nevertheless, a part of the public service conducted by the Government under the direct supervision and control of the Lieutenant-Governor in Council, who have the overriding powers of, *e.g.*, appointing and dismissing members of the Board and making general regulations for the purpose of "carrying into effect the provisions of this Act." And I am further of the opinion that the Attachment of Debts Act does not apply to servants of the Crown.

MARTIN, J.A.

GALLIHER, J.A.: This is an appeal from an order of McDONALD, J., refusing an application to set aside a garnishee order *nisi* granted by MORRISON, J., on October 25th, 1922.

Several grounds were argued before us, but if I am right in my view that the Liquor Control Board is not a corporation (which is the first ground of appeal taken) then it is not within the purview of the Attachment of Debts Act, R.S.B.C. 1911, Cap. 14, and the other grounds need not be considered.

Mr. *Carter,* counsel for the Liquor Board, admits that though not created a corporation by express words, if they can be held to be so by implication, they are nevertheless a corporation, citing Halsbury's Laws of England, Vol. 8, p. 320, pp. 720, *Ex parte The Newport Marsh Trustees* (1848), 16 Sim. 346, and *The Conservators of the River Tone* v. *Ash* (1829), 10 B. & C. 349.

GALLIHER, J.A.

In the light of the decisions in those cases, and what is admitted by counsel, we have to examine our own Government Liquor Act, B.C. Stats. 1921, Cap. 30, and the powers therein conferred on the Board.

The first thing to be noted is the title of the Act, "An Act to provide for Government Control and Sale of Alcoholic Liquors." In section 2, the word "Government" is defined as

COURT OF APPEAL

1923

March 6.

CALLOW v. HICK

"His Majesty in right of the Province, acting by the Lieutenant-Governor in Council." Section 3, provides that the Government shall establish and maintain throughout the Province, stores to be known as Government liquor stores, for the sale of liquor and shall from time to time fix the price at which liquor shall be sold. Section 4: The administration of the Act, including control, management and supervision vested in the Liquor Control Board. Section 5: Sales of liquor at the stores to be conducted by a person called a vendor appointed under the Act (by the Board, with the approval of the Lieutenant-Governor in Council: section 96 (1)).

Turning to the sections of the Act dealing with the Liquor Control Board. Section 92: The Board consists of 3 members appointed by the Lieutenant-Governor in Council. Section 93: Tenure of office during good behaviour. Section 94: Purchasing agent appointed by Lieutenant-Governor in Council. Section 95: Purchasing agent to purchase all liquor in name of and on behalf of Government, and all property real and personal required to be purchased for the purposes of this Act. Section 98 (*c.*): Board shall provide for the construction and acquisition or leasing in the name and on behalf of the Government of premises for warehouse and store premises. See also sections 105 and 107, and on through the Act.

GALLIHER, J.A.

As I interpret the Act the Board is merely an administrative body appointed by the Government with certain duties and powers entrusted to them for the better carrying out of the Act, and are in no sense a body corporate, either by express words or by implication, and do not come within the principle of either of the above-cited cases, and are not within the term "person" in the Attachment of Debts Act, or the definition of person in section 26 (19) of the Interpretation Act.

I have examined the cases of *Cannon Brewery Company* v. *Central Control Board (Liquor Traffic)* (1918), 2 Ch. 101, and *Rex* v. *Special Commissioners of Income Tax—Ex parte Dr. Barnardo's Homes* (1919), 35 T.L.R. 684, but I do not think either of these cases affect the point now under consideration. In the former, Swinfen-Eady, M.R., says at p. 124:

"The Board may sue and be sued [this power was given them in the regulation constituting the Board], and has an official seal which is to

be officially and judicially noticed. The fact that the Board is not incorporated does not make any difference in considering whether the Board is to be considered as the Crown."

The question there was as to compensation for property taken by the Board from the plaintiff. In the latter case a rule *nisi* for a writ of *mandamus* had issued against the special Commissioners of Income Tax and the Commissioners shewed cause why the writ should not be made absolute. The question there was whether certain income tax paid on income could be recovered back as being exempt, otherwise no question arose as to the right to make the rule absolute.

GALLIHER, J.A.

Mr. *Leighton* made a very carefully reasoned argument on the other branches of the appeal, and there may be much to say as to some of his contentions, but finding as I do on the first branch it is unnecessary for me to deal with them here.

The appeal should be allowed and the orders of McDONALD, J., and MORRISON, J. vacated.

MCPHILLIPS, J.A.

EBERTS, J.A.

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

Appeal allowed.

Solicitor for appellant: *J. W. Dixie.*

Solicitors for respondent: *Tait & Marchant.*

MARTIN, LO. J.A.

1923

Feb. 27.

ATTORNEY-GENERAL FOR BRITISH COLUMBIA *v.* S.S. "BERMUDA"

ATTORNEY-GENERAL FOR BRITISH COLUMBIA v. S.S. "BERMUDA."

Shipping—Maritime lien for damage done by ship—Proceedings for enforcement—Delay in proceedings—Bona fide purchasers of ship without notice—Reasonable diligence under circumstances in taking proceedings.

It is a general principle that "a maritime lien for damage done by a ship attaches that instant upon the vessel doing it, and, notwithstanding any change of possession, travels with her into the hands of a *bona fide* purchaser though without notice, and being afterwards perfected by proceedings *in rem*, relates back to the moment when it first attached; such proceedings, however, to be effectual, must be taken with reasonable diligence, and followed up in good faith" (rule approved, as stated in Maclachlan on Merchant Shipping, 5th Ed., 334).

The manifestation of the intention to retain and enforce the lien must depend upon the circumstances of the case and is not susceptible of any definite rule. Considerations of expense and difficulty should enter into the question of diligence.

In the circumstances in question it was held that there had not been a lack of reasonable diligence in the proceedings and that the delay complained of by innocent purchasers of the ship did not prevent the enforcement of the maritime lien for damage.

Statement

ACTION for damages caused to a Government bridge by the defendant ship. Tried by MARTIN, Lo. J.A. at Vancouver on the 13th of February, 1923.

Killam, for plaintiff.
Reid, K.C., for defendant.

27th February, 1923.

Judgment

MARTIN, Lo. J.A.: This is a suit to recover damages caused to the Government bridge at Sea Island, Fraser River, to answer which the defendant ship has been arrested. The damage was done on October 8th, 1919, and it is established that it was negligently caused by said ship and that it amounted to $505.38: the amount of the final bill for repairs was received on March 16th, 1920, and the writ issued on November 19th, 1921, but it was not served till August 11th last. About two months after the receipt of said final bill for repairs, *viz.*, on

May 15th, 1920, the present owners, the Whalen Pulp and Paper Mills Co., bought the ship from the person who was her owner at the time she did the damage, and in entire ignorance of any claim against her on that head, which it did not hear of till August, 1922, after the writ was served. The reason assigned for the delay in serving the writ is that the vessel was employed in middle northern waters (Swanson Bay) and on the west coast of Vancouver Island (Port Alice) where she could not be readily found for service and only at heavy expense, and she only came once to Vancouver City during that time and unknown to the plaintiff, for boiler inspection: the log contained no reference to the accident.

It is submitted that the maritime lien for the damage should not be allowed to be enforced as against the innocent purchaser after this delay. The general and well-known principle, extracted chiefly from the judgment of the Privy Council in *The Europa* (1863), Br. & Lush. 89, which defined the decision of the same tribunal in *Harmer* v. *Bell. The Bold Buccleugh* (1851), 7 Moore, P.C. 267, is succinctly and correctly stated in Maclachlan on Merchant Shipping, 5th Ed., 334, thus:

"A maritime lien for damage done by a ship attaches that instant upon the vessel doing it, and, notwithstanding any change of possession, travels with her into the hands of a *bona fide* purchaser though without notice, and being afterwards perfected by proceedings *in rem*, relates back to the moment when it first attached; such proceedings, however, to be effectual, must be taken with reasonable diligence, and followed up in good faith."

Judgment

And see Mayers's Admiralty Law and Practice, pp. 64 and 210, where the subject is given later and detailed consideration in that most useful and reliable work. To the cases cited in the notes by Maclachlan I add the following from our Canadian Courts: *The Hercyna* (1849), 1 Stuart 274; *The Haidee* (1860), 2 Stuart 25; and *Kennedy* v. *The "Surrey"* (1905), 11 B.C. 499; 25 W.L.R. 550, in the last of which I considered the question at p. 508, and held that the delay in suing for two years, less one month, was not unreasonable, and there the purchase of the ship did not take place till one year and eight months after the accident, whereas here it occurred only seven months thereafter. I agree with what was said in *The Hercyna,* that the manifestation of the intention to retain and enforce the lien "must depend upon the circumstances of the

MARTIN, LO. J.A.

1923

Feb. 27.

ATTORNEY-GENERAL FOR BRITISH COLUMBIA *v.* S.S. "BERMUDA"

case and is not susceptible of any definite rule"; and it was said in *The Europa,* p. 93, that "considerations of expense and difficulty" should enter into the question of diligence. In the circumstances before me I am of opinion that there has not been a lack of reasonable diligence, and the observation I made in *The "Surrey"* is also applicable to this case, *viz.*:

"There is nothing before me to shew that the owners in any way whatever have been or will be prejudiced by this not very long delay."

It is only desirable to add with respect to that case, that the opinion I therein expressed to the effect that the statutory provision in the Municipal Act limiting the time for bringing actions does not apply to suits *in rem* in Admiralty, has been confirmed by the subsequent decision of the Court of Appeal in *The Burns* (1907), P. 137; 76 L.J., P. 41.

Judgment

It follows that judgment will be entered in favour of the plaintiff.

Judgment for plaintiff.

MCDONALD, J.

FERRIS v. HARDY.

1923

Feb. 24.

Mortgage—Defendant agent of mortgagee—Agent enters mortgaged lands—Removes structures therefrom—Trespass.

FERRIS *v.* HARDY

The plaintiff owned certain land which was mortgaged and upon which were two greenhouses and a boiler. The defendant, as agent of the mortgagee, entered upon the lands, removed the greenhouses and boiler and sold them. In subsequent foreclosure proceedings credit was given the mortgagor (plaintiff) for the proceeds of the sale. In an action for damages for trespass:—

Held, that the plaintiff was entitled to recover as neither the mortgagee nor his agent had any right or authority to make such removal and sale.

Statement

ACTION for damages for trespass. The facts are set out in the head-note and reasons for judgment. Tried by MCDONALD, J. at Vancouver on the 25th of January, 1923.

P. J. McIntyre, for plaintiff.

Maclean, K.C., and *Pearse,* for defendant.

24th February, 1923. MCDONALD, J.

1923

Feb. 24.

FERRIS v. HARDY

McDONALD, J.: The plaintiff, as mortgagor to one Birch of some two acres of land near Courtenay, on Vancouver Island, sues the defendant for damages for trespass, alleging that the defendant unlawfully in the month of July, 1919, entered upon and removed from plaintiff's said lands two greenhouses and one boiler of the value of $2,250. In his pleadings, the defendant sets up that if he did the acts complained of he did so lawfully as the agent of the plaintiff or of the said Birch. At the trial for the first time the defendant took the position that, in July, 1919, acting as agent for the mortgagee Birch, inasmuch as the security was scanty, he entered upon the lands and removed and sold the greenhouses and boiler in question for the best price obtainable, *viz.*, the sum of $200. He states further that the greenhouses were becoming dilapidated and that it was for the benefit of both mortgagor and mortgagee that they were disposed of. An attempt was made to shew that the defendant was also acting for the plaintiff in making the said sale, but that attempt failed as no authority was shewn either from the plaintiff or his wife to make any such sale. On the 30th of June, 1920, the mortgagee commenced action against the present plaintiff for foreclosure and obtained his final order of foreclosure on the 15th of February, 1922, the total amount then due, under the mortgage, being $2,464.52. In the taking of the accounts in the foreclosure proceedings, Birch gave credit for the above-mentioned sum of $200 and Ferris, the present plaintiff, had notice of all the proceedings taken in connection with the foreclosure action, the account shewing the receipt of $200 from Hardy but not shewing that Hardy was acting as agent for Birch in realizing the said sum.

Judgment

The plaintiff contends that the defendant was a trespasser inasmuch as if he acted as the agent for the mortgagee he was precluded from taking any proceedings for sale by the terms of the War Relief Act, B.C. Stats. 1916, Cap. 74, and amendments thereto. The defendant contends that the plaintiff waived the benefit of this statute by not having raised the present issues when the accounts were being taken in the foreclosure action. With this contention I cannot agree, if for no other reason than that, pending the foreclosure proceedings, the

MCDONALD, J.

1923

Feb. 24.

FERRIS v. HARDY

defendant Hardy was very careful not to disclose to the plaintiff Ferris in what capacity, or by what right, he had made the sale in question.

Apart from the terms of the War Relief Act, I am of opinion that the defendant acted wrongfully, even if acting as agent for the mortgagee, in removing the greenhouses and boiler in question and selling them. The mortgagee has no such right. The defendant relies upon the decision of Boyd, C. in *Brethour* v. *Brooke* (1893), 23 Ont. 658. That was a case of giving a lease with a right to the lessee to cut timber. The same learned judge in *Stewart* v. *Rowsom* (1892), 22 Ont. 533 decided that a mortgagee is not entitled to sell timber apart from the mortgaged land upon which it is growing. As the learned Chancellor put it at p. 536:

Judgment

"The land may be divided vertically and parcels of it sold; but not horizontally."

See also *In re Yates* (1888), 38 Ch. D. 112; *Cholmeley* v. *Paxton* (1825), 3 Bing. 207; Falconbridge on Mortgages, 669.

It follows that, in my opinion, the plaintiff is entitled to succeed.

As to the damages, the evidence is very conflicting, estimates ranging from $50 to $2,250 having been given by various witnesses. The best conclusion I have been able to reach is that $1,000 would be a fair amount to allow, and there will be judgment for the plaintiff accordingly.

Judgment for plaintiff.

STILLWATER LUMBER & SHINGLE COMPANY LIMITED v. CANADA LUMBER & TIMBER COMPANY LIMITED.

COURT OF APPEAL

1923

March 6.

STILLWATER LUMBER & SHINGLE CO. v. CANADA LUMBER & TIMBER CO.

Bankruptcy—Action by trustee of insolvent estate—Permission of inspector—General permission—Must proceed under Bankruptcy rule 120—Can. Stats. 1919, Cap. 36, Secs. 20 (2) and 66.

A trustee in bankruptcy obtained written permission of the inspector under section 20 (1) (c) of the Bankruptcy Act to "bring, institute, or defend any action or other legal proceeding relating to the property of the debtor." He then brought action in the Supreme Court to set aside a transaction between the bankrupt and defendant whereby the defendant received $1,000, and to recover same for the benefit of the estate. The action was dismissed.

Held, on appeal, affirming the decision of MACDONALD, J., that as the written consent of the inspector does not in terms authorize him to bring an action in the Supreme Court he should have taken proceedings in the summary manner provided for in the Bankruptcy Act and Rules.

APPEAL by plaintiff from the decision of MACDONALD, J. of the 6th of December, 1922, dismissing an action to recover $1,149, being moneys advanced to the defendant by the Stillwater Lumber & Shingle Company Limited on or about the 10th of October, 1919. The Stillwater Company sold out all its assets for $10,000, and after paying some debts the balance amounting to $8,900, was distributed amongst the shareholders. In the distribution, the defendant Company as a shareholder received said sum of $1149. The Stillwater Company was adjudged bankrupt and a receiving order made against it in September, 1922, when R. W. Hunter was appointed receiver and authorized trustee, the debts of the Company amounting to $19,113.71. The inspector gave the trustee written consent to bring the action on the 22nd of September, 1922, in the following terms: "I consent for you to bring, institute, or take such legal proceedings as may be necessary." The trustee then brought this action in the Supreme Court. The action was dismissed on the ground that the trustee should have proceeded under rule 120 of the Bankruptcy Rules.

Statement

COURT OF APPEAL

1923

March 6.

STILLWATER LUMBER & SHINGLE CO. v. CANADA LUMBER & TIMBER CO.

The appeal was argued at Victoria on the 11th and 12th of January, 1923, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Argument

Gillespie, for appellant: The money advanced the defendant Company was a loan. They had no right to part with their assets. They were insolvent at the time as their liabilities were over $19,000, and they paid $8,900 to the shareholders. The Bankruptcy Act came into force after the loan was made and rule 120 cannot apply further than section 66 of the Act allows. Such a case as this should be tried by the ordinary tribunal: see Duncan on Bankruptcy, 565; *Ex parte Dickin. In re Pollard* (1878), 8 Ch. D. 377 at pp. 386-7; *Ex parte Musgrave. In re Wood* (1878), 10 Ch. D. 94 at pp. 98-9; *Re N. Brenner & Co. Ltd.* (1921), 58 D.L.R. 640. The learned judge followed *Re Levine and Fluxgold* (1921), 20 O.W.N. 167. On rule 120 being *ultra vires* see *Re Canadian Western Steel Corporation Limited* (1922), 69 D.L.R. 689 at p. 696. The Bankruptcy Act is not retrospective: see *Houlding* v. *Canadian Credit Men's Trust Association* (1921), 60 D.L.R. 533. *In re Hamer. Ex parte Royal Bank of Canada* (1922), 1 W.W.R. 1241. The trustee was held personally liable for the costs.

L. J. Ladner, for respondent: Proceedings must be taken in the Bankruptcy Court unless he gets leave. No leave was given to bring action in the Supreme Court: see *Fitzgerald* v. *McMorrow* (1922), 22 O.W.N. 350. Rule 120 provides a summary way to deal with such matters and should be resorted to: see *Bartley's Trustee* v. *Hill* (1921), 20 O.W.N. 170; 1 C.B.R. 477. As to the costs see *Bartley's Trustee* v. *Hill, supra; Thorne* v. *Canadian Steering Wheel Company* (1922), 2 C.B.R. 455; *Brenner's Trustee* v. *Brenner* (1922), 22 O.W.N. 334: *Burns* v. *Royal Bank* (1922), 2 C.B.R. 482.

Gillespie, in reply, referred to *Macdonald* v. *Worthington et al.* (1882), 7 A.R. 531.

Cur. adv. vult.

6th March, 1923.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The trustee in bankruptcy brought this action in the Supreme Court to set aside a transaction between

the bankrupt and defendant, whereby the defendant received $1,000 which the trustee in the action seeks to recover for the benefit of the estate. The trustee is empowered by section 20, subsection (1) (*c*) of the Bankruptcy Act, with the permission in writing of the inspector to "bring, institute, or defend any action or other legal proceeding relating to the property of the debtor." Settlements of the character of the one in question in this action are by section 29 of the Act rendered subject to attack by the trustee.

The question to be decided in this appeal is the right of the trustee to proceed by action instead of in the Bankruptcy Court. The learned judge held that the trustee should have proceeded under rule 120 of the Bankruptcy Rules, which provides a summary method of disposing of matters of this kind by a motion in Chambers in the first place, which may afterwards take the form of an issue or trial. If the inspector in this case had consented to the bringing of an action in the Supreme Court, I should have no doubt that it would not be competent for any Court to dismiss the action merely because in its opinion it might have been proceeded with under the provisions of rule 120. When a trustee in bankruptcy is given by statute the right to do a thing no Court has power to deny that right. *In re Dominion Trust Company and Critchley* (1916), 23 B.C. 42.

MACDONALD, C.J.A.

The written consent which the trustee obtained from the inspector in this case does not, however, in terms authorize him to bring an action in the Supreme Court. It reads: "I consent for you to bring, institute, or take such legal proceedings as may be necessary" for the recovery of the moneys in question. I am of opinion that the Bankruptcy Court has jurisdiction to entertain and dispose of the questions involved in this action, notwithstanding that the action when properly authorized, might also have been taken in the Supreme Court. That is to say, there was concurrent jurisdiction. It is really for the inspector to decide in which Court the proceedings shall be taken, and in the absence of his specific authorization to take the proceedings in the Supreme Court, I think the proceedings ought to have been taken in the summary manner provided for in the Bankruptcy Act and Rules. The consent above recited

COURT OF APPEAL

1923

March 6.

STILLWATER LUMBER & SHINGLE CO. v. CANADA LUMBER & TIMBER CO.

merely authorizes such legal proceedings as may be necessary. There was no necessity for invoking the jurisdiction of the Supreme Court in this matter, and I do not think that the trustee could invoke it without distinct authority in that behalf, which in my opinion he has failed to obtain.

The objection urged against invoking rule 120 was that it is in conflict with said section 20 (*c*) of the Act, in that it declares that proceedings of this character shall be disposed of under the rule. It does not, however, declare that actions in the Supreme Court shall not be brought but simply that applications by a trustee to set aside or avoid a settlement, shall be to a judge in Chambers by a notice of motion.

Now, section 20 (*c*) gives the trustee authority with consent of the inspectors to bring, institute, or defend any action or other legal proceedings relating to the property of the debtor. Rule 120 can therefore be read as applicable to a case where the trustee is directed by the inspectors to take proceedings in the Bankruptcy Court, in which case they shall be commenced by notice of motion as in that rule is provided. In that view of rule 120 there is no repugnancy between it and said section 20 (1) (*c*.) If there were then in view of section 66 of the Act, and in view of the decision in *Institute of Patent Agents* v. *Lockhart* (1894), A.C. 347, one would have to consider the *status* of that rule. If then I am right in my opinion that the consent relied upon by the trustee is insufficient to direct an action in the Supreme Court only, then the action was properly dismissed.

MACDONALD, C.J.A.

As pointed out by Mr. Justice Middleton, in *Bartley's Trustee* v. *Hill* (1921), 1 C.B.R. 477, the Court should discountenance costly proceedings when summary and inexpensive proceedings are open to the trustee. I agree entirely with his remarks in that regard.

I would dismiss the appeal.

MARTIN, J.A.: I agree with the learned judge below that one of the reasons, if not the chief reason, for the passing of the Bankruptcy Act, Cap. 36, 1919, is that a speedy and expeditious realization of the estate of the debtor should take place

MARTIN, J.A.

and that an honest debtor should obtain his discharge from the burden of his liabilities and make a new start in life. And section 66 of the said Act authorizes rules to be made "not inconsistent with the terms of this Act for carrying into effect the objects thereof." And subsection (2) goes on to say, that "such rules shall not extend the jurisdiction of the Court, save and except" matters which are immaterial herein.

In *Bartley's Trustee* v. *Hill* (1921), 20 O.W.N. 170, Mr. Justice Middleton says (p. 172):

"It is only by adopting a course which will make it plain that the estates of debtors are not to be frittered away in useless and purposeless litigation that this Act will be saved from the disaster which overtook its predecessors."

In that case the action was dismissed because the same result could have been more cheaply and expeditiously attained under Bankruptcy Rule 120 dealing with "settlements and preferences" and imperatively requiring such questions to be determined by application to a judge in Chambers, "who may proceed in a summary way to try the question or issue" thus carrying out the intention of the Act expressed in section 63 (2) as follows:

"(2) Subject to the provisions of this Act and to General Rules, the judge of the Court exercising jurisdiction in bankruptcy or in authorized assignment proceedings may exercise in chambers the whole or any part of his jurisdiction."

MARTIN, J.A.

But it is submitted that rule 120 is *ultra vires* because it attempts "to extend the jurisdiction of the Court" which is forbidden by section 66 (2), *supra,* and the trustee relies upon the fact that he has obtained the permission of the inspector to bring this action under section 20 (1) (*c*), which provides that with such permission he may "bring, institute, or defend any action or other legal proceeding relating to the property of the debtor." The permission he has got empowers him "to bring, institute, or take such legal proceedings as may be necessary," etc., herein, hence I am unable to see why there is any attempted extension of jurisdiction because section 20 only authorizes him to take the appropriate "proceeding" and the effect of rule 120 is simply that in certain specified matters to which it relates, *i.e.,* settlements and preferences, a certain "proceeding" in Chambers

COURT OF APPEAL

1923

March 6.

STILLWATER LUMBER & SHINGLE CO. v. CANADA LUMBER & TIMBER CO.

shall be followed whatever "action or other legal proceeding" might be necessary in other cases.

It must also be noted that by section 7 (1),—

"The Court may, at any time after the presentation of a bankruptcy petition against a debtor, order that any action, execution or other proceeding against the person or property of the debtor pending in any Court other than the Court having jurisdiction in Bankruptcy shall stand stayed until the last mentioned Court shall otherwise order. . . . ."

which supports the view that rule 120 is not inconsistent with the Act.

MARTIN, J.A. In this view the fact that the transaction complained of occurred before the Act came into force becomes immaterial. It follows that the appeal should be dismissed with costs in the usual way.

GALLIHER, J.A. GALLIHER, J.A: I agree with the Chief Justice and would dismiss the appeal.

MCPHILLIPS, J.A. MCPHILLIPS, J.A.: I am in entire agreement with the reasons for judgment of my brother MARTIN, and would dismiss the appeal.

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

Appeal dismissed.

Solicitor for appellant: *W. D. Gillespie.*
Solicitor for respondent: *J. F. Downs.*

LINNELL v REID *ET AL.*

COURT OF APPEAL

1923

Jan. 9.

LINNELL v. REID

Negligence—Nuisance—Excavation on property to border line of adjoining property—Person on adjoining property falls into excavation—Right of protection to person moving on his own land.

The owner of one of two adjoining lots let a contract for the construction of a building on his lot. The contractor made an excavation six feet deep up to the boundary line between the lots. The plaintiff, who was part lessee of the adjoining lot, fell into the excavation after dark and was injured. In an action for damages complaining of the failure to safeguard the excavation and of non-support of his land he obtained judgment before MORRISON, J, and a jury.

Held, on appeal, *per* MARTIN and MCPHILLIPS, JJ.A., that the defendants owed no duty in law to the plaintiff to protect him from the injury sustained. He had the right only to lateral support to his land in its "natural state" and not such as to sustain artificial weight, even his own, unless he had acquired a right thereto by an easement or otherwise.

Per GALLIHER, J.A. (EBERTS, J.A., agreeing that the appeal be dismissed): That the principle of lateral support should not deprive an owner of the right to walk over his property without incurring danger; he has the right to the full enjoyment of his property, and there was a duty incumbent on the owners and contractors to light and guard the excavation.

The Court being equally divided the appeal was dismissed.

[Affirmed by the Supreme Court of Canada.]

APPEAL by defendants from the decision of MORRISON, J., of the 23rd of May, 1922, and the verdict of a jury in an action for damages for injuries sustained by the plaintiff through the alleged negligence of the defendants. The defendant Reid owned lot 17 in block 32 on the west side of Granville Street, in the City of Vancouver. There was a building on the front of the lot and Reid entered into a contract with the defendant Fisher for the erection of a building on the back portion of his lot and adjoining the lane. Fisher then contracted with the defendant Campbell for the excavation work. Campbell completed this work, the excavation being about 6 feet deep and made up to its southern boundary and adjoining lot 18. No protection or notice was put up, there being a straight fall at the boundary line between the two lots into the excava-

Statement

COURT OF APPEAL

1923

Jan. 9.

LINNELL v. REID

Statement

tion. A stairway facing the lane behind came down from the back of the ground story of the building on lot 18, the bottom of the stairs being about seven feet from the excavation. At about 6:30 o'clock on the evening of February 10th, 1922, the plaintiff came down the stairs intending to go to an automobile about 15 feet from the stairs and towards the lane. When he reached the bottom of the stairs he turned to the right (towards the excavation) to throw some refuse in a garbage-can under the stairs and as he turned back intending to go to the automobile he fell into the excavation and sustained injuries. The jury found for the plaintiff and awarded $5,000 damages.

The appeal was argued at Vancouver on the 1st to the 8th of November, 1922, before MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Argument

McPhillips, K.C., for appellants Fraser and Campbell: Our position is that all we are bound to do is to leave the adjoining owner's property intact. The action is laid as an action of nuisance, and whether the circumstances here proved amount to a nuisance is a question for the judge. He left the law to the jury and we are entitled in any case to a new trial: see Odgers's Common Law, 2nd Ed., 248. On the difference between nuisance and negligence see *Latham* v. *R. Johnson & Nephew, Limited* (1913), 1 K.B. 398 at p. 412. They are quite different actions: *Barker* v. *Herbert* (1911), 2 K.B. 633 at pp. 637-8. He must shew the excavation was along a right of way: see Halsbury's Laws of England, Vol. 16, p. 7. The way over a lot is not a highway; see *Bailey* v. *Jamieson* (1876), 1 C.P.D. 329 at p. 332; *Schwinge* v. *Dowell* (1862), 2 F. & F. 845; *Robinson* v. *Cowpen Local Board* (1893), 63 L.J., Q.B. 235; *Maddock* v. *Wallasey Local Board* (1886), 55 L.J., Q.B. 267. On extent of landowner's duty to fence see Halsbury's Laws of England, Vol. 3, pp. 128-9; *Blyth* v. *Topham* (1607), Cro. Jac. 158; 79 E.R. 139; *Jordin* v. *Crump* (1841), 8 M. & W. 782 at p. 787; *Churchill* v. *Evans* (1809), 1 Taunt. 529; *Deane* v. *Clayton* (1817), 7 Taunt. 489 at p. 516; *Ponting* v. *Noakes* (1894), 2 Q.B. 281; *Lowery* v. *Walker* (1910), 1 K.B. 173 at p. 192; (1911), A.C. 10; *Barnes*

v. *Ward* (1850), 9 C.B. 392; *Corby* v. *Hill* (1858), 4 C.B. (N.S.) 556 at p. 585; *Hardcastle* v. *South Yorkshire Railway Co.* (1859), 4 H. & N. 67; *Hounsell* v. *Smyth* (1860), 7 C.B. (N.S.) 731 at p. 740; *Binks* v. *South Yorkshire Railway Co.* (1862), 3 B. & S. 244; *Wilkinson* v. *Fairrie* (1862), 1 H. & C. 633; *Gautret* v. *Egerton* (1867), L.R. 2 C.P. 371 at p. 374; *Lawrence* v. *Jenkins* (1873), L.R. 8 Q.B. 274 at p. 278. At common law the owners of adjoining property are under no obligation to put up a fence, either against or for the benefit of each other. *Murley Brothers* v. *Grove* (1882), 46 J.P. 360 is very like this case; see also *Rogers* v. *The Toronto Public School Board* (1897), 27 S.C.R. 448. He who enters another man's property wrongfully enters at his own risk: see Salmond on Torts, 5th Ed., 414; *Gallagher* v. *Humphrey* (1862), 10 W.R. 664; *Anderson* v. *Coutts* (1894), 58 J.P. 369; *Norman* v. *Great Western Railway Company* (1915), 1 K.B. 584 at p. 591; *Crane* v. *South Suburban Gas Company* (1916), 1 K.B. 33 at p. 37. *Baldock* v. *Westminster City Council* (1918), 35 T.L.R. 188; *Bromley* v. *Mercer* (1922), 2 K.B. 126; *Pittzen* v. *Shokluk* (1921), 2 W.W.R. 686; *Smith* v. *Mason* (1921), 30 B.C. 174. On the question of right of lateral support see *Dalton* v. *Angus* (1881), 6 App. Cas. 740; Salmond on Torts, 5th Ed., 286.

Argument

Buell, for appellant Reid: While endorsing the argument of Mr. *McPhillips* as regards liability, a sharp distinction must be drawn between the owner and the contractor who did the excavating. The rule is that the contractor is solely responsible for injuries caused to others by the carrying out of the works or for the negligence of the workmen employed; see *Reedie* v. *London and North Western Railway Co.* (1849), 4 Ex. 244; *Milligan* v. *Wedge* (1840), 12 A. & E. 737; *Murray* v. *Currie* (1870), L.R. 6 C.P. 24.

Bray, for respondent: The pleadings and the evidence covered both nuisance and negligence and the defendants pleaded contributory negligence which brings the case within the sphere of negligence. A neighbour is entitled to support for his land sufficient for his own weight upon it. He was lawfully where he was when he was hurt. He slipped from

COURT OF APPEAL

1923

Jan. 9.

LINNELL v. REID

lot 18 into the pit on lot 17. As to whether the action is one of nuisance or negligence see *Attorney-General* v. *Cory Bros. & Co.* (1921), 1 A.C. 521. As to the duty owing from defendant to plaintiff in making this excavation see *Chapman* v. *Rothwell* (1858), 27 L.J., Q.B. 315. On the general question of liability see *Clayards* v. *Dethick* (1848), 12 Q.B. 439; *Corby* v. *Hill* (1858), 4 C.B. (N.S.) 556; *Todd* v. *Flight* (1860), 9 C.B. (N.S.) 377; *Nelson* v. *Liverpool Brewery Co.* (1877), 2 C.P.D. 311; *Pretty* v. *Bickmore* (1873), L.R. 8 C.P. 401; *Sandford* v. *Clarke* (1888), 21 Q.B.D. 398; *Scott* v. *London Dock Co.* (1865), 3 H. & C. 596; *Smith* v. *London and Saint Katharine Docks Co.* (1868), L.R. 3 C.P. 326. In the case of an unwilling trespasser see *The Grand Trunk Railway Company* v. *James* (1901), 31 S.C.R. 420; *Nixon* v. *Grand Trunk R.W.Co.* (1892), 23 Ont. 124; *Earl* v. *Reid* (1911), 23 O.L.R. 453 at p. 455. The plaintiff has a legal right to be on his own property: see *Plouffe* v. *Canada Iron Furnace Co.* (1905), 10 O.L.R. 37; *Steinhoff* v. *Corporation of Kent* (1887), 14 A.R. 12 at p. 19. There is no virtue in the argument of "licence," "leave" or "invitation." Trespass must be a voluntary act: see *Hardcastle* v. *South Yorkshire Railway Co.* (1859), 4 H. & N. 67 at p. 74. *King* v. *Northern Navigation Co.* (1912), 27 O.L.R. 79. There are public and private rights of way, and it is a question of fact as to which it is: see Halsbury's Laws of England, Vol. 3, p. 129, par. 258; *Binks* v. *South Yorkshire Railway Co.* (1862), 37 B. & S. 244 at p. 254; *Deane* v. *Clayton* (1817), 7 Taunt. 489 at p. 509; *Beckwith* v. *Shordike* (1767), 4 Burr. 2092. Further authorities that trespass must be voluntary see Halsbury's Laws of England, Vol. 27, p. 844, par. 1486; *Townsend* v. *Wathen* (1808), 9 East 277; *Bird* v. *Holbrook* (1828), 4 Bing. 628; *Stanley* v. *Powell* (1891), 1 Q.B. 86; *Holmes* v. *Mather* (1875), L.R. 10 Ex. 261; *Basely* v. *Clarkson* (1681), 3 Lev. 37, 83 E.R. 565. This is a question of fact and the jury found he was not a trespasser. In the circumstances there was a duty imposed on the defendants: *Kimber* v. *Gas Light and Coke Company* (1918), 1 K.B. 439 at p. 447. The defendant should have protected the hole with an obstruction or a light:

Argument

see *Pickard* v. *Smith* (1861), 10 C.B. (N.S.) 470; *Heaven* v. *Pender* (1883), 11 Q.B.D. 503 at p. 508; *Hughes* v. *Percival* (1883), 8 App. Cas. 443; *Southcote* v. *Stanley* (1856), 1 H. & N. 247; *Dodd* v. *Holme* (1834), 1 A. & E. 493; *Davis* v. *The London and Blackwall Railway Co.* (1840), 2 Scott (N.R.) 74; *Chadwick* v. *Trower* (1839), 6 Bing. (N.C.) 1; *Cockshutt Plow Co. Limited* v. *Macdonald* (1912), 8 D.L.R. 112. Where the contractors are negligent the owner is responsible: see *Tarry* v. *Ashton* (1876), 1 Q.B.D. 314; *Bower* v. *Peate, ib.* 321; *Dalton* v. *Angus* (1881), 6 App. Cas. 740; *Hole* v. *Sittingbourne and Sherness Railway Co.* (1861), 6 H. & N. 488; *Gray* v. *Pullen* (1863), 32 L.J., Q.B. 169; *Hardaker* v. *Idle District Council* (1896), 1 Q.B. 335; *Reedie* v. *London and North Western Railway Co.* (1849), 4 Ex. 244; *Penney* v. *Wimbledon Urban Council* (1899), 2 Q.B. 72; *Longmore* v. *J. D. McArthur Co.* (1910), 43 S.C.R. 640; *Velasky* v. *Western Canada Power Co.* (1913), 18 B.C. 407; *Marney* v. *Scott* (1899), 1 Q.B. 986; *Steves* v. *South Vancouver* (1897), 6 B.C. 17; *Hounsome* v. *Vancouver Power Co.* (1913), 18 B.C. 81 at p. 84; (1914), 49 S.C.R. 430; *Black* v. *Christchurch Finance Co.* (1894), A.C. 48.

Argument

McPhillips, in reply: The general user of a back lot cannot make it a highway in any sense of the term. There was no path whatever.

Cur. adv. vult.

9th January, 1923.

MARTIN, J.A.

MARTIN, J.A.: This action is for damages occasioned by the plaintiff falling into an ungaurded excavation which the defendants had made upon the defendant Reid's premises, being No. 559 Granville Street, in the City of Vancouver, otherwise known as lot 17, the excavation being made up to, but not beyond, the extremity of the southerly boundary of that lot, adjoining which was lot 18. The plaintiff was a sub-lessee of certain premises situate on lot 18 and his case is that on the night of the 10th of February last he was proceeding from the foot of the steps at the back of the building he occupied towards a motor-car which was waiting for him in the open space at the back of said lot adjoining the public lane at

COURT OF APPEAL

1923

Jan. 9.

LINNELL v. REID

the back of both said lots (which are each 25 feet in width), which lane is a distance of some 28 feet from the foot of said steps; he had come down the steps in the dark to first put some rubbish into one of three garbage-cans which were close to the foot of the steps on the north side thereof towards the boundary of Reid's lot 17, and then to proceed to the motor-car; the situation is well shewn in the photographs and the plan. When he got to the foot of the steps he turned to the right (northerly) to put the garbage in the tin and after that turned towards the lane to go to the motor-car which was facing the steps the northerly rail of which would be about 8 feet from the excavation (*i.e.*, boundary line of the lots 17-8) in question according to said plan, and he goes on to say (on cross-examination) that after he had taken about two steps towards the car, facing that way, "my right foot went out under me and I fell . . . . the ground fell with me—the ground that I stepped on with that right foot went out from under me and I went down." And later on he said "I went down on my right side first"; and that he thought he was on solid ground but what he was standing on "gave out from under" him. There was snowy slush on the ground at the time and it is obvious that in the dark he missed his proper direction towards the motor-car and got over too far to the right (northerly) and in going along the extreme margin of the excavation the natural support to his right foot failed him causing him to fall in. His case is clearly set up in the pleadings and supported by his evidence and it is that he was "lawfully on and using the said westerly (back) portion of said lot 18 [when he] fell into the said pit . . . . ."

MARTIN, J.A.

I have been at some pains to make the exact situation plain, because the case is an unusual one and therefore the facts should be clearly understood. It is not alleged that the work in making the excavation was done in a negligent manner, the failure to safeguard it is what is complained of.

It will thus be seen that the immediate cause of the accident in such circumstances was the failure of the natural soil to support him when he was walking along the brink of the excavation; the next step towards the car with his left foot would doubtless have taken him out of danger. The jury absolved

him of negligence and so he cannot be regarded as a tresspasser, but as one who is lawfully using his own property. That user, however, is subject to certain risks as regards the rights of adjoining owners. It is *e.g.,* settled beyond question that though an owner is entitled to have his soil supported in its "natural state" and "as an incident to the land itself," *per* Selborne, L.C., in the leading case in the House of Lords of *Dalton* v. *Angus* (1881), 6 App. Cas. 740 at p. 791) yet if he artificially imposes upon it an additional weight by the erection of a building he is, not entitled to the lateral support of the adjacent land of another owner to sustain that artificial weight unless he has acquired a right thereto by an easement or otherwise. At p. 793, Lord Selborne defines "support" thus:

"What is support? The force of gravity causes the superincumbent land, or building, to press downard upon what is below it, whether artificial or natural; and it has also a tendency to thrust outwards, laterally, any loose or yielding substance, such as earth or clay, until it meets with adequate resistance."

Lord Blackburn (p. 808) points out that this right to support of land in its natural state is

"not a right to have the adjoining soil remain in its natural state (which right, if it existed, would be infringed as soon as any excavation was made in it); but a right to have the benefit of support, which is infringed as soon as, and not till, damage is sustained in consequence of the withdrawal of that support."

Lord Penzance, at p. 804, graphically describes the right of the adjoining owner thus:

MARTIN, J.A.

"It is the law, I believe I may say without question, that at any time within twenty years after the house is built the owner of the adjacent soil may with perfect legality dig that soil away, and allow his neighbour's house, if supported by it, to fall in ruins to the ground."

He admits his diposition to have decided otherwise, if possible, in the following language:

"If this matter were *res integra,* I think it would not be inconsistent with legal principles to hold, that where an owner of land has used his land for an ordinary and reasonable purpose, such as placing a house upon it, the owner of the adjacent soil could not be allowed so to deal with his own soil by excavation as to bring his neighbour's house to the ground. It would be, I think, no unreasonable application of the principle '*sic utere tuo ut alienum non lœdas*' to hold, that the owner of the adjacent soil, if desirous of excavating it, should take reasonable precautions by way of shoring, or otherwise, to prevent the excavation from disastrously affecting his neighbour."

COURT OF APPEAL

1923

Jan. 9.

LINNELL v. REID

But then he proceeds to say that "the matter is not *res integra,*" and illustrates it as above quoted.

Now, since "it is the law" that an adjoining owner may dig away his own soil up to the extremity of his boundary without taking any "reasonable precautions by way of shoring or otherwise to prevent the excavation from disastrously affecting his neighbour" why should he be required to shore up or otherwise guard his excavation against one kind of an artificial weight imposed upon the natural soil more than another? If an owner builds to the extremity of his land he takes the risk of ruin by finding himself without adjacent support for the artificial weight he has imposed upon the natural soil; and likewise, on the same principle he takes, in my opinion, a similar risk if "for any other ordinary and reasonable purpose" (as Lord Penzance hath it) he imposes any artificial weight upon the natural soil, be that weight inanimate, as *e.g.,* in the case of a building, or, by piling or storing brick, or wood or stone, or be it animate as in the case of horses or cattle driven along the brink, or walking there himself or with others when carrying a piece of timber for example, or a sack of coals, or simply his own weight. The principle cannot, in my opinion, be affected by the nature or amount of the weight; the true question is, did the artificial weight imposed upon the soil which supported itself in the ordinary course of nature cause it to give way and so bring that artificial weight, animate or inanimate, "in ruins to the ground"? If so, the owner who imposed the weight has no cause of action because his right was only to have support for his land in "its original state," as Lord Chancellor Selborne puts it, p. 793, *supra.*

MARTIN, J.A.

I pause here to note, by way of precaution, that the land surveyor who made a plan of the *locus* and examined the soil said that it was "just the ordinary top soil that you find about here," and described its natural state.

This view is consistent with the general principle as succintly laid down in *Wyatt* v. *Harrison* (1832), 3 B. & Ad. 871; 37 R.R. 566; by Lord Tenterden, C.J. at p. 876, in giving the unanimous decision of the King's Bench, thus:

"It may be true that if my land adjoins that of another, and I have not by building increased the weight upon my soil, and my neighbour

digs in his land so as to occasion mine to fall in, he may be liable to an action. But if I have laid an additional weight upon my land, it does not follow that he is to be deprived of the right of digging his own ground, because mine will then become incapable of supporting the artificial weight which I have laid upon it. And this is consistent with 2 Roll. Ab. Trespass (I.) pl. 1."

Very many authorities were cited to us but I shall not attempt to review them here because not one of them is in my opinion on all fours with this case, which stands by itself, because it is not the case of one who as a trespasser, or an invitee or a licensee enters upon the land of another but that of one who (putting him upon the lightest plane) in the exercise of the ordinary rights of an owner has accidentally and without negligence fallen upon the property of his neighbour. But the defendant submits that however the plaintiff may be regarded he is not a person to whom the defendant owed any duty to fence or guard the excavation in question which he was entitled to make without any notice to an adjoining owner. It is admitted that if there were a public way or road substantially adjoining the excavation, the case would be otherwise (the furthest illustration of which is *Harrold* v. *Watney* (1898), 2 Q.B. 320), but apart from the immaterial public lane at the back, there is no evidence of a "way" here, in the true sense, adjoining the boundary line, but merely that the whole unfenced 25 feet in width of the back of the lot were open to the use at random of those who had any business with the occupants of the front of it. The question as to whether or no there was a private way across that back portion for the use of such persons was, if material, one of fact for the jury to determine and confine the use of it within reasonable bounds according to the circumstances; a mere capricious rambling across a whole lot would not, of itself, constitute a way, but as no such question was in fact submitted to the jury, or anything at all said upon it, no useful purpose is to be served by considering it further.

MARTIN, J.A.

I have not overlooked what was said about a fence between the lots by the lessee, Mrs. Roberts (who sub-let to the plaintiff) *viz.*, that "they" tore down a fence there without her permission saying they would replace it but did not do so, but it is to be observed, first, that it is clear from the evidence, and was admitted during the argument, that the defendants did

COURT OF APPEAL

1923

Jan. 9.

LINNELL v. REID

not trespass beyond their boundary line and therefore the fence must have belonged to them, and they were entitled to remove it just as in the case of a wall of an old building; and, second, the plaintiff does not allege in his pleadings or his evidence, that he knew of its existence or relied upon it; and third, nothing whatever was said on the subject in the charge to the jury in the way of directing them to consider or pass upon it, and therefore I think that reference to it should be disregarded.

MARTIN, J.A.

Seeing that no case can be cited in direct support of any duty in the circumstances on the part of the defendant owner to the plaintiff, I am of opinion that the action cannot, consistently with the principle laid down, be maintained, and therefore the appeal against the judgment should be allowed.

GALLIHER, J.A.: The plaintiff was tenant in a building situate on lot 18, in block 32, district lot 541, Vancouver, and had, in common with other tenants and tradesmen, for a considerable period of time been using the back portion of said lot (which was vacant) for the purpose of egress and ingress to the building, to a back lane.

There is no dispute as to the right of plaintiff and others to so use the premises. While so using it on a dark night, in going from the building to a motor-car parked on the back of the lot, the plaintiff fell into an excavation and was injured. This excavation was being dug on lot 17 (immediately adjoining lot 18) the property of defendant Reid, as a basement for a building to be erected thereon, and the work was being carried on by the defendants Fisher & Campbell, to whom the contract had been let. At the time of the accident, this excavation was some five or six feet deep at, and was right up to the dividing line, of the two lots. No lights or fencing or other protection were put up to guard the excavation at the place where the accident occurred or to warn people of the danger.

GALLIHER, J.A.

There is no contention that this was on or near a highway, but there is a dispute as to whether it could be said to be on or near a private way in use, as I have before stated. There is no evidence that there was a clear cut, well defined private way across this property back of the dwelling, and there may be doubt as to whether it could be classed strictly as a private

way, but in my view of the case I am not called upon to decide that question. The jury found in favour of the plaintiff against all defendants for the sum of $5,000.

The first point pressed by the appellants' counsel, was that the plaintiff was a trespasser and as such the defendants owed no duty towards him. The plaintiff's evidence in substance is this: That on the night of the accident, after going down the back stairs to deposit some rubbish in the cans which were at the foot of the back stairs of the building, a couple of steps to one side, in the direction of the excavation, and having done so, he started walking to get to the motor-car when suddenly the ground slipped from under him and he fell into the excavation. The night was dark, and he must have deviated from the straight line between the garbage-cans and the motor-car, otherwise he would not have fallen into the excavation. The appellants' submission is, that the ground did not slip from under him, but that he walked right off lot 18 into the excavation, and they adduced evidence to shew that early in the morning after the accident the face of the excavation which was examined shewed no indications of a cave-in. About 10 o'clock of the same morning, a considerable cave in did take place, breaking into lot 18, but it is admitted that this particular cave-in was not the cause of the accident, and at this point Mr. *McPhillips* pressed strongly that plaintiff's counsel had admitted that there was no cave-in at all at the time of the accident, and was out of Court. The words relied on are:

GALLIHER, J.A.

"Mr. *Bray*: I am willing to admit that that cave-in took place between 9 and 10, and it is immaterial to me."

When you read what the witness was then being examined upon, it is quite clear it had reference only to the large cave-in and not to what, although trivial, as described by the plaintiff, might be termed a cave-in or slipping away of the soil and the admission goes no further than that. The jury had this evidence before them and they were entitled to believe the plaintiff's story. Moreover, a slipping away of a very small piece of earth would be sufficient to bring about the precipitation of the plaintiff into the pit, and the jury might very well have concluded, in considering the defendants' evidence, that the examination would not be directed to any such minor

COURT OF APPEAL

1923

Jan. 9.

LINNELL v. REID

slipping away. The jury are men of understanding and when we consider the condition of the weather pertaining at that time (rain and soft snow) it is more than likely that there were small crumblings away of the soil (which is described as loose) from the face of the excavation and which would not be considered by the witness as cave-ins. I know if I were on a jury, I should hesitate to accept as conclusive, under the existing conditions, that the face of the excavation was flawless, nor do I think the witness meant that. Then, assuming ground did slip from under plaintiff's feet, thereby casting him into the pit, was he a trespasser? When the ground slipped from under his feet he was on lot 18, where he had a right to be. The ground slipped by reason of the excavation, in short, it was the act of the defendants causing the ground to slip that cast the plaintiff upon their land. How can a person under such circumstances in law be said to be a trespasser, either voluntarily or involuntarily?

The question was then raised by Mr. *McPhillips,* as to what right of lateral support the owner of one piece of property has as against the owner of an adjoining piece of property. Take first the case of a building erected by one owner on his land and where an adjacent owner in excavating on his own land weakens the support of his neighbour's building, and damages ensue, the owner of the building has no recourse unless he has gained the right of support by prescription or grant.

GALLIHER, J.A.

The subject is very fully dealt with in *Dalton* v. *Angus* (1881), 6 App. Cas. 740, in the House of Lords. The result of the views of their Lordships, expressed in somewhat different language, is summed up in a very few words, in the speech of Lord Penzance, at page 804. After remarking that if the matter were *res integra,* his Lordship thought

"it would not be inconsistent with legal principles to hold, that where an owner of land has used his land for an ordinary and reasonable purpose, such as placing a house upon it, the owner of the adjacent soil could not be allowed so to deal with his own soil by excavation as to bring his neighbour's house to the ground . . . ."

and goes on to say:

"But the matter is not *res integra.* It has been the subject of legal decisions, and those decisions leave it beyond doubt that such is not the law of England. On the contrary it is the law. I believe I may say

without question, that at any time within twenty years after the house is built the owner of the adjacent soil may with perfect legality dig that soil away and allow his neighbour's house, if supported by it, to fall in ruins to the ground."

Backus v. *Smith* (1880), 5 A.R. 341, in the Court of Appeal of Ontario, composed of Moss, C.J.A., Patterson, Morrison, JJ.A. and Osler, J., was referred to, and while there were other elements which seem to have entered into the judgment there, they adopted the view of the Court of Appeal in England in *Dalton* v. *Angus, supra,* afterwards affirmed by the House of Lords.

This then being the law, how does it affect the present case? The superimposing of a considerable weight, such as a building or other structure, on the soil is one thing, but are we to carry the principle applicable to that to the extent of saying that the owner of a piece of property cannot walk over his property except at his own risk of falling into an unlighted and unguarded excavation made by the owner of the adjoining property right up to the boundary line? To the extent of his own weight, of course, the soil is bearing a certain burden other than in a state of nature, but to do so to that extent, would practically curtail any enjoyment of his property and until some Court whose judgment is binding on me goes that far, I am not prepared to do so. I hold that there was a duty incumbent on the owner and contractor under the circumstances here, to light or guard this excavation. That they anticipated such would be necessary, is shewn by the fact that they specifically provided for it in the contract. I cannot regard it as collateral negligence which would relieve the owner, nor is he relieved by reason of the stipulation in the contract that the contractors should guard and light.

GALLIHER, J.A.

The appeal should, in my opinion, be dismissed.

McPHILLIPS, J.A.: This appeal has relation to an action for personal injuries suffered by the respondent through falling into an excavation made wholly upon the land adjoining the premises of which the respondent was part lessee. The action was brought against the owner of the land in which the excavation had been made as well as the contractors who had carried

MCPHILLIPS, J.A.

COURT OF APPEAL

1923

Jan. 9.

LINNELL v. REID

out the excavation, a contract having been entered into for the construction of a building, and the owner and contractors are the appellants. The action was founded upon negligence, as well as nuisance. The circumstances under which the respondent suffered the injuries were as follow:

Whilst proceeding over a portion of lot 18 (the land of the respondent's lessor) and close to the line of division between lots 17 and 18 (the excavation was upon lot 17), the night being dark, the respondent fell into the excavation or pit; he had just come down a staircase from the premises occupied by him to the rear thereof and was proceeding to a waiting motor-car which had been driven in upon the rear portion of lot 18. The evidence is that the respondent fell consequent upon his walking along the division line between lots 17 and 18 oblivious of the fact that there was an excavation up to the division line then six feet deep. The respondent stated that he was unaware of the excavation having been made. That which caused him to fall into the excavation must to a great extent be conjecture. Whether he actually walked into space or fell through the crumbling of the earth under his feet it is difficult to say. The respondent undertook to say that the earth crumbled under his feet and he was thereby precipitated into the pit. The action was tried by a judge and jury, and the verdict was a general verdict awarding the respondent (the plaintiff) $5,000 damages and upon that verdict the learned trial judge entered judgment against both of the appellants (the defendants). The appellants separately appeal, *i.e.*, the owner of the land and the contractors separately appeal from the judgment.

MCPHILLIPS, J.A.

The appeal brings up for consideration a very nice point of law and one which has had very considerable attention for long years and the question is—is there liability in law for the happening and are both of the appellants liable for the damages assessed? If the facts establish an actionable wrong it may well be that both of the appellants are liable. (See Lord Watson in *Dalton* v. *Angus* (1881), 6 App. Cas. 740 at pp. 831-2). The inquiry though must be directed to whether the appellants owe any duty in law to the respondent to protect him from the injury which he unfortunately sustained.

The excavation in question in the present case was not at the point where the respondent suffered the injury, along a highway or lane, nor was it established that there was any public or private way over lot 17 upon which the excavation had been made. There was no evidence led by the respondent shewing that the case was one of his being a licensee or invitee. The present case was not one of the respondent being upon a public highway or upon even a right of way of any kind and in this connection *Hardcastle* v. *South Yorkshire Railway Co.* (1859), 4 H. & N. 67 (118 R.R. 331) is in point. There it was held that,

"where an excavation is made near to but not substantially adjoining a public highway, at common law no action lies against the owner of the land by a person who has strayed off the highway and fallen into such excavation."

In this case, Pollock, C.B. at pp. 74-5 said: [His Lordship quoted from the beginning of the 2nd paragraph on p. 73 to the end of the 2nd paragraph commencing on p. 74 and continued].

(Also see *Binks* v. *South Yorkshire Railway and River Dun Company* (1862), 32 L.J., Q.B. 26 and *Hounsell* v. *Smyth* (1860), 29 L.J.,C.P. 203).

Then I would refer to *Rogers* v. *The Toronto Public School Board* (1897), 27 S.C.R. 448, where it was held that a person voluntarily visiting the premises for his own purposes without notice to the occupants assumed all the risks of danger from the condition of the premises and could not recover damages.

MCPHILLIPS, J.A.

It is to be remembered that the evidence discloses in the present case, that upon the morning after the accident, the line of division between the properties was intact, that is, there was no falling away of the land from off which the respondent fell into the pit.

In *Norman* v. *Great Western Railway* (1915), 1 K.B. 584, the question of liability toward the trespasser, the licensee, and the invitee was considered, the negligence alleged being in not fencing a sloping bank. It was held that there was no evidence of any breach of duty. Buckley, L.J., at pp. 591-2, said:

[The learned judge quoted the 1st paragraph and continued].

COURT OF APPEAL

1923

Jan. 9.

LINNELL v. REID

In *Humphries* v. *Brogden* (1850), 12 Q.B. 739 (76 R.R. 402), a leading decision on the right to support for one's land as between the surface-owner and a subjacent mine-owner, Lord Campbell, C.J., at pp. 743-4, dealt with the case of adjoining closes, which is the present case. The *Humphries* case was referred to by Lord Macnaghten in *Trinidad Asphalt Co.* v. *Ambard* (1899), 68 L.J., P.C. 114.

In *Wyatt* v. *Harrison* (1832), 3 B. & Ad. 871 (37 R.R. 566), referred to by Lord Campbell, the judgment of the Court delivered by Lord Tenterden C.J. was in the following terms (pp. 875-6):

"The question reduces itself to this, Whether, if a person builds to the utmost extremity of his own land, and the owner of the adjoining land digs the ground there, so as to remove some part of the soil which formed the support of the building so erected, an action lies for the injury thereby occasioned? Whatever the law might be, if the damage complained of were in respect of an ancient messuage possessed by the plaintiff at the extremity of his own land, which circumstance of antiquity might imply the consent of the adjoining proprietor, at a former time, to the erection of a building in that situation, it is enough to say in this case that the building is not alleged to be ancient, but may, as far as appears from the declaration, have been recently erected; and if so, then, according to the authorities, the plaintiff is not entitled to recover. It may be true that if my land adjoins that of another, and I have not by building increased the weight upon my soil, and my neighbour digs in his land so as to occasion mine to fall in, he may be liable to an action. But if I have laid an additional weight upon my land, it does not follow that he is to be deprived of the right of digging his own ground, because mine will then become incapable of supporting the artificial weight which I have laid upon it. And this is consistent with 2 Roll. Ab. Trespass (I.) pl. 1. The judgment will therefore be for the defendant."

MCPHILLIPS, J.A.

The present case is not one in which any prescriptive right to lateral support exists such as was held in *Dalton* v. *Angus* (1881), 6 App. Cas. 740, and I would refer to what Lord Selborne, L.C. said at p. 793:

"I think it clear that any such right of support to a building, or part of a building, is an easement; and I agree with Lindley, J. and Bowen J., that it is both scientificially and practically inaccurate to describe it as one of a merely negative kind."

And what Lindley, J., said at p. 763:

"The owner of a newly-erected building has no such right of support unless his neighbour has conferred it upon him."

Here there is no evidence of any conferred right of support. Here we have not the case of a building and the right to the

support of a building but we have the case of a person suffering an injury. Is the situation at all different? Is it not the same question, *i.e.*, is there any common law right of support to a person walking upon the brink of a pit the pit being wholly upon the adjoining close and made without negligence, as no negligence in making the excavation is established? I would think not. In *Dalton* v. *Angus, supra,* at p. 792, Lord Selborne said:

"Support to that which is artificially imposed upon land cannot exist *ex jure naturæ*, because the thing supported does not itself so exist."

(Also see Lord Penzance at p. 804).

As I have previously pointed out this is not a case where injury has resulted from a pit existent upon a highway, the injury suffered was at a considerable distance from the highway, and not even upon a private way, but suffered by falling from the adjoining close into the pit wholly excavated upon the adjoining close and no negligence is established in the making of the pit or being in any way the proximate cause of the happening. In this connection it is instructive to note what was decided in *Bromley* v. *Mercer* (1922), 2 K.B. 126. The head-note reads as follows:

"The defendants were the owners of a house and yard abutting on a highway, and separated therefrom by a wall which was in such a defective state of repair as to constitute a public nuisance in the highway. The plaintiff, a child of nine years of age, who was visiting the tenant of the premises, while playing in the yard was injured by a heavy stone which fell from the wall upon her. In an action against the owners for damages for the injuries so sustained:—*Held*, that as the plaintiff was not using the highway when the accident occurred she was not entitled to recover damages from the defendants."

Lord Sterndale, M.R., in his reasons for judgment said, at pp. 128-30:

[His Lordship quoted the whole of the judgment and continued].

It is to be observed that in the *Bromley* case, negligence was assumed against the defendants, but here there is an entire absence of negligence in the making of the excavation as I read the evidence. At this bar the negligence pressed was the non-support of the land and the failure to erect a barrier or otherwise protect persons upon the adjoining close.

It is with deep regret that I have arrived at the conclusion

COURT OF APPEAL

1923

Jan. 9.

LINNELL v. REID

MCPHILLIPS, J.A.

that the judgment entered for the respondent upon the verdict of the jury cannot stand. The respondent cannot be deemed other than a trespasser if he attempted to go upon the adjoining close in which he suffered the injury. It was not the case of his being a licensee or invitee and if the proximate cause of the accident was the failure of support of the land, there is no law in the circumstances of the present case that entitled the respondent to any right of support upon the land.

I would allow the appeal.

EBERTS, J.A.

EBERTS, J.A. agreed with GALLIHER, J.A. in dismissing the appeal.

The Court being equally divided the appeal was dismissed.

Solicitors for appellants Fisher and Campbell: *Gwillim, Crisp & MacKay.*

Solicitors for appellant Reid: *Senkler, Buell & Van Horne.*

Solicitor for respondent: *H. R. Bray.*

COURT OF APPEAL

1923

Jan. 10.

SWAN v. ELLIS

SWAN v. ELLIS

Use and occupation—Action against administrator—Evidence—Corroboration—R.S.B.C. 1911, Cap. 78, Sec. 11.

In an action by the plaintiff against the administrator of her father's estate to recover $1,000 rent for use and occupation of a house by her father and mother for six years immediately prior to his death, the only evidence in corroboration of plaintiff's was that of an illiterate foreigner who said the deceased father said to him in his lifetime: "Ten years I been here, no rent at all." "Sylvie [plaintiff] good to me, good to her mother." "I can pay my rent all right to my girl Sylvie, who is good friend to us."

Held, on appeal, affirming the decision of GRANT, Co. J. that the foregoing was sufficient corroboration of the plaintiff's evidence.

Per MACDONALD, C.J.A.: Under section 10 of the Evidence Act all that is required in corroboration is that it be material, relevant to the issue and of such a nature as to be calculated to convince the Court that the main evidence is true.

COURT OF APPEAL

1923

Jan. 10.

SWAN v. ELLIS

APPEAL by defendant from the decision of GRANT, Co. J., of the 6th of October, 1922, in an action by Sylvia Swan against the administrator of her father's estate for rent for use and occupation of a house by her father and mother at the corner of 18th and Mary Avenue in New Westminster. The father and mother had three daughters and had previously lived at Extension, B.C. The plaintiff built a house on the lot in question for her father and mother to live in and they came to New Westminster and occupied it from December 1st, 1915, until December 1st, 1921. Up to the time of the father's (Antone Vanwerk) death in February, 1922, no rent was ever paid and the plaintiff paid all taxes and water rates. The only evidence in corroboration of the plaintiff's statement was a conversation of the deceased father with a foreigner named Colassin who spoke in broken English. He stated that deceased had said: "If I get sick she bring my dinner here, my supper, and we no pay rent. My Sylvie no bother me to pay rent." "Ten years I been here no rent at all." "Sylvie good to me, good to her mother, buy Doctor." "I can pay my rent all right to my girl Sylvie, who is good friend to me." The plaintiff obtained judgment for $1,000 in the County Court the learned judge finding that there was sufficient corroborative evidence.

Statement

The appeal was argued at Victoria on the 10th of January, 1923, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS, and EBERTS, JJ.A.

Reid, K.C., for appellant: No rent was paid for ten years. We say no rent was agreed to and secondly there is no corroboration of the plaintiff's evidence. During the ten years Mrs. Swan paid the taxes. As to the corroboration required see *Blacquiere* v. *Corr* (1904), 10 B.C. 448; *Adamson* v. *Vachon* (1914), 6 W.W.R. 114 at p. 120; *Ericcsson* v. *Marlatt* (1913), 18 B.C. 120; *Thompson* v. *Coulter* (1903), 34 S.C.R. 261 at pp. 263-4. They did not sue for rent but for use and occupation.

Argument

Ellis, K.C., for respondent: This is an action for use and occupation: see *Hellier* v. *Sillcox* (1850), 19 L.J., Q.B. 295; *Dominion Trust Co.* v. *Inglis* (1921), 29 B.C. 213. We submit there is sufficient corroboration in the evidence of state-

COURT OF APPEAL

1923

Jan. 10.

SWAN v. ELLIS

ments made by deceased; see also *Ledingham* v. *Skinner* (1915), 21 B.C. 41; *McDonald* v. *McDonald* (1903), 33 S.C.R. 145.

Reid, in reply:

MACDONALD, C.J.A.: I would dimiss the appeal. I think the contract is proven by the plaintiff; and that therefore the only question which remains to be considered by this Court is the question of corroboration.

I am quite clear that on the evidence of the plaintiff there was a renting on the terms which he mentions, namely, what would be charged to any person else. The learned trial judge has found that to be the basis of the action. The question then arises as to corroboration. Corroboration need not be of every particular; all that is required in corroboration is that it shall be material and shall convince the Court that the plaintiff's story is true—it shall be relevant, of course to the issue, and shall be of such a nature as to be calculated to convince the Court that the main evidence is true.

Now here is the corroboration obtained, in the deceased's conversation with Colassin. It is given in broken English, but the fact that rent is referred to imports that there had been an agreement to pay rent; because one does not speak of paying rent when there is no agreement to pay rent, and no relationship of landlord and tenant. "If I get sick she bring my dinner here, my supper, and me no pay rent, my Sylvie no bother me to pay rent." Now what does that mean? "Ten years I been here no rent at all." It is in broken English, but the true meaning, as I understand it from the context, is that he had paid no rent in ten years; not that he was not to pay but that he had paid no rent in ten years. "Sylvie good to me, good to her mother, buy Doctor." And he said that he had money in the bank and got a mortgage. Now here is the most essential part of this evidence, "I can pay my rent all right to my girl Sylvie, who is good friend to me." Surely that is a recognition of the tenancy by the deceased himself, and obligation to pay rent; and it is clearly, in my view of the case, corroborative of the plaintiff's evidence.

MACDONALD, C.J.A.

MARTIN, J.A.: I agree with the learned trial judge; adding only to his reasons the case in this Court of *Dominion Trust Co.* v. *Inglis* (1921), 29 B.C. 213, wherein this principle is expressed; and it is only a question of the application of that principle to the facts and circumstances of each case. I think the learned judge has rightly applied the facts before him.

GALLIHER, J.A.: I am not at all free from doubt in this case on the question of corroboration. As I view the evidence of corroboration, the only evidence that I really can turn to is the evidence of Colassin. I have doubts as to whether that is not open to two constructions, and therefore, under the authorities, not sufficient corroboration. However, my doubts in that respect are not so strong that when the rest of the Court is, as I understand, in favour of maintaining the judgment, for me to express definite dissent to the judgment of the Court.

GALLIHER, J.A.

McPHILLIPS, J.A.: In my opinion the appeal cannot succeed. In all these cases we have to give great weight to the judgment of the Court below. I would refer to Foa on Landlord and Tenant, 5th Ed., 390-1; there we have the proposition stated:

> "The presumption, however, of a contract to pay a reasonable sum which arises from the defendant's occupation of the plaintiff's property may be rebutted by proof of circumstances which shew that such occupation was to be without compensation."

There was use and occupation here. If that had stood alone, in this case where recovery is sought against the estate of the occupier, there would be difficulty in recovering. There is evidence, though, that rent was to be paid, scant as it may be, and the learned judge in the Court below determined it was sufficient, apparently, by giving effect to it. I cannot agree that the case is one entitling a contrary opinion; to do so one has to say that the learned judge in the Court below went entirely wrong; and that I cannot say. It is not necessary for a Court of Appeal to do more than this, to say that the judgment is not unreasonable. And therefore I am of the view that we should not disturb the judgment.

MCPHILLIPS, J.A.

COURT OF APPEAL

1923

Jan. 10.

SWAN v. ELLIS

EBERTS, J.A.: I am also of opinion that there is sufficient evidence of corroboration.

Appeal dismissed.

Solicitor for appellant: *D. S. Wallbridge.*
Solicitors for respondent: *Ellis & Brown.*

LAMPMAN, CO. J.

1923

Jan. 24.

REX v. WONG CHUN QUONG

REX v. WONG CHUN QUONG.

Criminal law—Accused charged with unlawfully having drugs in his possession—Mens rea—Conviction—Appeal—Can. Stats. 1911, Cap. 17.

Mens rea is a necessary ingredient on a charge against a person of unlawfully having drugs in his possession in contravention of The Opium and Narcotic Drug Act.

APPEAL by Wong Chun Quong from a conviction by the police magistrate for the City of Victoria on the 21st of December, 1922, on a charge brought against him that he on the 1st of December, 1922, at Victoria, had unlawfully in his possession certain drugs, to wit, opium without first obtaining a licence from the minister presiding over the department of health, contrary to the provisions of The Opium and Narcotic Drug Act.

Statement

The evidence disclosed that the appellant arrived from China at the Port of Victoria on the 1st of December, 1922, being a passenger on the S.S. "Protesilaus." The accused on landing at the Outer Wharf had in his possession a certain trunk and the customs officers upon proceeding to examine it found a false bottom in the said trunk which contained 119 tins of opium. The accused Chinaman denied that he knew that the opium was in the trunk and stated that he had no knowledge of the same but that upon leaving China to come to the City of Victoria a friend of his had asked him to take the trunk from China to Victoria as a matter of courtesy.

Moresby, for appellant: The doctrine of *mens rea* applies. The statute under which the appellant was charged is a penal one and if the appellant was not aware of the opium being in his possession he is entitled to be acquitted: see *Rex* v. *Lee Duck* (1919), 27 B.C. 482; *Rex* v. *Young* (1917), 24 B.C. 482; *Rex* v. *Cappan* (1920), 32 Can. Cr. Cas. 267.

O'Halloran, for the Crown, contended that *mens rea* was not a necessary ingredient in the case but the statute being a prohibitive one the mere finding of the opium in the possession of accused was sufficient to warrant a conviction.

Argument

LAMPMAN, Co. J. after expressing his opinion that he was satisfied that the accused was not aware of the opium being in the trunk, reserved judgment on the question of *mens rea.*

24th January, 1923.

LAMPMAN, Co. J.: At the conclusion of the hearing I stated my view of the facts, but reserved my judgment for the purpose of considering the question as to the necessity, in order to make a conviction proper, of the accused having had a guilty mind. After considering the cases, I am of the opinion that the offence charged does not differ from the ordinary criminal offence and the general rule applies.

Judgment

I would refer to Kenny's Outlines of Criminal Law, 8th Ed., 37-45, where the question is fully dealt with.

The appeal is allowed, but without costs.

Conviction quashed.

APPEAL COURT OF

1923

Jan. 31.

BLOOMFIELD v. T. ALEXANDER AND SONS

BLOOMFIELD v. T. ALEXANDER AND SONS AND CHESTER ALEXANDER.

Negligence—Motor-truck in collision with motor-car—Going in same direction—Motor attempting to pass—Truck swerves to left to make straight turn—Drives motor into curb—Damages.

A jitney was about to pass on the left side of a truck going in the same direction when the truck swerved sharply to the left in order to make a straight turn into a driveway on the right side of the road upon which they were driving and in so swerving to the left the truck drove the jitney into the curb on the left and the plaintiff, who was a passenger on the jitney, was severely injured. An action for damages was dismissed.

Held, on appeal, reversing the decision of MCINTOSH, Co. J., that there was negligence on the part of the driver of the truck in crossing the line of traffic without having regard to those coming behind and in failing to give warning of his intention to do so.

APPEAL by plaintiff from the decision of MCINTOSH, Co. J., of the 24th of October, 1922, in an action for damages owing to the negligence of the defendant. The plaintiff was a passenger in a jitney driven by one Bishop easterly on Yates Street, in the City of Victoria, on the afternoon of February the 28th, 1922. The defendants' truck, driven by one of the Alexanders, was going in the same direction on Yates Street, ahead of the jitney, the driver intending to turn to the right into a driveway about 614 feet east of Cook Street. As they approached the driveway, the jitney was going a little faster with the evident intention of passing, its front wheels overlapping and being about even with the back wheels of the truck. The truck then swerved over to the left for the purpose of making a straight turn into the driveway but in doing so drove the jitney over against the curb on the left side of Yates Street, the result being that the plaintiff passenger was severely injured. The action was dismissed, the learned judge holding that there was no negligence on the part of the driver of the defendants' truck.

Statement

The appeal was argued at Victoria on the 31st of January, 1923, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

D. S. Tait, for appellant: The jitney was going at about 15 miles an hour and gradually overhauled the truck. When the driver of the truck swerved over to the wrong side it was his duty to see that he did not interfere with anyone approaching behind and to give warning by holding out his hand. The jitney driver had a right to assume there was ample room to pass and he should have been warned of the unusual swerve the motor-truck driver was about to take.

Aikman, for respondents: The jitney driver was coming up behind. He could have taken the safe course of waiting behind, but he tried to pass. He did this at his own risk: see *Mayhew* v. *Boyce* (1816), 1 Stark. 423; *Beauchamp* v. *Savory* (1921), 30 B.C. 429 at p. 432. Notwithstanding the swerve to the left the jitney still had 14 feet between the truck and the curb in which to pass. That he attempts to pass at this own peril see Angell on Highways, p. 453. There is no evidence of custom as to holding out your hand.

Argument

Tait, in reply.

MACDONALD, C.J.A.: I think the appeal should be allowed. The facts are, shortly, that the defendant's motor-truck driver was driving up the south side of Yates Street towards Cook; he was followed by the plaintiff's jitney driver, that is, the plaintiff was in the jitney as a passenger, in the back seat, and had admittedly no control of the driver, the question of control of him not being raised in this action at all events. They were proceeding along in that way, one of them at about fourteen miles an hour, and the other about fifteen; the jitney driver was in the act of creeping up upon the truck, for the purpose of passing it; and they were partially overlapped at the time this occurrence happened. The driver of the truck then swung across the street sharply to the left, in order to turn in at his own place to the right; he had a long motor-truck and a narrow passage to get in, and he had to swing across to the opposite side of the street in order to make it. He did that without warning, that is, he drew in to cross the line of the traffic, without paying any attention to the possibility of persons coming up behind and being impeded, and the accident occurred. It may

MACDONALD, C.J.A.

COURT OF APPEAL

1923

Jan. 31.

BLOOMFIELD v. T. ALEXANDER AND SONS

be assumed, if you will, that the jitney driver was also guilty of want of care in not giving notice that he was about to pass; but that does not make any difference, the plaintiff in this action not being affected by the contributory negligence of the driver. That was decided in the case of *Brooks* v. *B. C. Electric Ry. Co.* (1919), 27 B.C. 351, and in the case of *Smith* v. *South Vancouver and Corporation of Richmond* (1922), 31 B.C. 168. Those being the circumstances in which this occurred, was the defendant guilty of negligence? I think he was. I think any prudent man in those circumstances, having regard to the fact that motor-cars have now practically replaced horse traffic, and the traffic is much more rapid, with much more danger of collisions in close quarters than formerly, and in view of the fact that it is the universal custom, I think, of which we can take judicial notice, if it does not appear in the evidence, that where a person is about to turn on to a cross street he holds out his hand as a means of warning to those coming behind that he is about to slack up and turn; that is a rule, not in the Motor-vehicle Act, but of caution; and the same rule of caution is equally applicable to this case. In not giving warning I think the defendant was guilty of negligence; and the plaintiff is entitled to succeed. I understand that damages have not been assessed. There should be a new trial for the purpose of assessing damages, but not on the question of liability.

MACDONALD, C.J.A.

MARTIN, J.A.: In a nutshell, what the negligence consists in here is the undue appropriation of the highway, without giving warning of that intention. How that warning should be given I express no opinion; there is no evidence on it, and I take no notice of it. But I do say this, that where a person crosses the line of traffic he must then do so having regard to two things, first, that he must anticipate that there will be somebody behind him who will be affected by such a dangerous act, and, second, he must take reasonable care to avoid the consequences of that danger.

MARTIN, J.A.

In this case I do not hesitate to say that upon the uncontradicted evidence, it is only open to one conclusion, as a matter of law, which is that there was negligence in both these respects,

that is to say, crossing the line of traffic without having regard to those coming behind, and failing to give warning of some kind of thus doing. The principle is settled as to negligence in such cases; in fact in all cases, in the *Ottawa Electric Railway Co.* v. *Booth* (1920), 63 S.C.R. 444 at p. 458, where it is stated that the only standard is, what is reasonable care in all the circumstances.

GALLIHER, J.A.: I do not see any escape from setting aside this judgment. There is really only one thing to find, and that is, as to the defendant's negligence. Under the circumstances of this case I fail to see how we could absolve him from negligence. I think the appeal must be allowed.

GALLIHER, J.A.

MCPHILLIPS, J.A.: I also am of the opinion that the appeal must be allowed. Different considerations would arise if there had been an attempt on the part of the driver of the jitney to bring an action. But in this particular case this lady is in no way affected with what the jitney driver did in the circumstances. The act of negligence which entitles this action to be brought for an actionable wrong, in my opinion, was the negligent act of turning in the manner in which the defendant did. He occupied, or demonstrated his intention to occupy, such a large proportion of the road, that it threw the jitney driver into a perplexed state of mind no doubt; and the injury to the plaintiff was the result of the negligent act of the defendant. It would have been easy, and, I think, in accordance with custom and usage, as the learned Chief Justice has stated, for some warning to be given in circumstances that obtained here; and no warning was given, thus bringing about a very perilous condition of things. And naturally it must follow that the defendant must take the responsibility which the law imposes, and that is, the injury being occasioned by his negligent act, damages should properly be assessed against him.

MCPHILLIPS, J.A.

EBERTS, J.A.: I have nothing to add to what my brothers have said.

EBERTS, J.A.

Appeal allowed.

Solicitors for appellant: *Tait & Marchant.*
Solicitors for respondents: *Aikman & Shaw.*

COURT OF APPEAL

1923

Feb. 1.

GERRARD v. ADAM AND EVANS.

Negligence—Collision between pedestrians—Complainant a woman 75 years old—Knocked over by young man running across the sidewalk—Thigh bone broken—Damages.

GERRARD v. ADAM AND EVANS

The plaintiff, a lady of 75 years of age, while walking along a sidewalk was struck and knocked down by a young man running backward and forward across the sidewalk while loading a delivery wagon at the curb from the side door of a store opposite. An action for damages was dismissed.

Held, on appeal, reversing the decision of LAMPMAN, Co. J., that in so running into the plaintiff when recklessly and carelessly running backward and forward across a sidewalk the defendant was guilty of negligence and (MARTIN, J.A. dissenting) there was in the circumstances no contributory negligence on the part of the plaintiff who is therefore entitled to damages.

Statement

APPEAL by plaintiff from the decision of LAMPMAN, Co. J., of the 11th of October, 1922, in an action for damages for negligence. The facts are that the plaintiff, a lady of 75 years of age, made some purchases in the defendant Adam's grocery store at the south-east corner of Fort and Cook Streets, Victoria, on the 8th of March, 1922, at about 11.15 a.m. On coming out of the store she turned to her right walking easterly up Fort Street. The defendant Evans, who was Adam's employee, was loading a truck which was backed to the curb of the sidewalk on Fort Street opposite a side door of the defendant Adam's store, about 15 yards east of the corner. After putting a box on the truck he turned back towards the side door and ran into the plaintiff, knocking her down, breaking her thigh bone. The plaintiff claimed $1,000 damages against both defendants. The action was dismissed.

The appeal was argued at Victoria on the 31st of January, 1923, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Argument

Maclean, K.C., for appellant: This woman, who is 75 years old, was in splints for several weeks and in the hospital three months. The accident was due to the reckless running back-

ward and forward of the defendant Evans. The sidewalk is for pedestrians and anyone going across a sidewalk must take care to avoid interfering with those using it in the regular way. There was no contributory negligence; she was using the sidewalk in the regular way and was entitled to do so without interference from anyone running across it.

Higgins, K.C., for respondent: We say she slipped and fell and was not knocked down. Her evidence is conflicting and should not be relied upon: see *Campbell* v. *Cleugh* (1920), 28 B.C. 352. She was guilty of contributory negligence in not taking reasonable care: see *Fletcher* v. *Rylands* (1866), L.R. 1 Ex. 265; Beven on Negligence, 3rd Ed., 568.

Argument

Maclean, in reply.

MACDONALD, C.J.A.: I would allow the appeal. The case is a very simple one. The plaintiff is an old lady of 75 years of age, who had been shopping at the defendant Adam's place of business on Cook Street, at the corner of Fort. She left the store, intending to go two doors up Fort Street to the dairy company's place. One would expect her to go along that side of the sidewalk, that is to say, looking at the probabilities of it, she would hardly swerve out ten feet, as is suggested here, towards the outer edge of the sidewalk in order to arrive at the place of her destination. However, be that as it may, the defendant Evans, who was an employee of Adam, was loading a truck on Fort Street, drawn up at the curb. He had just deposited a box on the truck, and turned around, and, according to her story, ran back towards the store, and into her, throwing her down, with the result that her thigh was broken and very serious pain and suffering, and disablement, perhaps for life, and serious expenses were incurred in the hospital, and for doctor's fees. Evans tells a different story, at all events at the trial. He says that he was right at the edge of the sidewalk, that is at the north limit of the sidewalk, eighteen inches or two feet from the curb, that he swung around, and in swinging around brushed against her, and she fell, and this injury was occasioned. The defence put up in the statement of defence was that she was on the wrong side of the street; and carrying that out, he places the place of collision with her on

MACDONALD, C.J.A.

COURT OF APPEAL

1923

Feb. 1.

GERRARD v. ADAM AND EVANS

MACDONALD, C.J.A.

the left-hand instead of on the right-hand side of the sidewalk. The learned trial judge, in the judgment, which is not altogether satisfactory, finds that issue apparently in favour of the defendants, and dismisses the action. With respect, I am unable to agree with him. While Evans gives such evidence at the trial, yet when we look at his evidence on discovery, when the matter was fresher in his mind than it was at the trial, and when witnesses are perhaps more prone to tell the truth than they are at the trial, what do we find? He was asked, distinctly and directly on what part of the sidewalk the accident occurred, and he said on the south side—thus corroborating her story that it was on the right-hand side of the sidewalk. He says towards the building, on the side the building was on; and he emphasizes it, so that he clearly understood the question, and clearly answered the question. Now, are we to take his evidence at the trial, or are we to take his evidence upon discovery, which corresponds with the evidence of the plaintiff? I prefer to take the evidence of an interested witness which is most against himself; and therefore I would accept as true the evidence which he gave on discovery, and I would discredit the evidence which he gave at the trial. The explanation which Mr. *Higgins* attempted to make in regard to that is not at all satisfactory to me.

There are other discrepancies which I need not refer to. The case depends purely upon a question of fact. And as I have come to a clear decision on the question of fact, I need say no more.

I think the judgment should be set aside. There will be judgment for the plaintiff for $1,000 with costs.

MARTIN, J.A.

MARTIN, J.A.: The facts have been so fully gone into, it is unnecessary for me to restate them, I shall content myself with saying that I feel that, with due respect, the learned judge should have found that the defendant was guilty of negligence. In so doing, I wish it to be understood that I do not intend to depart from the long-established rule of this Court that we should not interfere with a finding of fact unless we can say it is clearly wrong. Because, in this instance, the learned judge, unfortunately, has introduced an element of great

embarrassment at the conclusion of his judgment, when he says that he has approached this case in such a way that the fact that he has not had another case of the kind before him has had considerable weight with him in deterring him from finding that Evans was guilty of negligence. Now, of course, with all due respect, that is quite an improper element (using the word judicially) to introduce into the consideration of the matter. The question as to whether or not the matter should have been approached from a certain point of view is not determined by the fact that the learned judge had not happened to have had a case of that kind before. And therefore, as I said, his approach (to use his own words), his wrong approach has had considerable weight with him in determining and finding that there was no negligence. That exonerates me from any embarrassment in saying that upon the facts before him the learned judge should have found that there was negligence.

That, however, does not dispose of the matter. The question then arises as to whether there was contributory negligence on the part of the plaintiff. I must say, although that matter has not received very much attention today when it was given to us first, yet the plaintiff's own account, which Mr. *Higgins* read to us at the conclusion of his argument, satisfies me completely that the plaintiff was guilty of contributory negligence. MARTIN, J.A.

I apply the rule as adopted by me in recent cases in this Court, of *Winch* v. *Bowell* [(1922), 31 B.C. 187] and *Skidmore* v. *B.C. Electric Ry. Co.* [*ib.* 282] that the test is, as stated by Lord Justice O'Connor, as to what was the duty—the question to be asked is, what was the real cause of the accident? I think the real cause of this accident was this, that the defendant, the servant, hurriedly crossed the sidewalk, but that unfortunately the plaintiff, who says herself she saw him coming at the time, did not stop herself and take the ordinary precautions to avoid inevitable collision.

Therefore, there being contributory negligence to my mind, the appeal should be dismissed.

GALLIHER, J.A.: This is one of these unfortunate cases which does not very often come up, as the learned trial judge has said. However, when they do come, we must deal with GALLIHER, J.A.

COURT OF APPEAL

1923

Feb. 1.

GERRARD v. ADAM AND EVANS

them on the facts as we find them. With respect, I say that the learned trial judge has not dealt very satisfactorily with the points in his judgment, and I feel myself quite open to take my own view of the evidence. In my view the defendant was guilty of negligence. There is no question raised as to the employer being responsible for his servant's negligence.

GALLIHER, J.A.

On the question of contributory negligence, I must say that I cannot find that there was any contributory negliegnce on the part of the plaintiff. Evans in hurriedly rushing back to the store to put more goods on the truck, is upon the old lady before she really could do anything; it is just in a moment; he takes a sudden rush to run five or six or ten feet, he is upon her before she could possibly protect herself, and I do not think she would be called upon to anticipate that a person would dash back in that way and run into her. He has his back to her in the first instance, putting his goods in the truck, he suddenly darts back to the store, the collision occurs before she has even any chance to look out for herself, as I view the evidence. So that I find the defendant guilty of negligence, and the plaintiff not guilty of contributory negligence. Only one result can follow—that the appeal should be allowed.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I am of the opinion that the appeal should be allowed. I find negligence, an actionable wrong, was clearly established. In canvassing the evidence, it is evident to me that the plaintiff told a common-sense story; it is just what we would expect a truthful person to say under the circumstances in all its details. Really there has been no variation from actual fact except only in a minor detail, and that is, that the lady said that she fell into the doorway. Well, when you work it out, according to the defendant's story, if she fell at about the centre of the sidewalk her head was towards the building, and she was opposite the door she speaks about. It seems to me that in view of all the circumstances, her story is credible; no doubt she was actually correct in that it was just opposite the door. The circumstances have to be considered, her age, and the injuries she sustained at the moment. Now, on the other hand, the defendant Evans's story is one of contradiction. He is a young man, active physically and

mentally, and there was nothing to prevent him from having a good recollection of the circumstances; but apparently he is absolutely confused, to put it as charitably as possible. He tells about brushing her, he tells about turning around, in a rather impossible sort of a way, and brushing her; he tells of not seeing her in rather an impossible way, too; he tells of meeting her, he tells of colliding with her, and as my brother the learned Chief Justice brought out very clearly, his evidence is full of contradictions, when we consider what he said on the discovery evidence and what he said at the trial. There is no confusion upon the part of the testimony of the plaintiff whatever; and it fits in with common sense.

With regard to the question of contributory negligence, I cannot see that there are any of the elements of contributory negligence. Contributory negligence has to have with it as a premise, the opportunity, and the real sensible recognition of the opportunity, to avert an accident where another person has been guilty of negligence, that notwithstanding that negligence you could have averted the happening. I am quite in agreement with what my brother GALLIHER has said upon that point. As the plaintiff says, the thing was sudden—naturally, it was sudden; the circumstances all indicate suddenness. The evidence shews that the truck was loaded at certain times; and one of the times that the truck was to go out was at half past eleven o'clock in the morning; and here was this young man loading his truck at the time of this accident, it then being quarter past eleven. I can visualize the whole circumstances, this young man was working under pressure, hastening to load his truck, careless, apparently, and reckless of the traffic upon the sidewalk. Can it be that citizens are to be menaced in this way, by young capable men absolutely reckless and careless of circumstances, so that the old and delicate people, young children, and so on, are to be placed in this position of jeopardy? The circumstances were such that there was no opportunity on the part of this lady to avoid the accident, in my opinion. The testimony drawn out by counsel, it seems to me, does not displace this view.

MCPHILLIPS, J.A.

Now, the principle under which we should proceed was

COURT OF APPEAL

1923

Feb. 1.

GERRARD v. ADAM AND EVANS

stated in that well-known case of *Coghlan* v. *Cumberland* (1898), 1 Ch. 704, where Lindley, M.R. (afterwards Lord Justice Lindley), at p. 705 said:

"When, as often happens, much turns on the relative credibility of witnesses who have been examined and cross-examined before the judge, the Court is sensible of the great advantage he has had in seeing and hearing them. It is often very difficult to estimate correctly the relative credibility of witnesses from written depositions; and when the question arises which witness is to be believed rather than another, and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may shew whether a statement is credible or not; and these circumstances may warrant the Court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the Court has not seen."

Now, all these elements are present here, in my opinion; the evidence of this defendant is so fallacious that it can be disregarded. The learned trial judge undertook to disregard it, in a matter which evidently he did think was very important; the defendant lays stress on the fact that this lady had rubbers on her feet, and that she came up like the foot-pad does behind him, and that therefore he should be excused on that ground. The learned trial judge discredits that statement; he believes the plaintiff. This is not a case where it can be stated that the learned trial judge disbelieves the plaintiff. As pointed out by my brother MARTIN during the argument the learned trial judge gave weight apparently to the rarity of this class of accident in arriving at his conclusion, and that deterred him in finding negligence. He says:

MCPHILLIPS, J.A.

"There is a certain class of accidents such as motor-car collisions respecting which it is not against one's every-day experience to believe that there was negligence. One would approach the acts of a boy on a bicycle with much the same state of mind—also the tendency of any inexperienced hunter to fire without being sure as to what he is firing at. But accidents such as the one that happened to the unfortunate plaintiff are rare. I can not recall another here and this has considerable weight with me in deterring me from finding that Evans was guilty of negligence."

With great respect to the learned trial judge, the case is to be determined upon the facts as adduced at the trial, and upon those facts only. It is true, of course, that certain things may be taken judicial notice of (open and notorious facts) and may be considered in a proper case, but I cannot see their relevancy here.

The trial judge is not entitled to shrink from the responsibility and duty which rests upon him, and, with great respect, the learned trial judge should not have shrunk from his duty here, in finding, not upon the rarity of the accident and other happenings, but upon the actual facts of the case. This Court has a like duty and must discharge its duty and not shrink from it, but rehear the case and give the judgment which ought to have been given in the Court below. Lord Buckmaster, in *Ruddy* v. *Toronto Eastern Railway* (1917), 86 L.J., P.C. 95 at p. 96 said:

"But upon questions of fact an Appeal Court will not interfere with the decision of the judge who has seen the witnesses and has been able, with the impression thus formed fresh in his mind, to decide between their contending evidence, unless there is some good and special reason to throw doubt upon the soundness of his conclusions."

MCPHILLIPS, J.A.

There is ample here to throw doubt upon the soundness of the learned judge's conclusion.

EBERTS, J.A.: In this case I have carefully perused the evidence, and heard the able arguments, and I am of opinion that the defendant Evans was guilty of negligence which brought about this accident, and the plaintiff did in no way contribute to it. And with every respect to the learned judge who decided otherwise, I think the appeal should be allowed.

EBERTS, J.A.

Appeal allowed, Martin, J.A. dissenting.

Solicitors for appellant: *Crease & Crease.*
Solicitor for respondents: *Frank Higgins.*

COURT OF APPEAL

1923

March 6.

URE *v.* MACGREGOR AND GENOA BAY LUMBER CO.

URE *ET AL.* v. MACGREGOR AND GENOA BAY LUMBER COMPANY LIMITED.

Woodman's lien—Action for wages—Contract between employer and lumber company—Logging machinery supplied for which option to purchase logs is given—R.S.B.C. 1911, Cap. 243, Secs. 37 and 38.

M., a logger, who acquired an interest in certain timber lands entered into an agreement with a logging company whereby M. was given the right to use certain logging machinery on said lands and the logging company was given the first right to purchase all the logs manufactured by M. during the period he used the machinery. M. employed the plaintiffs who, after 13 months' work filed liens for wages. The logging company under the agreement purchased all the logs manufactured but did not enforce the production of pay-rolls by M. as required by the Act. An action by M.'s employees to enforce the liens succeeded as against M. but was dismissed as against the logging company.

Held, on appeal, affirming the decision of MCINTOSH, Co. J. (MCPHILLIPS, J.A. dissenting), that the action as against the logging company should be dismissed as the agreement between M. and the Company is not within the scope of section 37 of the Woodman's Lien for Wages Act.

APPEAL by plaintiffs from the decision of MCINTOSH, Co. J., of the 8th of August, 1922, in an action by woodmen to enforce liens for wages. The defendant MacGregor, acquired a logging interest in certain lands near Crofton, B.C., and on May 20th, 1921, entered into an agreement with the defendant, The Genoa Bay Lumber Company, Limited, whereby he was to have the use of the Company's logging machinery, in consideration for which the Company was to have the first right to purchase all logs manufactured by MacGregor on said lands. MacGregor employed the plaintiffs who worked on the lands in question for him from March, 1921, until April, 1922. The logs were sold to the defendant Company but the Company did not require the production by MacGregor of pay-rolls or sheets of wages, etc., as required by the Woodman's Lien for Wages Act. Judgment was given against the defendant McGregor, but the action was dismissed as against the defendant Company.

Statement

The appeal was argued at Victoria on the 25th of January,

1923, before MACDONALD, C.J.A., MARTIN, GALLIHER, McPHILLIPS and EBERTS, JJ.A.

COURT OF APPEAL

1923

March 6.

URE v. MACGREGOR AND GENOA BAY LUMBER CO.

D. S. Tait, for appellants: The first question is whether the agreement comes within the Act, and secondly, if it does, does it include logs taken from lands other than those specified in the agreement. When there is an executed consideration passing from one party to another the law will assume a corresponding obligation on the other to give consideration for it. We submit there was an implied contract: see Leake on Contracts, 7th Ed., 31. The logs all went to one boom in Crofton Bay and the Company took them all under the agreement.

Maclean, K.C., for respondent: By section 38, to make the Company liable, it must be under the contract, but this is not a contract that comes within section 37 of the Act: see *Mills* v. *Smith Shannon Lumber Co.* (1916), 22 B.C. 579 at pp. 582-3. The question is as to liability under the contract. He put it in and is bound by it: see *MacKenzie* v. *Palmer* (1921), 62 S.C.R. 517 at p. 519.

Argument

Tait, in reply.

Cur. adv. vult.

6th March, 1923.

MACDONALD, C.J.A.: I concur in the judgment of Mr. Justice GALLIHER.

MACDONALD, C.J.A.

MARTIN, J.A.: By section 37 of the Woodman's Lien for Wages Act, Cap. 243, R.S.B.C. 1911, it is enacted that:

"Every person making or entering into any contract, engagement, or agreement with any other person for the purpose of furnishing, supplying, or obtaining logs or timber by which it is requisite and necessary to engage and employ workmen and labourers in the obtaining, supplying, and furnishing such logs or timber as aforesaid, shall, before making any payment for, or on behalf of, or under such contract, engagement, or agreement is to be made to produce and furnish a pay-roll or sheet of the wages and amount due and owing and of the payment thereof, which pay-roll or sheet may be in the form in Schedule B to this Act, or, if not paid, the amount of wages or pay due on or under such contract, engagement, or agreement at the time when the said logs or timber are delivered or taken in charge for, or by, or on behalf of, the person so making such payment and receiving the timber or logs."

MARTIN, J.A.

Under the contract in question made between the two defend-

COURT OF APPEAL

1923

March 6.

URE v. MACGREGOR AND GENOA BAY LUMBER CO.

ants, MacGregor, a logger, is given the right to continue to use as a "loan" (subject to termination "without notice and without cause") certain machinery owned by the defendant Company, to assist him in getting logs off certain specified lands, and the consideration for this loan and use is thus stated, *viz.*:

"The logger hereby gives to the owner (*i.e.*, the Company), the first right to purchase all the logs manufactured by the logger during the period he is using the said logging machinery . . . . at the same price and on the same terms as any other purchaser would pay."

And goes on to say:

"6. It is particularly understood and agreed between the parties hereto that the owner is not bound to purchase any of the logs logged off the said lands by the logger, but as aforesaid shall have the first right to purchase the said logs."

There is nothing in the contract to obligate the logger to furnish or supply any number of logs at all, and it must be conceded that if he failed to do so no action would lie against him however much the Company may have had the expectation of obtaining some upon which it could exercise its option. So the question really is, at large—Is a contract by which John Doe for valuable consideration (whatever it may be, for money, or loan of machinery, or otherwise) obtain an option from Richard Roe to purchase logs which the latter in his discretion may or may not get off Blackacre, one "for the purpose of furnishing, supplying or obtaining logs or timber" within the meaning of the Act? If so, it is admittedly within the rest of the Act in this case, because it would be necessary to employ workmen to carry it out.

MARTIN, J.A.

In my opinion the kind of contract contemplated by the Act is one by which one of the parties is obligated to "furnish, supply or obtain logs," and the other is obligated to take them, the words "for the purpose" of so doing indicate this because that means a "purpose" which is fixed and definite in its result, and not one which may have no result whatever. A careful perusal of the action shews that many kinds of contracts to "obtain, supply or furnish" logs are not within its scope; *e.g.*, a contract by which A agreed to lend machinery to B so that B could "obtain" logs off Blackacre, and then sell them to C, would clearly be outside the section as regards A because though the "purpose" would be to obtain and supply logs to C

yet A could not be called upon to make "any payment . . . . under such contract . . . . in money or by kind," and therefore he was not required or entitled to call for a pay-roll and so was not liable for wages under section 38, and much less is a contract within the section by which A simply lends machinery to B for the purpose of "obtaining" logs from Blackacre so that B could sell them in the open market. The "purpose" of the contract must be determined at its date of execution and here, at that date, the "purpose" was not more than if MacGregor "obtained" logs by means of the Company's loaned machinery then the Company might or might not buy them from him. I do not think that this indefinite "purpose," freed from any obligation on the part of MacGregor to "obtain" even one log, or on the part of the Company to buy that log if obtained, can be said to be a "purpose" which would produce any definite or fixed result under the section, and the fact that later on the Company did exercise its option in favour of buying the logs does not alter the original "purpose" of the transaction in its true statutory sense, or throw it back, so to speak, into a different interpretation.

MARTIN, J.A.

I have arrived at this conclusion not without hesitation, in view of the very plausible, indeed weighty submissions of Mr. *Tait* to the contrary, but after the most careful consideration, I am unable to give effect to them, and therefore the appeal should be dismissed.

GALLIHER, J.A.: This is an appeal from the decision of McINTOSH, Co. J., dismissing the plaintiff's action against the defendants, the Genoa Bay Lumber Company, Limited.

The claim as against the Company was founded on sections 37 and 38 of the Woodman's Lien for Wages Act, R.S.B.C. 1911, Cap. 243. These sections are as follow:

"37. [Already set out in the judgment of MARTIN, J.A.]"

"38. Any person making any payment under such contract, engagement, or agreement without requiring the production of a receipted pay-roll or sheet as mentioned in the last preceding section shall be liable, at the suit of any workman or labourer so engaged under the said contract, engagement, or agreement, for the amount of pay so due and owing to the said workman or labourer under the said contract, engagement, or agreement."

GALLIHER, J.A.

COURT OF APPEAL

1923

March 6.

URE v. MACGREGOR AND GENOA BAY LUMBER CO.

The learned judge held that these sections did not apply in the circumstances of this case.

There is, as I understand, no dispute as to the amounts due the respective plaintiffs, or that the work was done upon the logs produced by the defendant MacGregor and purchased by the defendant Company. It appears that the Company on or about October, 1919, purchased certain logging machinery and equipment from a firm of loggers, Paitson & Young, for whom the defendant MacGregor was then working. MacGregor then started logging for the Company by using the machinery of the Company on what was known as the Keating tract on the understanding that he was to receive $100 per month and a bonus if he could log for less than $10 a thousand. This tract was all logged off in April, 1920. In the meantime MacGregor had acquired the right to log off what was known as the Leather and Bevan tract, and with respect to this tract the verbal arrangement was the same as for the Keating tract, with this exception, that for the purpose of earning the bonus the logging price was raised to $15 per thousand.

Up to the end of December, 1920, the Company paid off the men and in fact, I find an entry in January, 1921, in the accounts, shewing that they paid the pay roll $809.03 for that month. None of the claims for back wages go back of January 1st.

GALLIHER, J.A.

We then come to the document of May 20th, 1921. It is submitted on behalf of the wage-earners that the document is a contract, engagement or agreement within section 37 of the Woodman's Lien for Wages Act. I have considered this document from every angle and I cannot conclude that it is. This Court has already held in *Mills* v. *Smith Shannon Lumber Co.* (1916), 22 B.C. 579, that these sections (37 and 38) apply only to contracts which contemplate the employment of labour after the date of the contract: see the judgment of the Chief Justice at p. 582. Under the document, there is nothing binding MacGregor to produce logs, and even when produced, there is nothing binding on the Company to accept them, and only on production and acceptance can it be said to become a contract such as is referred to in section 37.

The work then has been all done before we can say there is a binding contract. I have considered this phase of the question—as to whether the production having been started, men hired and work done under the agreement; when it becomes a complete contract by acceptance, could it be said to relate back to the date of the agreement so as to bring it within the Act, but I am unable to convince myself that such would be the case, and can find no authority for such a proposition.

There were some 500,000 feet of logs manufactured by MacGregor on limits outside those described in the agreement, scale bills of which are put in, which were bought by the Genoa Logging Company, and by them sold to the defendants, the Genoa Lumber Company; but assuming these to have been in reality purchased by the Lumber Company, I would hold that these could not be said to be under any new implied contract, but rather an acquiescence by the Company in an extension of the agreement to other limits, and in such case the objections I have before pointed out would apply.

GALLIHER, J.A.

I would dismiss the appeal.

McPHILLIPS, J.A.: The consideration of this appeal involves the consideration not only of the evidence but the construction of, in particular, sections 37 and 38 of the Woodman's Lien for Wages Act, R.S.B.C. 1911, Cap. 243, and the agreement between the respondents of date the 20th of May, 1921. The sections of the Act and the agreement read as follow: [His Lordship after quoting sections 37 and 38, already set out in the judgment of MARTIN and GALLIHER, JJ.A., and the agreement, continued].

MCPHILLIPS, J.A.

In my opinion, the agreement constitutes a sufficient contract within the purview of the Act and, apart from its express terms, there was a further contract (the contract is not required to be in writing) which sufficiently came within the purview of the Act which enables the appellants to enforce the provisions of the Act as against the respondent Company. The learned counsel for the appellants, Mr. *David Tait*, in a very able argument reviewed the evidence, which is somewhat voluminous, and presented the appeal in a very convincing manner

COURT OF APPEAL

1923

March 6.

URE v. MACGREGOR AND GENOA BAY LUMBER CO.

which resolved all doubts as to whether the case was one which entitled the reversal of the judgment of the Court below which was for the respondents, my opinion being, with great respect to the learned trial judge, that the appellants should have succeeded. The evidence discloses a long continued course of action of the respondent Company of strict compliance with the provisions of the Act only making payments upon the production of the receipted pay-rolls (sections 37 and 38) but later, and no doubt being of the opinion that, under the terms of the agreement or whatever they believed the contractual relationship which existed to be, there was no liability under the Act, departed from this salutary rule and now contend that no statutory liability exists to the appellants, loggers, who, in good faith, in my opinion, gave their labour to getting out logs which the respondent Company acquired and took the benefit of, contending that they are in no way answerable for the wages. First, dealing with the written agreement itself, it is contended that in any event, it is confined to logs taken out from the described lands. After careful consideration of this contention and paying attention not only to the language of the contract but to the surrounding circumstances attendant upon its being entered into, I am of the opinion that even, under the terms of the writing, it cannot be contended that the contractual relation-

MCPHILLIPS, J.A.

ship was confined to taking out logs from and off only the specifically described lands. In applying the provisions of the Woodman's Lien for Wages Act, an enactment for the protection of woodsmen, who engage in such arduous labour and in the main untutored men, there should be such construction of the contracts entered into as will admit of the protection Parliament intended, provided of course no violence be done to the plain reading of the contract when in writing or that which may have been agreed to verbally. Here we have a consistent course of conduct upon the part of the respondent Company for a long time in plain compliance with the Act, then a departure therefrom, and the attempt is to defeat these woodsmen of a statutory protection which should be afforded, if it be at all possible, without unduly straining the law. In my opinion, the evidence is amply sufficient to impose liability upon the respondent

Company. I would refer to paragraph 4 of the agreement. There it is plain that it was in contemplation, as the evidence shews, that the machinery would be used upon other than the described lands, as it gives the right to retake the machinery "upon any lands" and the class of machinery is such that it is in use always upon the ground where actual logging operations are going on. Then we have paragraph 6 using the words "the owner is not bound to purchase any of the logs logged off the said lands." The "said lands," in my opinion, means upon any lands, *i.e.,* the respondent Company, as in paragraph 6 is stated "shall have the first right to purchase the said logs," meaning, of course, any logs logged off any lands. It is common sense that this should be deemed to be the contract—how absurd otherwise. It is inconceivable that all this valuable machinery was to be allowed to remain in possession of MacGregor and that no consideration would result therefrom, save as to the specifically described lands, when to the absolute knowledge of the respondent Company the machinery was, in the main, being used upon lands other than those specifically described. It is only necessary to weigh all the evidence to be compelled to conclude that the contract was one at large, *i.e.,* the machinery was to be used upon any lands and the respondent Company was to always have upon whatever lands logged, as stated in the contract, "the first right to purchase the said logs." Here we have a substantial lumber company engaged in a very large way of business on the one hand and woodsmen in the woods devoting their labour to the production of the logs which that Company afterwards acquires. The machinery used being the machinery of the Company, yet there is the effrontery to contend that, upon the facts, there is no statutory liability upon the Company. The contention made is not lacking in courage, but, in my opinion, lacks merit and working an injustice it can only prevail if there is intractable law in the way which prevents natural justice and the intention of Parliament being carried out. I have no hesitation in arriving at the conclusion that a sufficient contract was established both by writing and verbally which admits of the provisions of the Act being given effect to. Further, the facts and cir-

MCPHILLIPS, J.A.

COURT OF APPEAL

1923

March 6.

URE v. MACGREGOR AND GENOA BAY LUMBER CO.

MCPHILLIPS, J.A.

cumstances and the work done, the getting out of the logs and the purchase of them by the respondent Company amply entitles (if that be necessary) it being said that a contract must be implied. This stands out in an illuminative way when sections 37 and 38 are carefully considered. What is to be found and that only is to be found: "making or entering into any contract, engagement or agreement with any other person for the purpose of furnishing, supplying or obtaining logs or timber by which it is requisite and necessary to engage and employ workmen and labourers in the obtaining, supplying and furnishing such logs or timber." Here there was that necessity. Can it for a moment be contended, without creating an immediate atmosphere of fraud that MacGregor was to be allowed to use the machinery of the respondent Company and get out logs and be under no requirement to account therefor to the respondent Company or be at liberty to retain the machinery and remain inactive and not get out any logs at all? The answer to this must be that the contract was to use the machinery to get out logs which the respondent would acquire, but even if there was no absolute contract upon the respondent Company to acquire them, yet to be able to exercise the option, the logs had to be produced, therefore there was a contract which necessitated the employment of workmen and that contract the respondent Company was a party to. Further, when the respondent Company did exercise its option it made a payment within the meaning of section 38 in respect of a contract within the meaning of section 37, as it made a payment under a contract, by which it was necessary to engage and employ workmen and, without requiring the production of a receipted pay-roll. This is not a case of innocence of the law, which, in any case, would not excuse, but it is and can only be said to be an attempt to evade a statute well knowing the intention of Parliament (to protect labourers in the woods). Parliament making a statutory contract for these labourers and imposing that contract upon the purchasers of logs and timber to the end that purchasers of logs and timber would not be able to exploit the labourers to their advantage and not be called upon to see that that labour was paid for. Why did the respondent Company not pursue the

course of caution previously adopted? If that course had been continued no injury or deprivation of hard-earned wages would have ensued; the appellants would have got their money. The course now pursued and given effect to in the Court below means the deprivation of a right which, in my opinion, has been amply established. Further, it is in the interests of justice to make it plain that it is impossible to evade statutory liability in the way here attempted. In *Attorney-General* v. *Richmond and Gordon (Duke)* (1909), A.C. 466, Lord Collins at p. 480, said:

"I accept unreservedly the conclusions of fact found by Bray, J., and adopted by the Court of Appeal, and I do not at all question the right of an owner of property so to dispose of it, if he can, as to keep it outside the meshes of a taxing statute. But the real question here is whether he has succeeded in doing so. In my opinion he has not."

I am of the like opinion to that of Lord Collins, in the present case. The respondent Company entered into contracts which, in my opinion, are not "outside the meshes" of the Woodman's Lien for Wages Act. With great respect to all contrary opinion, it would appear to me to be nothing less than a calamity to hold that what took place here absolves the respondent Company from liability under the Act. To so hold and to so view all the surrounding circumstances and the contractual relationship would be, in the language of Lord Shaw of Dunfermline in the above cited case at p. 487, "to shut out the light, to lose their true meaning and to produce a risk of failure to get down to the reality and substance of the case." Liability cannot be evaded by the respondent Company by entering into contracts which they say are futile to impose the statutory liability provided for in the Act. In the result labour was employed, logs were produced and the respondent Company purchased them, and the attempt is to escape by contending that the contracts are ineffective to impose liability. The contention is without force and, if driven to it, I would say that the respondent Company cannot be listened to. It means that a colourable trick, (Solicitor's Journal, Vol. 61, p. 742 at p. 743) has been resorted to to evade liability. Such procedure cannot receive the sanction of the Court. Lord Atkinson in the case above referred to said, at p. 475:

MCPHILLIPS, J.A.

"It might have been legitimate to inquire into these matters subsequent, if the transactions which were concluded on that day had been impeached

COURT OF APPEAL

1923

March 6.

URE v. MACGREGOR AND GENOA BAY LUMBER CO.

as unreal, colourable, or sham transactions; but they have been admitted to be real and genuine in their character."

In the present case, there is no such admission and it is plain that the attempt is to put forward a contract which, according to the construction put upon it by the respondent Company, would amount to nothing but a colourable or sham contract.

The liens of the appellants, in my opinion, should be held to have been established, and the respondent Company compellable to pay and discharge the same, the judgment below to be reversed, the appeal to be allowed.

EBERTS, J.A.

EBERTS, J.A. would dismiss the appeal.

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitor for appellants: *Arthur Leighton.*

Solicitor for respondent, Genoa Lumber Company, *H. A. Maclean.*

COURT OF APPEAL

1923

March 6.

CRISPIN & CO. v. EVANS, COLEMAN & EVANS

CRISPIN & COMPANY v. EVANS, COLEMAN & EVANS LIMITED.

Contract—Sale of goods—Failure to deliver—Exception clause relieving seller—Construction—Ejusdem generis rule—Measure of damages.

Two similar contracts by the defendants to sell and deliver salmon, being the first 2,500 cases of half-pound flat tins of Fraser River pink salmon of the Acme and St. Mungo Canneries respectively of the 1917 run, contained a provision relieving against default in delivery arising from "the packing being interfered with or stopped or falling short through failure of fishing or through strikes or lockouts of fishermen or workmen or from any cause not under the control of the sellers." The season's run of fish was ample but at the Acme Cannery they first packed 3,700 cases of one-pound cans and the run closed before completion of the half-pound order, and at the St. Mungo Cannery they proceeded to pack half-pound tins but after an interval they found the tins were defective and before a supply of proper tins could be obtained the run of fish ceased. The defendant was unable

to make delivery and in an action for damages for breach of contract the defendants were held liable.

Held, on appeal, affirming the decision of MORRISON, J. (MARTIN and MCPHILLIPS, JJ.A. dissenting), that the *ejusdem generis* rule applied and the defendants were liable for breach of contract.

COURT OF APPEAL

1923

March 6.

CRISPIN & CO. *v.* EVANS, COLEMAN & EVANS

APPEAL by defendants from the decision of MORRISON, J. of the 9th of September, 1922 (reported in 31 B.C. 328), in an action to recover $15,731.29 damages for breach by the defendants of two contracts of 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 half-pound flat tins at $5.75 per case, unlabelled, free on board export steamer or cars at Vancouver, B.C., the salmon to be the first 2,500 cases of half-pound flat tins 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 Cannery Co., Ltd., during the season 1917. After entering into the above contracts the plaintiffs, who were merchants in England immediately sold the whole pack to M. Lebeaupin, Nantes, France. As no delivery was made, M. Lebeaupin claimed damages and on an arbitration the umpire assessed same at $12,500 and the award was upheld by McCardie, J. in England. This action was then brought consequent on the breach. The case turned on the meaning of the "packing" clause in the contract, *i.e.*, "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." There was an excellent run of fish on the Fraser River in the season of 1917. The St. Mungo Cannery began to pack the salmon into the half-pound 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

Statement

COURT OF APPEAL

1923

March 6.

CRISPIN & CO. v. EVANS, COLEMAN & EVANS

Statement

into half-pound tins and destroyed the cooking already made. Before they could get a new lot of half-pound tins the run of salmon had practically ceased. As to the Acme Cannery, they had a full supply of half-pound tins, but they also had a large number of one-pound tins on hand and these were getting rusty when the fish began to run, so they filled the one-pound tins first to the extent of over 3,700 cases to avoid the loss of those one-pound tins, and before they could proceed to fill the half-pound tins the run of fish ceased and they were unable to prepare half-pound tins at all. The trial judge gave judgment for the plaintiffs for $20,606.

The appeal was argued at Victoria on the 16th, 17th and 18th of January, 1923, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Argument

Davis, K.C., for appellants: There was an award against Crispin & Co. which was upheld by McCardie, J. We say the judgment was wrong. (a) This was a sale of specific goods and there was impossibility of performance; (b) he did not interpret one of the conditions of the contract in its true meaning. As to the *ejusdem generis* rule he should have followed *Howell* v. *Coupland* (1876), 1 Q.B.D. 258; *Nickoll & Knight* v. *Ashton, Edridge & Co.* (1901), 2 K.B. 126. This was a contract of 2,500 cases of half-pound tins and became a specific article: see *In re Thornett & Fehr and Yuills, Ld.* (1921), 1 K.B. 219; *Canadian Trading Co. Ltd.* v. *Canadian Government Merchant Marine Ltd.* (1922), 30 B.C. 509; 3 W.W.R. 197; *Krall* v. *Henry* (1903), 2 K.B. 740 at pp. 750-2. The saving clause in the contract was not properly interpreted by the learned judge: see *Lebeaupin* v. *Crispin* (1920), 2 K.B. 714 at p. 718. If it is uncontrollable by either we are relieved. Words should be construed in their primary and natural sense: see *Attorney-General of Ontario* v. *Mercer* (1883), 8 App. Cas. 767 at p. 778; *Hawke* v. *Dunn* (1897), 1 Q.B. 579 at p. 586; *Smelting Company of Australia* v. *Commissioners of Inland Revenue, ib.* 175 at p. 182; Beal's Cardinal Rules of Legal Interpretation, 2nd Ed., pp. 64-5. On *ejusdem generis* rule see *Ambatielos* v. *Anton Jurgens Margarine Works* (1922), 2 K.B. 185; 39 T.L.R. 106; *S.S. Magnhild* v. *McIntyre Bros.*

& Co. (1920), 3 K.B. 321 at p. 325. The charter contracts differ from this case and the rule does not apply. The exception clause provides for failure of fishing, strikes and lock-outs. If there is any *genus* at all these would be included in "any cause not under the control of the sellers." In any event if the *ejusdem generis* rule applies the three exceptions above are broad enough to cover the cause of the failure to obtain the fish under both contracts.

Craig, K.C., for respondents: The defendants have placed themselves in the position of the canneries and subject to the doctrine of impossibility of performance they are bound to deliver. They are not relieved by default of the canners. Evans & Co. never contended they could escape when they had a right over against the canneries. One measure of damages see *Slater* v. *Hoyle and Smith* (1920), 2 K.B. 11; *Rodocanachi* v. *Milburn* (1886), 18 Q.B.D. 67; *Williams* v. *Agius* (1914), A.C. 510; *Agius* v. *Great Western Colliery Co.* (1898), 1 Q.B. 413; *Hammond & Co.* v. *Bussey* (1887), 20 Q.B.D. 79. On the question of impossibility see *Canadian Trading Co. Ltd.* v. *Canadian Government Merchant Marine Ltd.* (1922), 30 B.C. 509; 1 W.W.R. 662; 64 S.C.R. 106; (1922), 3 W.W.R. 197; *Hood* v. *West End Motor Car Packing Company* (1916), 2 K.B. 395; *Lebeaupin* v. *Crispin* (1920), 2 K.B. 714; *French & Co.* v. *Leeston Shipping Co.* (1922), W.N. 93; *Dahl* v. *Nelson, Donkin & Co.* (1881), 6 App. Cas. 38; *Carr* v. *Berg* (1917), 24 B.C. 422; *In re Thornett & Fehr and Yuills, Ld.* (1921), 1 K.B. 219. The exception clause must be clear: see *Neilson* v. *L. & N.W. Ry. Co.* (1922), 1 K.B. 192 at 197; *Harrison* v. *Holland, ib.* 211 at p. 213; *Price & Co.* v. *Union Lighterage Company* (1904), 1 K.B. 412; *Elderslie Steamship Company* v. *Borthwick* (1905), A.C. 93; *Nelson Line (Liverpool), Limited* v. *James Nelson & Sons, Limited* (1908), A.C. 16. On the *ejusdem generis* rule see *Rex* v. *Shann* (1910), 1 K.B. 10; *Northfield Steamship Company* v. *Compagnie L'Union des Gaz* (1912), 1 K.B. 434; *Herman* v. *Morris* (1919), 35 T.L.R. 574; *In re Richardsons and M. Samuel & Co.* (1898), 1 Q.B. 261; *Fenwick* v. *Schmalz*

Argument

COURT OF APPEAL

1923

March 6.

CRISPIN & CO. v. EVANS, COLEMAN & EVANS

(1868), L.R. 3 C.P. 313 at p. 315; *Zinc Corporation, Limited* v. *Hirsch* (1916), 1 K.B. 541 at p. 549; *Tillmanns & Co.* v. *Steamship Knutsford, Lim.* (1908), 77 L.J., K.B. 778 at pp. 785-7. There was no insuperable obstacle in the way and they are bound by the judgment in the *Lebeaupin* case. In other words they are estopped: see *Jones* v. *Williams* (1841), 7 M. & W. 493; *Duffield* v. *Scott* (1789), 3 Term Rep. 374; *Marshall* v. *Houghton* (1922), 3 W.W.R. 65.

Davis, in reply: There is no estoppel by the *Lebeaupin* judgment as we were not parties to that case. The difference is as to control. We cannot be liable except for our own default. We cannot be affected unless we told them not to defend.

Cur. adv. vult.

6th March, 1923.

MACDONALD, C.J.A.

MACDONALD, C.J.: I would dismiss the appeal substantially for the reasons given by the learned trial judge. I will only add, since there was a good deal of argument as to the applicability of the *ejusdem generis* rule to the contract in question, that, in my opinion, that rule is not a scientific one, but rather one adopted from practical necessity, since without some such limitation on general words, the preceding words indicating the intention of the parties to confine their agreement to anticipated events would be rendered nugatory.

The events in the minds of the parties were, an interference with, stopping and falling short in the pack, through (and these are the particular words) the failure of fishing, strikes or lock-outs. Would there have been any doubt of the meaning of what had been agreed upon had the word "like" been inserted by the parties in the sentence, "or from any causes not under the control of the sellers"? That word the rule implies. It was argued very strongly that, a "lock-out" is as much within the control of the packers as the conditions of the tins, for instance, but it is well known that the expression "strikes and lock-outs" means labour troubles.

I think the rule is applicable to the contract in question. The appeal should be dismissed.

MARTIN, J.A.

MARTIN, J.A.: This appeal should, I think, be allowed for

reasons which I shall give later, only saying now, that the *ejusdem generis* rule does not, in my opinion, apply.

GALLIHER, J.A.: I would dismiss the appeal. It seems to me the learned trial judge came to the right conclusion in applying the rule of *ejusdem generis,* and once that is decided I do not think the class and amount of damages awarded can be interfered with, in fact I understood Mr. *Davis,* in the end, to practically concede that was so.

MCPHILLIPS, J.A.: This appeal has been very ably argued by the learned counsel upon both sides, and we have a most voluminous appeal book, with the citation of a large array of cases, but, with every deference to all that has been so ably presented, it seems to me that the case is one within small compass and is to be decided upon the terminology in the contracts, coupled, of course, with such evidence as is admissible defining the intention of the parties. It is to be first noted that the contracts are not positive and absolute, at least I so read them. They had relation to the acquirement of specific goods (the purchase of canned salmon) contemplated to come into existence at a later date, and the contracts may be said to come within the implied rule governing in such cases that the "sellers," as the appellants are called, should be excused in case of impossibility of performance, if the fact was that there was impossibility of performance owing to the goods not coming into existence, without the default of the sellers. The submission, upon the part of the respondents, was that, as they had been held liable to their vendees in an action relative to the non-production of the salmon they had contracted with the appellants to supply to them (as it was that identical salmon they had contracted to sell), it followed that the appellants were liable to them and that the appellants were liable to fully and completely indemnify them for all loss and expenses in connection therewith, inclusive of the costs of litigation and interest upon the moneys. The learned trial judge so held but, with great respect to the able and careful judgment of the learned trial judge, I am unable to agree with the conclusions at which that learned judge arrived. The

COURT OF APPEAL

1923

March 6.

CRISPIN & Co. v. EVANS, COLEMAN & EVANS

respondents were held liable upon contracts differing in terms from the contracts we have here to construe. The decision relied upon by the respondents as determinative of the liability of the appellants to them, is *Lebeaupin* v. *Crispin* (1920), 2 K.B. 714. There there was a contractual obligation having relation to the "canners or shippers," here we have "sellers" only. The clause which calls for consideration in the present case 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."

The exception clause in the *Lebeaupin* case reads as follows:

"In the event of the destruction, or partial destruction, of the cannery, plant, or material, or the packing being interfered with, or stopped, or falling short through short run of fish, or through strikes or lock-out of fishermen or workmen, or from any cause not under the control of the canners or shippers . . . . causing non-arrival at destination, the contract to be cancelled in respect of such non-delivery or part non-delivery as the case may be."

Then appears in large letters the words, "subject to force *majeure.*"

MCPHILLIPS, J.A.

In the contracts in the present case "subject to force *majeure*" is not to be found. The appellants submitted that there was error in law in the judgment of Mr. Justice McCardie, but even if they were wrong in that the decision in the *Lebeaupin* case could in no way be held to be determinative of the liability upon the contracts under review in the present case, as the contracts differ in material terms, and the salmon not being packed, as the fact was, the "sellers," in my opinion, are excused from performance. The appellants entered into contracts for the salmon with two canneries, the St. Mungo and the Acme, and it was the failure of the production of the salmon by the canners which rendered it impossible for the appellants to supply the salmon to the respondents. It was pointed out that at most the total profit the appellants could have made if the transaction had been completed would have been but $1,200, and how unreasonable it would have

been for the respondents, a business concern of substance, to make a contract which, if there was failure upon the part of the canners, would mean to the appellants a monetary loss of some $20,000. It was strenuously pressed upon the argument at this bar that the exception clause in the contracts in the present case precluded the appellants from claiming any exemption from liability in that the *ejusdem generis* rule applied. I am of the view that the *ejusdem generis* rule is not applicable in the present case. In *Stoomvaart M.S.H.* v. *Merchants' Marine Insurance Co.* (1919), 89 L.J., K.B. 834 Lord Birkenhead, L.C. said at pp. 836-7:

"What we have to ask ourselves in this case, as in all cases, is: 'Do generic words precede the words the effect of which is in controversy?' In other words: 'Can a *genus* be evoked from the terms "capture, seizure, and detention"?' I think that it can. The *genus* here is a category more or less complete of various disadvantages and risks following upon a state of war. The words 'capture, seizure and detention' are in any case suggestive of, certainly are consistent with, a state of hostilities, and when these words are followed by the expression 'all other consequences of hostilities,' the matter seems to me to be perfectly plain. I therefore arrive without difficulty at the conclusion that, just as 'capture, seizure and detention' are, or may be, consequences of hostilities, and were evidently contemplated by the parties to this contract as being so, the words 'other consequences of hostilities' ought to be construed so as to include the casualty which has happened in this case."

Here we have causes mentioned that had no relation whatever to the "sellers" (the appellants) and over which they had no control and further no *genus* can, in the present case, be evoked from the words used, *viz.*: MCPHILLIPS, J.A.

"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."

At most, if there is a *genus* here, it could only be "failure to pack" and that was not within the control of the "sellers," and the exception clause relieves the appellants in such event. The words which follow the above-quoted words are:

"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."

This language, coupled with what precedes it, makes it abundantly clear that there never was any intention to impose liability upon the appellants for anything which was not within

COURT OF APPEAL

1923

March 6.

CRISPIN & CO. v. EVANS, COLEMAN & EVANS

their control. The default of the canners was not to be their default, as note "sellers to use every endeavour to supply the full quantities specified"—no intractable provision, no positive or absolute contract. In the case last quoted (*Stoomvaart M.S.H.* v. *Merchants' Marine Insurance Co.*) Viscount Haldane at p. 837 said:

"In accordance with well-known principles of construction the rule of *ejusdem generis* is applied in cases in which an intention is to be collected that the rule should apply."

As I view it in the present case, any such intention is abundantly rebutted. I would quote all that Viscount Haldane said, as the proposition of law is succinctly stated and the analogy of the reasoning therefrom is helpful in the present case:

"I have arrived at the same conclusion. I do not propose to add anything upon the first two questions, but I wish to add a few words upon the construction of the exception in the warranty clause. In accordance with well-known principles of construction the rule of *ejusdem generis* is applied in cases in which an intention is to be collected that the rule should apply. One judges of that intention from the words, and it yields to any expression which seems to exclude it, but the rule is broadly this: Where you have an enumeration which is obviously an enumeration of *species* falling within a *genus*, the general words following upon the enumeration are held not to exclude the *genus*, but only to cover further *species* which belong to the *genus*. The rule, as I have said, may yield to intention, but it is the rule which is *prima facie* to be applied in the construction of such documents. Now applying the rule to the extent to which it can be legitimately applied, that is to say, to the extent to which it can be applied consistently with the expressions made use of by the parties, I think that the true reading of them is this: The exception extends first of all to capture, seizure, and detention due to hostilities, and then, under a second set of words, to all other consequences due to hostilities which are *ejusdem generis* in the sense that the assured is thereby deprived of the ship, but excepting from such consequences those which are in the nature of 'piracy, riots, civil commotions, and barratry.' I think that to that extent and in that fashion the application of the rule can be made in such a way as to apply the principle of *ejusdem generis* in the only fashion in which it can be legitimately applied in considering the clause which we have before us."

MCPHILLIPS, J.A.

I cannot but conclude that in the present case the rule is excluded, *i.e.*, the *ejusdem generis* rule, when the position of the "sellers" is considered. Note the language of Viscount Haldane as applied to the "intention," and here we have intention well spread upon the contracts: "one judges of that intention from the words, and it yields to any expression which

seems to exclude it." Then even were it necessary to admit that the rule governs in the present case, I am by no means of the opinion that that would conclude the case and impose liability upon the appellants. In this connection I would again quote from the language of Viscount Haldane, wherein he said:

"Where you have an enumeration which is obviously an enumeration of *species* falling within a *genus*, the general words following upon the enumeration are held not to exclude the *genus*, but only to cover further *species* which belong to the *genus*."

Now the obstacle to the fulfilment of the contracts by the appellants was the non-packing and the non-production of the salmon consequent upon the default of the canners to put up the fish. That was a further *species* and beyond the control of the sellers (the appellants). Reverting, however, to the view which I have expressed and strongly adhere to, that the rule of *ejusdem generis* does not apply in the present case, I would refer to what Lord Buckmaster said in the same case (*Stoomvaart M.S.H.* v. *Merchants' Marine Insurance Co.*) at p. 838:

"The doctrine of *ejusdem generis* merely means this, that where you have in at least two cases illustrations given of particular instances, and those are followed by general words, if you can from the instances mentioned obtain a general characteristic which will cover the general words, they do not extend beyond that characteristic, but if you find in the general words themselves further exceptions which shew that the general words must be regarded as having a wider ambit than would be covered by the special characteristic, then the doctrine of *ejusdem generis* does not apply."

Now we have here "any cause not under the control of the sellers." Admittedly the real cause here accounting for the non-production of the salmon was a cause over which the canners had control but not within the control of the sellers, the appellants. These words, in the language of Lord Buckmaster, "must be regarded as having a wider ambit than would be covered by the special characteristic," and if so, in the further language of Lord Buckmaster, "then the doctrine of *ejusdem generis* does not apply." (Also see *Ambatielos* v. *Anton Jurgens Margarine Works* (1922), 2 K.B. 185 at pp. 194, 196, affirmed on appeal to the House of Lords, 39 T.L.R. 106). In the present case the controlling clause is "any cause

COURT OF APPEAL

1923

March 6.

CRISPIN & CO. v. EVANS, COLEMAN & EVANS

not under the control of the sellers" and, in my opinion, it is really immaterial whether they precede or follow the general words, the intention being clearly expressed. As I have previously pointed out this was not a positive and absolute contract (*Horlock* v. *Beal* (1916), 1 A.C. 486, 496, 506; *Taylor* v. *Caldwell* (1863), 3 B. & S. 826, 833; *Canadian Trading Co. Ltd.* v. *Canadian Government Merchant Marine Ltd.* 30 B.C. 509; (1922), 1 W.W.R. 662; affirmed in the Supreme Court of Canada, 64 S.C.R. 106; (1922), 3 W.W.R. 197). Undoubtedly where there is a positive and absolute contract it must be performed, as Lord Atkinson put it, in *Horlock* v. *Beal, supra,* at p. 506:

"Of course, if the contract of the parties be thus positive and absolute, they are bound by it, however impossible the performance of it may become."

MCPHILLIPS, J.A.

But that is not the position as regards the contracts calling for construction in the present case, and the rule established by *Taylor* v. *Caldwell, supra,* is applicable to this case. I am therefore of the opinion that there was impossibility of performance of the contracts in the present case; further, that the non-delivery of the salmon by the appellants under the contracts was due to a cause not under the control of the sellers (the appellants), and within the exception clauses of the contracts. I would, therefore, allow the appeal.

EBERTS, J.A.

EBERTS, J.A. would dismiss the appeal.

Appeal dismissed,
Martin and McPhillips, JJ.A. dissenting.

Solicitors for appellants: *Davis & Co.*
Solicitors for respondents: *Craig & Parkes.*

BROWN v. KELLY DOUGLAS & CO. LTD.

COURT OF APPEAL

1923

March 6.

BROWN v. KELLY DOUGLAS & CO.

Bankruptcy — Petition — Presentation of — Act of bankruptcy — Proof of within six months—"Ceases," meaning of—Can. Stats. 1919, Cap. 36; 1922, Cap. 8, Secs. 3(j) and 4(3).

Under the Bankruptcy Act it is an act of bankruptcy if the debtor "ceases to meet his liabilities as they become due." Under the Act a creditor is not entitled to present a bankruptcy petition against a debtor unless the act of bankruptcy upon which the petition is grounded has occurred within six months before the presentation of the petition.

Held, that the word "ceases" does not include a continuing default, and if a person has failed to pay liabilities on their due dates eighteen months prior to the presentation of the bankruptcy petition against him the mere continuance of the failure to pay the same liabilities cannot be said to be an act of bankruptcy occurring within six months before the presentation of the petition.

APPEAL by plaintiff from the order of MURPHY, J., of the 20th of December, 1922, adjudging Harry Brown and F. G. England, executors of the estate of W. C. England, deceased, carrying on business under the name of England & Son, bankrupt. The facts are that W. C. England, who had a grocery business in Kamloops, under the firm name of W. C. England & Son, died in 1914, and the executors, Harry Brown and F. C. England continued the business with Brown as manager. On the 11th of December, 1922, Kelly Douglas & Co. Ltd. petitioned the Court that Harry Brown and Fred C. England, executors of the estate of W. C. England, deceased, and England & Son of the City of Kamloops be adjudged bankrupt. The petition recited that Harry Brown and Fred G. England as such executors and England & Son were justly and truly indebted to the petitioners in the sum of $1,000 for goods sold and delivered and that the account accrued due in or about the month of May, 1921, and had not been paid.

Statement

The appeal was argued at Victoria on the 16th of January, 1923, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Jeremy, for appellant: Respondent is not entitled to present

Argument

COURT OF APPEAL

1923

March 6.

BROWN v. KELLY DOUGLAS & CO.

its petition as it has security and, secondly no act of bankruptcy has been proved. It has certain security with others as $2,000 is held in trust for the creditors by the Credit Men's Association. As to acts of bankruptcy the words are: "If he ceases to pay his liabilities as they become due." There was no debt due within six months previous to the petition.

Argument

F. R. Anderson, for respondent: There is no evidence of any security; at the meeting the figures shewed liabilities of $6,500 and assets of $2,000. There was a general failure to pay debts which is an available act of bankruptcy: see *Ex parte Bunny.—In re Bunny* (1857), 1 De G. & J. 309 at p. 313.

Jeremy, in reply, referred to *In re Gagnon* (1921), 1 C.B.R. 556.

Cur. adv. vult.

6th March, 1923.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: A receiving order in bankruptcy was made by the learned judge below on the grounds following:

"It appearing to the Court that the following act or acts of bankruptcy has or have been committed, namely, that the said debtors, within six months before the date of the presentation of this petition, have ceased to meet their liabilities as they became due and have exhibited or caused to be exhibited to a meeting of their creditors on the 20th of July, 1922, a statement of their assets and liabilities which shews that they are insolvent."

If the Act of bankruptcy was the exhibition of a statement such as mentioned above, it must, I think, have been a written statement. The language is only applicable to such and it is clear upon the evidence that no written statement of any kind was exhibited by any one at the meeting in question. But even if the language can be said to include a verbal statement, which I think it cannot, there was no verbal statement made by anybody on behalf of the debtor or debtors at that time. That also is clear from the evidence.

This finding eliminates that portion of the alleged act of bankruptcy. The other alleged act of bankruptcy was that within six months before the date of the presentation of the petition, the debtors had ceased to meet their liabilities as they became due. This is a ground of bankruptcy declared in the amendment to the Bankruptcy Act, Cap. 8 of the statutes of

1922, section 3, subsection (*j*). Section 4, subsection (3) of the original Act enacts that:

"A creditor shall not be entitled to present a Bankruptcy petition against a debtor (unless) the acts of bankruptcy on which the petition is grounded has occurred within six months of the presentation of the petition."

The question therefore arises, what is meant by the language "ceases to meet his liabilities as they become due?" It seems to me that the section to which I have referred indicates an intention to exclude stale acts of default on the part of debtors. The offence which is to constitute an act of bankruptcy must have been committed within six months of the presentation of the petition. Now, it is clear from the evidence in this case that the debtors had ceased to meet their liabilities in May, 1921, a year and a-half before the presentation of the petition, and that they had not ceased to pay any liabilities within six months, unless we are to construe the word "ceases" as a continuing default. The language is, perhaps, not very fortunate, but in ordinary parlance, a man ceases to pay his liabilities when he fails to pay them at their due dates, and having regard to the facts to which I have already adverted, that the intention of Parliament that stale defaults should not be construed into acts of bankruptcy, I think, I must hold that the debtors had not ceased to pay their liabilities within six months of the presentation of the petition, which was on the 22nd of November, 1922.

MACDONALD, C.J.A.

I would therefore allow the appeal.

MARTIN, J.A.: On the 17th of November last, the respondent presented a petition that the executor of the estate of W. C. England, deceased, be adjudged bankrupt because of debts incurred for goods sold and delivered in the month of May, 1921, and the order of bankruptcy was made on the 20th of December following on the ground that the debtor had under section 3 (*f*) of the Bankruptcy Act, exhibited to a meeting of his creditors a statement of his assets and liabilities which shewed that he was insolvent, and also that under said section 3 (*j*) he had "[ceased] to meet his liabilities as they [became] due."

MARTIN, J.A.

COURT OF APPEAL

1923

March 6.

BROWN v. KELLY DOUGLAS & CO.

It is objected that it was not proved that he had exhibited such statement to the meeting in question and after reading the evidence I am satisfied that this objection is well taken, and that that finding of fact is clearly wrong upon the uncontradicted evidence.

As to the second ground; section 4, subsection 3 (*b*) declares that a creditor shall not be entitled to present a bankruptcy petition against a debtor unless "the act of bankruptcy on which the petition is grounded has occurred within six months before the presentation of the petition." And it is submitted that as the debt here became due more than six months before that date the petition should have been dismissed.

The point turns upon the meaning to be attached to the expression "ceases to meet his liabilities as they become due."

MARTIN, J.A. It would be impossible I think to give a comprehensive definition of that unusual expression, and I shall not attempt it, but I am prepared to say that it does not include a simple case such as this where all that has happened is that the debtor has not paid for certain goods which he bought and there have been no further transactions between the parties. In my opinion said expression cannot be said within the meaning of the Act to mean that ceasing to do anything more about a liability already due can be expanded to include ceasing to meet liabilities as they become due. It is the same position as if the maker of a note failed to meet it and nothing more was said about it for six months. Such a case would in my view be *dehors* the statute which clearly contemplates something more than mere passivity after one default which has not been invoked within the limited period.

It follows that the appeal should be allowed.

GALLIHER, J.A.: I think the appeal should succeed.

I think the exhibiting of a statement of the assets and liabilities of the debtor to a meeting of his creditors shewing that he was insolvent, should be in writing, but if it can be held

GALLIHER, J.A. that such exhibiting can be verbal, then the evidence does not shew that it was made by the debtor, nor by any one representing him.

On the other point raised, being under Can. Stats. 1922, Cap. 8, section 3 (*j*), "If he ceases to meet his liabilities as they become due." By section 4 (*b*) of the Bankruptcy Act, a creditor shall not be entitled to present a bankruptcy petition against a debtor unless "the act of bankruptcy on which the petition is grounded has occurred within six months before the presentation of the petition." Much turns on the interpretation to be placed on the words "ceases to meet his liabilities as they become due." The word "ceases" infers in itself a cessation or stopping of some act or work heretofore being done or performed, as, to cease work, to cease talking, etc. You can cease just as much at the moment as you can for a day or a month, so that I do not think the six months' limit has any reference to a continuing in default, but it must be there for some purpose, and that purpose as I view it, is to place a limit of time within which, and not afterwards, unless upon a new act within the time limit, a petition may be presented, in other words, where, as here, the act complained of occurred a year and a half before the petition was presented, such acts, stale acts, if I may so term them, are not within the section.

GALLIHER, J.A.

McPHILLIPS, J.A.: I agree in the disposition of this appeal, that is, that it should be allowed.

MCPHILLIPS, J.A.

EBERTS, J.A. would allow the appeal.

EBERTS, J.A.

Appeal allowed.

Solicitor for appellant: *J. E. H. Jeremy.*
Solicitors for respondent: *Russell, Hancox & Anderson.*

COURT OF APPEAL

1923

March 6.

LEE MONG KOW v. REGISTRAR-GENERAL OF TITLES

LEE MONG KOW AND CHETHAM v. THE REGISTRAR-GENERAL OF TITLES.

Real property—Overlapping of surveys—Certificate of indefeasible title—Description according to later plan—"Mistake" of registrar—B.C. Stats. 1893, Cap. 66; 1906, Cap. 23, Sec. 99—R.S.B.C. 1911, Cap. 127.

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 No. 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 about 100 feet on plan 263 but after some correspondence and investigation the Registrar-General decided that 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 from the Registrar's office to him. In 1913 the British Columbia Electric Railway Co. fenced in a strip of about 100 feet of the western portion of the land included in plan 858, claiming that it was part of section 4 within plan 263, and in an action between Lee Mong Kow and the Railway Company it was held that map 858 was wrongfully filed and null and void in so far as it conflicted with map 263. The plaintiff obtained judgment in an action for damages against the Registrar-General of Titles under section 99 of the Land Registry Act, 1906.

Held, on appeal, reversing the decision of MCDONALD, J., that the Registrar-General of Titles was not guilty of any "omission, mistake or misfeasance" so as to render the assurance fund liable for damages under section 99 of said Act.

Held, further, that in any case section 105 of said Act provided against the assurance fund being liable in such a case.

Statement

APPEAL by defendant from the decision of MCDONALD, J. of the 20th of June, 1922 (reported in 31 B.C. 287), in an action to recover $25,000 damages by reason of defendant's misfeasance or mistake in wrongfully granting a certificate of title to lots 6 to 13 inclusive in block 20, subdivision 48, map 858. The facts are that plan 263 being a survey of section 4 and adjoining section 48 (the land in question) on the west was filed in 1890. Map 858, being a survey of lot 48 (east of section 4), was filed pursuant to an order of the Court on

the 4th of October, 1907. The plan was received and filed by the Registrar and later a certificate of title was issued to the plaintiff for lots 6 to 13 in block 20 according to said plan. In February, 1909, the city surveyor brought to the notice of the Registrar-General of Titles the fact that the boundary line between sections 4 and 48 was not fixed and that plan 858 encroached about 100 feet on plan 263, thus cutting 100 feet off the plaintiff's lots 6 to 13, taking away all of lot 13 but none of lot 11. The plaintiff became the owner of the lots on the 29th of January, 1910, and certificate issued on the 20th of June, 1910. In January, 1913, the British Columbia Electric Railway Company took possession of the westerly portion of these lots, which they claimed was in section 4 (a strip of about 100 feet) and they put up a fence on what they looked on as the line between these two sections, *i.e.*, 4 and 48. The plaintiff sold his lots (6 to 13) between April and September, 1912. The sales fell through owing to the mistake and he first sued the British Columbia Electric but lost, MORRISON, J. holding plan 858 conflicted with the prior plan No. 263, which was correct, and he was not entitled to the 100-foot strip in dispute. He then brought this action in May, 1917, for $25,000 damages. Judgment was given in his favour and on reference $13,284 damages found.

Statement

The appeal was argued at Victoria on the 18th and 19th of January, 1923, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Pattullo, K.C., for appellant: Under section 68 of the Land Registry Act, 1906, the Registrar is not bound to make a comparison of the maps. The Registrar acted *bona fide* and is not personally liable: see section 95. The principal defence is under section 105 and should be read with section 81. Under section 105 the assurance fund is not liable for any shortage. In this case there is an overlapping of 100 feet. The only case at all in point is *Burden* v. *Registrar North Alberta* (1913), 25 W.L.R. 460, where it was held the registrar certifies to title not to acreage. This section is a bar to the action. See also *Fowler* v. *Henry* (1903), 10 B.C. 212. He cannot succeed when he is equally responsible for the mistake:

Argument

COURT OF APPEAL

1923

March 6.

LEE MONG KOW v. REGISTRAR-GENERAL OF TITLES

see *Attorney-General* v. *Odell* (1906), 2 Ch. 47. In order to be secure he must have a survey made: see *Loewen* v. *Duncan* (1921), 30 B.C. 295. On the question of damages and date to be taken see Hogg's Registration of Titles to Land throughout the Empire, pp. 395-6; *Russell* v. *Registrar-General* (1906), 26 N.Z.R. 1223. It is the value at the time he obtained his certificate of title: see *Bain* v. *Fothergill* (1874), L.R. 7 H.L. 158; *Engel* v. *Fitch* (1867), L.R. 3 Q.B. 314; L.R. 4 Q.B. 659. No interest should be allowed: see *McKinnon* v. *Campbell River Lumber Co.* (1922), [31 B.C. 18]; 2 W.W.R. 556; *Bradley* v. *Bailey* (1922), 66 D.L.R. 441. As to costs see Mayne on Damages, 9th Ed., 320; *Collinge* v. *Heywood* (1839), 9 A. & E. 633.

W. J. Taylor, K.C., for respondent: The Registrar under section 68 of the Act has the right to correct a plan. His attention was called to the conflict between the two plans and that plan 858 was wrong. We have suffered by reason of his refusal to do his duty and correct it: see *Burden* v. *Registrar North Alberta* (1913), 25 W.L.R. 460 at p. 462; *Darley Main Colliery Co.* v. *Mitchell* (1886), 11 App. Cas. 127 at pp. 133-5; *Morrison* v. *Commissioners of Dewdney Dyking District* (1922), 31 B.C. 23. On the question of the damages we have suffered see *McArthur & Co.* v. *Cornwall* (1892), A.C. 75 at p. 86; *Rowe* v. *School Board for London* (1887), 36 Ch. D. 619 at p. 623; *Randall* v. *Roper* (1858), 27 L.J., Q.B. 266; *Spark* v. *Heslop* (1859), 28 L.J., Q.B. 197; *Agius* v. *Great Western Colliery Company* (1899), 1 Q.B. 413 at pp. 420 and 423; *The Millwall* (1905), P. 155 at pp. 174 and 176; *Chr. Salvesen & Co.* v. *Rederi Aktiebolaget Nordstjernan* (1905), A.C. 302 at pp. 305 and 311; *Cassaboglou* v. *Gibb* (1883), 11 Q.B.D. 797 at pp. 803-5.

Argument

Pattullo, in reply, referred to Thom's Canadian Torrens System, 220; *Morris* v. *Bentley* (1895), 2 Terr. L.R. 253; *Hamilton* v. *Iredale* (1903), 3 S.R. (N.S.W.) 535; *Amar Singh* v. *Mitchell* (1916), 23 B.C. 248.

Cur. adv. vult.

6th March, 1923.

COURT OF APPEAL

1923

March 6.

LEE MONG KOW v. REGISTRAR-GENERAL OF TITLES

MACDONALD, C.J.A.: The narrative of the case has been very fully told by the learned trial judge in his reasons for judgment, and I will not repeat it here. The salient facts to which I will particularly refer are as follow:

Map No. 263 was deposited in the Land Registry office on the 5th of February, 1890. Lands adjoining those shewn on map 263 were afterwards subdivided as shewn on map 858, which conflicted with the earlier map. Map 858 was, on the 4th of October, 1907, deposited in the Land Registry office by the plaintiff's predecessor in title, pursuant to a judge's order made under the Victoria Official Map Act, 1893.

I may say at once that I do not attach any significance to the judge's order, since it was required merely for the purpose of shewing that the map did not offend against the by-laws and regulations of the City of Victoria, and had nothing to do with the boundaries. The Registrar had actual notice of the conflicting boundaries in 1909, and in the following year he registered the plaintiff's title.

There is now no controversy as to which survey is the correct one. The plaintiff has since sued the owner of the lands defined on map 263 for trespass, and that action was decided against him.

The plaintiff became possessed of the lots in question on the 20th of June, 1910, and some time afterwards applied to the Registrar for registration, which was granted and a certificate of indefeasible title was issued to him for the lots as defined on said map 858.

The Act gives the Registrar a discretion to accept or reject a map which conflicts with another deposited map, and there is no doubt that he *bona fide* thought that the mistake was in the prior map. The plaintiff was not aware of the mistake in map 858 until some time after he had obtained his certificate of title. He now brings this action to recover damages out of the assurance fund provided by legislation for cases falling within the benefit of that legislation. The Act applicable to the case is the Land Registry Act, Cap. 23 of the Acts of 1906, and the sections relating to the assurance fund are sections 96 to 108, both inclusive.

COURT OF APPEAL

1923

March 6.

LEE MONG KOW v. REGISTRAR-GENERAL OF TITLES

Similar legislation was enacted in some of the other Provinces and in Australia, the Australian Acts being no doubt the source from which the Canadian legislation was adopted. Section 96 of our Act applies only to a case where the complainant has been deprived of land, and therefore it can have no direct application to the case at bar, since it is clear that the mistake alleged here did not deprive the plaintiff of any land. At most the error of which the Registrar was guilty, was in not informing the plaintiff when he applied for registration of his lots that there was a conflict between the two plans which might affect the area of the plaintiff's lots, so that the plaintiff might seek redress if he desired and could obtain it from his vendors.

When the legislation was first framed, it appears to have offered relief only to persons deprived of land, but at some subsequent time it appears to have been thought fit to broaden its application, and apparently there was then added to what is in our Act section 99, the first three or four lines of that section, without changing or sufficiently changing the language of the rest of the section to bring about a harmonious whole. As section 99 now stands it is most confusing, but nevertheless, I think the object of the Legislature has been so clearly indicated though inartificially expressed, that the Court ought to give it the interpretation which the Legislature must have intended it to have. Stated shortly, the section provides that any person sustaining loss by error of the Registrar may, "in any case in which the remedy by action for the recovery of damages as hereinbefore provided is barred, bring an action." Now, the action "hereinbefore provided" was an action for deprivation of land only, while the action against the Registrar for error was not, I think, intended to be so limited. The condition that the action thereinbefore provided should be barred, would seem to be inconsistent with the right given to a complainant in other parts of the section, and if literally construed, to practically defeat it. The manifest intention was to give to a complainant a new right, not for deprivation of land alone, but for loss suffered by error of the Registrar for deprivation of land or otherwise. To make it a condition to such relief in a case where there was no deprivation of land,

MACDONALD, C.J.A.

that a claim for deprivation of land should be barred leads, I think, to an absurdity. To add to the confusion we have section 103, which would appear to bar an action against a registrar at the same time that it bars one against the other party liable to be sued. The time within which such an action may be brought is limited to six years from the deprivation of land. But the last clause of section 105 would seem to be decisive of this case. It reads:

"Nor shall the assurance fund be liable in any case for any error or shortage in area of any lot, block or subdivision according to any map or plan filed and deposited in the office of the Registrar."

The mistake was in the survey of the subdivision shewn on map 858. The shortage, damages for which are claimed herein, is a shortage in area of lots according to the said map and hence, I think, within the words of the clause. There was an error in the survey of the subdivision, and hence in the map or plan. The plaintiff's deed is of lots according to said map or plan. Because of the error of the surveyor there is a shortage in area in the lots. The Registrar's certificate of title is for the lots according to the plan, therefore the fund is not liable.

MACDONALD, C.J.A.

MARTIN, J.: No cause of action has been shewn, in my opinion, against the Registrar-General, because he has not been guilty of any "omission or mistake or misfeasance" in the proper meaning of that expression. Briefly, my view is that he has, with all respect, been erroneously regarded as if he were under the statutes a land surveyor dealing with an area *in situ* instead of an examiner of titles dealing with documents in the ordinary way, with an additional power to be mentioned later. Under the Victoria Official Map Act, 1893, Cap. 66, Sec. 35, he had no power to prevent the filing of the original plan, though after filing he had a power of altering or amending it as contained in the Land Registry Act, 1906, Cap. 23, Sec. 68, in the final proviso, thus:

MARTIN, J.A.

"Provided always, 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; and provided further, that he may, upon the filing of sufficient evidence, correct the measurements upon any deposited map or plan."

COURT OF APPEAL

1923

March 6.

LEE MONG KOW v. REGISTRAR-GENERAL OF TITLES

That gives him the absolute discretion also to refuse to accept a non-corresponding plan, but once he does so he may "upon sufficient evidence" correct it or any other deposited plan. The question as to the sufficiency of the evidence is one for him alone, and I see no authority to review such a *quasi*-judicial decision, unless possibly upon a reference under section 91 in case any question should arise "with regard to . . . . the exercise of any of (his functions)." But in this case no such question did in fact arise. The fact being simply that the Victoria City surveyor on his own responsibility and to set the matter "upon record" (something not authorized by the Act) wrote to the Registrar-General stating that in his opinion there had been an error in the subdivision, to which the Registrar replied that "after carefully looking into the matter" and considering the plans before him of the surveyor, he thought the city surveyor was in error, and there the matter rested because none "of the parties interested" (section 91) thought it worth while to raise any question about the correctness of his decision. To my mind this disposes of the whole matter apart from whatever may be the effect of section 105, and so the appeal should be allowed.

MARTIN, J.A.

GALLIHER, J.A.

GALLIHER, J.A. would allow the appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: This appeal involves the consideration of whether upon the facts and circumstances it can be said that the Registrar-General in the discharge of his official duty was guilty of any omission, mistake or misfeasance whereby the respondents sustained loss or damage, and which would entitle recovery being had from and out of the assurance fund within the purview of the Land Registry Act (1906), which is the governing statute.

The learned trial judge held that the respondents had suffered damage, holding that it was established that the Registrar-General was guilty of a "mistake" within the meaning of section 99 of the Act, but although he had been guilty of a mistake it was *bona fide* done and there was no personal liability; that there was liability, however, in accordance with the terms of the Act, upon the Crown under section 99 of the Act, and

directed that upon the final judgment being entered the necessary certificate to the minister of finance would issue entitling the minister of finance to charge the amount of the judgment to the account of the assurance fund. From this judgment the appeal is taken. The mistake found to have been made by the Registrar-General was, in the words of the learned judge:

"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 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."

The learned judge in his reasons for judgment further said:

"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.

"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."

MCPHILLIPS, J.A.

I cannot, with great respect, agree with all the conclusions of the learned trial judge, nor do I agree in the result at which he arrived. This action cannot be said to be within sections 96, 97 and 98, and, in this, I am in agreement with the learned trial judge, and I am also in agreement with the learned trial judge that the Registrar-General proceeded *bona fide*. The learned trial judge has held that the Registrar-General was bound to accept plan No. 858, which was subsequently proved to be in error, overlapping in area the land described in map

COURT OF APPEAL

1923

March 6.

LEE MONG KOW v. REGISTRAR-GENERAL OF TITLES

MCPHILLIPS, J.A.

No. 263. In that I agree. I cannot agree that the Registrar-General was guilty of any mistake within the meaning of section 99 of the Act, as a result of which mistake the respondents "sustained loss or damage." The loss or damage sustained should have been provided against by proper and sufficient covenants for title and an accurate search of title, and in that title was taken in accordance with the description as contained in plan No. 858, the proper course for the respondents to have followed was to have satisfied themselves that the area was upon the ground, having purchased in accordance with plan No. 858 and registered title in pursuance of plan No. 858. The error in the plan and the deficiency of area upon the ground, followed by the issuance of an indefeasible title, was not "any omission, mistake or misfeasance of the Registrar" within the meaning of section 99 of the Act. It was not a duty incumbent upon the Registrar to determine the question of conflict between plan No. 858 and map No. 263. There was no conflict upon the face of the plan and map and the Registrar was entitled to assume that the work of duly-qualified surveyors was rightly done and that the areas shewn thereon were to be found upon the ground, and, as I have pointed out, the risk in the matter was the risk of the purchasers who purchased the lands relying upon the plan, *i.e.,* plan No. 858, and making it part of the title. Furthermore, there was not sufficient evidence, in truth, no evidence at all, demonstrating any conflict between the plan and map and as it subsequently developed, it took a long and intricate research and suit at law to establish the true facts, Lee Mong Kow being the plaintiff in the action and the British Columbia Electric Railway Company Limited being the defendant, and it was held that plan No. 858 was wrongly deposited (and it was under this plan that Lee Mong Kow had requested title to be issued to him) in the Land Registry office in so far as the same conflicted with map No. 263, and that plan No. 858 was void and invalid in so far as it so conflicted, and that Lee Mong Kow's certificate of title should not include any part of section 4. Now, what was the mistake for which liability has been imposed? The mere fact that there was mistake in the plan No. 858 cannot be that mistake. How was it possible for

the Registrar to determine that? He had no machinery to do that. Was there mistake in issuing the indefeasible title at the request of Lee Mong Kow based upon plan No. 858? I fail to see any mistake in this; it was the request of Lee Mong Kow, and in making the request he was warranting the authenticity of plan No. 858 (*Attorney-General* v. *Odell* (1906), 2 Ch. 47, and *Fowler* v. *Henry* (1903), 10 B.C. 212), and in any case this was the risk of Lee Mong Kow, the applicant for title. Can it be said that in the result Lee Mong Kow has been deprived of any land? In my opinion it is impossible to so contend. The indisputable facts are that Lee Mong Kow was never the owner of the land shewn on plan No. 858, which encroaches upon map 263, and, not being deprived of any land within the purview of section 99 of the Act, I fail to see wherein he has sustained any loss or damage arising from any mistake of the Registrar. The subsequent sales made by Lee Mong Kow, I assume, were made with covenants for title, and it would be because of those covenants for title that Lee Mong Kow would be answerable in damages, but by what manner of reasoning can those damages be imposed upon the Registrar and passed along and constitute an obligation upon the assurance fund? Lee Mong Kow admittedly has not been deprived of any land. He never was entitled to it, and it is not the case of any other person being wrongly registered as the owner of the land as against Lee Mong Kow, as Lee Mong Kow never was entitled to be the registered owner of the land. It therefore follows that, in my opinion, there was no mistake committed by the Registrar within the purview of section 99 of the Act which admits of liability being imposed, which eventually is to fall upon the assurance fund. But if I should be in error in this conclusion, then, in my opinion, section 105 of the Act constitutes a complete bar to the respondents' recovering anything in this action. The section reads as follows: [His Lordship, after quoting the section, continued]. The concluding words of the section give ample and complete immunity to the assurance fund, *viz.*:

MCPHILLIPS, J.A.

"Nor shall the assurance fund be liable in any case 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."

COURT OF APPEAL

1923

March 6.

LEE MONG KOW v. REGISTRAR-GENERAL OF TITLES

The real shortage in area upon the ground was 100 feet, constituting an overlapping of plan No. 858 as against map No. 263, which was correct in its boundaries, and upon that state of facts it would seem to me the exact situation is present which the learned trial judge would appear to have thought was absent when he said in his reasons for judgment: [already quoted at p. 155].

I make this observation with the greatest respect and with the fear that I may be misunderstanding the learned judge, but, as the facts appear to me, the present case is an exact illustration of what the learned judge would have apparently thought would have entitled him to apply section 105 of the Act, and would have been conclusive of the case against the respondents, that is, the action would have been dismissed by the learned judge.

Burden v. *Registrar North Alberta* (1913), 25 W.L.R. 460 is a decision which supports the view that, in the present case, no mistake was made by the Registrar under section 99 of the Act. Finally, the effect of the indefeasible fee itself is conclusive against the respondents, as no warranty of area is given (see section 81 of the Act) as to description, boundaries or parcels. Subsection (*i*) to section 81 reads:

"The right of any person to shew that any portion of the land is by wrong description of boundaries or parcels improperly included in such certificate."

MCPHILLIPS, J.A.

And that was what was shewn in the action above referred to, brought by Lee Mong Kow himself, *i.e.*, that Lee Mong Kow's certificate of title should not have had included therein any part of section 4, and it is because of that adjudication that the claim for damages in this action is brought, Lee Mong Kow ostensibly losing a portion of the lots purchased by him as shewn in plan No. 858 but in reality he never acquired title to this portion of the land, as in fact it was non-existent and never was the property of his vendors. If Lee Mong Kow has good and sufficient covenants for title in the conveyance to himself he may enforce those covenants and thereby recover his loss. If the covenants for title are non-effective and not sufficiently far-reaching, it is his mistake. This is not the case, even of Lee Mong Kow being the purchaser from persons holding an

indefeasible fee to the lands as delineated on plan No. 858, it was upon Lee Mong Kow's own application that the indefeasible fee issued based upon a plan which has been found to be in error, and it was upon that plan Lee Mong Kow took title. That plan should have been checked and a survey made on the ground, but this was not done. The whole scheme of the Land Registry Act is to exclude liability or mistake of the Registrar. If the error has relation to wrong description of boundaries or improper inclusion of parcels of land (as set forth in the certificate of indefeasible title, section 81 of the Act), and that is the burden of the complaint of the respondents, in my opinion, no cause of action was established within the purview of any of the provisions of the Act.

MCPHILLIPS, J.A.

I would allow the appeal.

EBERTS, J.A. would allow the appeal.

EBERTS, J.A.

Appeal allowed.

Solicitor for appellant: *W. D. Carter.*
Solicitors for respondents: *Taylor & Brethour.*

HUNTER, C.J.B.C.

1923

March 29.

REX v. JONES.

Criminal law—Sale of intoxicating liquor—Warrant of commitment—Insufficient statement of offence—Habeas corpus—B.C. Stats. 1921, Cap. 30, Sec. 20.

REX v. JONES

A warrant of commitment made on a conviction for an infraction of section 20 of the Government Liquor Act is bad if it does not shew on its face that the Act has been violated.

A motion by the Crown to amend the warrant of commitment was refused in view of it having already been twice amended.

MOTION for *habeas corpus* for discharge of the prisoner on the ground of insufficient statement of the offence in the warrant of commitment.

Statement

The prisoner was committed to Oakalla Prison after a conviction by the police magistrate of Vancouver, affirmed on appeal by the County Court Judge of Vancouver pursuant to section 77 of the Summary Convictions Act on a warrant of commitment of the said County Court Judge (CAYLEY, Co. J.) "for that he did on the 7th of November, 1922, at the City of Vancouver, British Columbia, unlawfully sell liquor to one W. G. Bremner." Heard by HUNTER, C.J.B.C. at Vancouver on the 28th of March, 1923.

Argument

Bray, for accused: The conviction and commitment were made for infraction of section 26 of the Government Liquor Act. The commitment is not in the terms of the section and accordingly bad. The allegation of its being done "unlawfully" does not cure the vital defect which is one of substance: see *Fletcher* v. *Calthrop* (1845), 6 Q.B. 880 at p. 889: *Ex parte Hopkins* (1891), 61 L.J., Q.B. 240.

W. M. McKay, contra.

29th March, 1923.

Judgment

HUNTER, C.J.B.C.: The warrant is bad. The offence is wholly statutory, and therefore the warrant should shew on its face that there has been a conviction for a breach of the statute. Here, for anything that appears, he might have been convicted on general principles as a bootlegger. As to the request to allow the warrant to be amended, apart from any other difficulty it ought not to be allowed as it has already been amended twice.

MILLIGAN v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY LIMITED.

COURT OF APPEAL

1923

March 6.

MILLIGAN v. B.C. ELECTRIC RY. CO.

Negligence — Collision — Street-car and automobile—Damages—Verdict of jury—Contributory negligence.

Shortly after the noon hour the plaintiff in his automobile approached a street on which was a street-car line. As he neared the intersection he heard nothing and when about 15 feet from the track he looked to the left and saw nothing. He then proceeded to cross the intersection and when his front wheels were within two feet of the track he again looked to his left and saw a street-car about 40 feet away coming at an excessive rate of speed. It was then too late to avoid a collision. The automobile was smashed and the driver and passengers injured. The jury brought in a verdict for the plaintiff for which judgment was entered.

Held, on appeal, reversing the decision of LAMPMAN, Co. J. (MARTIN and GALLIHER, JJ.A. dissenting), that the jury's finding of absence of contributory negligence was perverse as in not exercising reasonable care by slowing down his car and looking when entering into the street to be crossed to see if there was danger before proceeding he was guilty of contributory negligence.

APPEAL by defendant from the decision of LAMPMAN, Co. J. of the 3rd of November, 1922, and the verdict of a jury, in an action for damages for negligence which resulted in a collision between a car of the defendant Company and the plaintiff's automobile. Shortly after the noon hour on May 14th, 1922, a car of the defendant Company was proceeding north on Menzies Street (east track) and approaching Simcoe Street. The plaintiff at the same time was approaching Menzies Street on Simcoe, in his automobile, going westerly. The plaintiff's story is that when about 15 feet from the easterly track he could see well up Menzies Street to his left but he saw nothing and proceeded with the intention of crossing the track. When two feet from the track he again looked to his left and saw a car of the defendant Company about 40 feet away coming at the rate of 30 to 40 miles an hour. It was impossible to then avoid a collision and he was struck, his car, with the exception of the engine, being badly wrecked. The cost of repairs was over $1,000. Passengers were in the

Statement

COURT OF APPEAL

1923

March 6.

MILLIGAN v. B.C. ELECTRIC RY. CO.

automobile and two of them subsequently died from injuries sustained.

The appeal was argued at Victoria on the 1st and 2nd of February, 1923, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Argument

Harold B. Robertson, K.C., for appellant: We say there was contributory negligence. If the plaintiff had looked to his left when coming to the intersection he would have seen the car but he allowed himself to get within 2 feet of the track before looking and then it was too late to stop: see *Fraser* v. *B.C. Electric Ry. Co.* (1919), 26 B.C. 536; *Allen* v. *North Metropolitan Tramways Company* (1888), 4 T.L.R. 561; *Maltby* v. *B.C. Electric Ry. Co.* (1920), 28 B.C. 156; *Morrison* v. *The Dominion Iron & Steel Co. Ltd.* (1911), 45 N.S.R. 466 at p. 471; *Skidmore* v. *B.C. Electric Ry. Co.* (1922), 31 B.C. 282; *The Ottawa Electric Railway Co.* v. *Booth* (1920), 63 S.C.R. 444; *Davey* v. *London and South Western Railway Co.* (1883), 12 Q.B.D. 70; *Grand Trunk Railway* v. *McAlpine* (1913), A.C. 838 at p. 845; *Danger* v. *London Street R.W. Co.* (1899), 30 Ont. 493; *Carleton* v. *City of Regina* (1912), 1 D.L.R. 778; *O'Hearn* v. *Port Arthur* (1902), 4 O.L.R. 209; *Andreas* v. *Canadian Pacific Ry. Co.* (1905), 37 S.C.R. 1 at p. 16. *Admiralty Commissioners* v. *S.S. Volute* (1922), 1 A.C. 129 is a case like this: see p. 137; see also *Winch* v. *Bowell* (1922), 31 B.C. 186; *Toronto Railway* v. *King* (1908), A.C. 260; *Dublin, Wicklow, and Wexford Railway Co.* v. *Slattery* (1878), 3 App. Cas. 1155. In all cases where a bell or horn was necessary they proved some statute or custom: see *Simington* v. *Moose Jaw Street R. Co.* (1913), 15 D.L.R. 94; *Sitkoff* v. *Toronto R.W. Co.* (1916), 36 O.L.R. 97 at pp. 100-1. The evidence clearly shews contributory negligence.

Maclean, K.C., for respondent: Negligence on the part of the defendant is no doubt established. As to contributory negligence plaintiff looked twice and he is not obliged to look for a hidden or unexpected danger. He had a right to assume the street-car would be run prudently: see *The Toronto Railway Company* v. *Gosnell* (1895), 24 S.C.R. 582. He

cannot be guilty of unreasonable procedure against something he would not reasonably expect. This is eminently a case for the jury, being entirely a question of fact.

Robertson, in reply, referred to *The Canadian Pacific Ry. Company* v. *Smith* (1921), 62 S.C.R. 134. The *Booth* case was decided on breach of statutory warnings.

Cur. adv. vult.

6th March, 1923.

MACDONALD, C.J.A.: In my opinion the finding of the jury that there was no contributory negligence should be set aside, and the action dismissed.

The collision occurred in broad daylight, at a place where there was no congestion of traffic, and nothing to distract the plaintiff's attention from a careful attendance to what he was doing. He approached with his automobile a street on which he knew tram-cars were being operated; he had a clear and unobstructed view on all sides except one, and that was in the direction from which the car which struck his automobile came. On that side of the street, there was a building which would obstruct his view of the street-car coming from that direction, but with ordinary care in approaching the street no difficulty at all would have been encountered. Instead of using such care he attempted to cross the street at a speed of 10 miles an hour and was struck by the approaching car. Assuming that the tram-car was travelling at an excessive rate of speed, yet by the exercise of the most ordinary caution, a caution which every prudent man ought to exercise when about to cross another street, particularly a street upon which tram-cars are being operated, he could have avoided all risk by slowing down his car and looking to see if there was danger before proceeding to cross. Instead of doing this, he drives at a high rate of speed, without looking, right into danger. How anyone, in view of these facts, which are not contradicted, can be said to have exercised reasonable care, I cannot understand. He says he looked before he got to the street line and saw no car, which simply indicates that he did not look at the right time, and looking at the wrong time is equivalent to not

COURT OF APPEAL

1923

March 6.

MILLIGAN v. B.C. ELECTRIC RY. CO.

looking at all. There is not a question of a doubt that had he slowed down when he got to the street line and looked up the street, the accident could not possibly have happened. The verdict of the jury is perverse, they having drawn an unreasonable and inadmissible inference from the evidence. There was no evidence upon which reasonable men could have found that the plaintiff had taken ordinary and reasonable care.

MACDONALD, C.J.A.

Since writing the above my attention has been called to *The Grand Trunk Railway Co.* v. *Labreche* (1922), 64 S.C.R. 15.

MARTIN, J.A.

MARTIN, J.A.: This appeal should, in my opinion, be dismissed. The case was rightly left to the jury, according to the recent decision of the Supreme Court in *The Ottawa Electric Railway Co.* v. *Booth* (1920), 63 S.C.R. 444, and the view they had here would be, in the circumstances, of special value respecting the important line of vision being "an appeal to the eye," which I considered in *Yukon Gold Co.* v. *Boyle Concessions Ltd.* (1916), 23 B.C. 103; 10 W.W.R. 585 at p. 588, and see *Bourne* v. *Swan & Edgar, Limited* (1903), 1 Ch. 211. I find nothing in the most recent reported case before the Supreme Court on the question of negligence (*The Grand Trunk Railway Co.* v. *Labreche* (1922), 64 S.C.R. 15) to detract from its decision in the *The Ottawa Electric Railway Co.* case, which was not even cited, doubtless because the circumstances were very different, the deceased there being held to have assumed the usual risk of express trains being run through railway yards at high speed on main tracks.

GALLIHER, J.A.

GALLIHER, J.A.: At the close of the plaintiff's case, there was evidence to go to the jury, both as to negligence and contributory negligence. I must say, frankly, that had I been trying the case I should have found the plaintiff guilty of contributory negligence. No man has a right to rush into danger that he knows may await him without taking precautions. I do not consider that a person coming to street-railway tracks and intending to cross, is justified in approaching at ten miles an hour unless he has satisfied himself that

no car is approaching from which danger might ensue. Until he has so satisfied himself he should have his motor under such control that he could stop almost immediately. That is the standard of care I would lay down, but the jury evidently thought differently, and, as they were the judges of fact and had the advantage of a view of the *locus in quo,* I feel in this case that I should not go so far as to upset their verdict.

MCPHILLIPS, J.A.: The action was one for damages to an automobile upon a collision between the automobile of the plaintiff and an electric street-car of the defendant upon Menzies Street in the City of Victoria. The particulars of negligence as set out in the plaint were excessive speed of the street-car and no warning given. It was not established that there was any statutory, municipal or other regulation as to speed or as to any warning that should be given, and although the evidence cannot be said to be satisfactory, I will assume that negligence was established as against the appellant both as to speed and failure to give a warning, *i.e.,* the non-sounding of gong as the car approached the intersection of Menzies and Simcoe Streets, the point where the accident took place. The difficulty though that confronts the plaintiff (the respondent in the appeal) is the contributory negligence of which he was guilty. The evidence is overwhelming as to this. It is true the jury came to the conclusion that there was an absence of contributory negligence upon the part of the plaintiff, but as to this I, without hesitancy, am of the opinion that the verdict of the jury cannot be viewed as other than perverse. The plaintiff was in every sense careless and reckless in all that he did, wholly unmindful, as the evidence shews, of that reasonable and necessary care which ought to actuate all drivers of motor-cars when entering upon a street having street railway traction thereon. The plaintiff admits that he did not look when entering into Menzies Street to apprize himself as to whether any street-cars were approaching from the north or the south. He admits that the only time he looked at all was when he was some two feet back from the line of the buildings upon Menzies Street, he then being upon the inter-

MCPHILLIPS, J.A.

COURT OF APPEAL

1923

March 6.

MILLIGAN v. B.C. ELECTRIC RY. CO.

MCPHILLIPS, J.A.

secting street. This demonstrates that he was in the end the author of the injury that subsequently overtook his car and which, unfortunately, brought about the death of two lady occupants of the automobile. This action, though, has relation only to damages to the motor-car. It is clear that if the plaintiff had looked at the time he should have looked he would have seen the car and it is fair to assume that no accident would have taken place, as at the speed the plaintiff states he was going (13 miles an hour), having slowed down at the intersection, it would have been a simple matter for him to have stopped or turned north or south on Menzies Street without attempting that which he did, which was the attempt to cross in front of a street-car travelling, as he says, at 30 or 40 miles an hour. These statements of the plaintiff demonstrate the utter recklessness of his conduct and it is impossible to view what he did in the circumstances as other than contributory negligence of the grossest kind. In truth, it might be stigmatized as negligence of even a graver character. This Court had occasion to pass upon facts analogous to the facts of this case in *Fraser* v. *B.C. Electric Ry. Co.* (1919), 26 B.C. 536, and there it was held, in an action for personal injuries and the wreck of an automobile, that the plaintiff could not recover where the accident was due, as this accident was due, to the negligence of both the plaintiff and the defendant, it being clear, as it was clear in the present case, that the defendant could not by the exercise of reasonable care, after becoming aware of the danger, have avoided the accident. The plaintiff in that case said he looked when he came to the curbed line of the street upon which the double track street line was, but did not look again and proceeded across the street-car tracks and the automobile was hit by a street-car travelling at a high rate of speed, admitted to be 30 or 35 miles an hour. I would refer to what Lord Justice Lindley said in *Allen* v. *North Metropolitan Tramways Company* (1888), 4 T.L.R. 561. *Maltby* v. *B.C. Electric Ry. Co.* (1920), 28 B.C. 156 was also a decision of this Court, with analogous features to this case. There it was held that notwithstanding the verdict of the jury (and in the present case

the verdict of the jury was for the plaintiff) the plaintiff's action should be dismissed as it was his own negligence in not looking carefully when approaching the crossing that caused the accident and that the jury's verdict was unreasonable. Also see *Skidmore* v. *British Columbia Electric Ry. Co.* (1922), [31 B.C. 282]; 2 W.W.R. 1036.

In *Grand Trunk Railway* v. *McAlpine* (1913), A.C. 838 at pp. 845-6 we find Lord Atkinson, who delivered the judgment of their Lordships of the Privy Council, saying:

"It is in reference to this question, it appears to their Lordships, that the learned judge fell into some grave errors in addition to those already mentioned. For instance, he said: 'A party who crosses a railway is obliged to look, there is no doubt about that, but to what extent he is obliged to look is a question which is disputed. It seems to be considered now that it is sufficient if a party . . . . looks both ways on approaching the track. He need not necessarily look again just before crossing. That is the English law.'

"This is an entirely erroneous view of the English law. Whether, in a case of this character, the plaintiff's negligence was the sole cause of his own misfortune, or whether he was guilty of contributory negligence, are questions of fact to be decided in each case on the facts proved in that case. There is no such rule of law in England as that if a person about to cross a line or lines of railway looks both ways on approaching the track, he need not look again just before crossing it. Neither is it true, as the learned judge apparently supposes, that according to the law of England a plaintiff who is guilty of negligence cannot recover damages. On the contrary a plaintiff whose negligence has directly contributed to the accident, that is, that his action formed a material part of the cause of it, can recover, provided it be shewn that the defendant could by the exercise of ordinary care and caution on his part have avoided the consequence of the plaintiff's negligence."

It is apparent that Lord Atkinson is of the view that negligence will always have to be the absence of what would have been the exercise of reasonable care in the circumstances, and that in the present case at least required the plaintiff to look for the street-car when he entered into Menzies Street, upon which the tracks of the street railway were, which he admits he did not do. Also see *Danger* v. *London Street R.W. Co.* (1899), 30 Ont. 493; *Carleton* v. *City of Regina* (1912), 1 D.L.R. 778. In *Andreas* v. *Canadian Pacific Ry. Co.* (1905), 37 S.C.R. 1 at p. 16, Davies, J. said:

"Now, the tool-house was a small house 10 ft. by 12 ft. and about 8 ft. high, standing up and alongside of the west side of Albert Street, within, say, 18 ft. of the railway track. For the moment of time that he was

COURT OF APPEAL

1923

March 6.

MILLIGAN v. B.C. ELECTRIC RY. CO.

passing this little tool-house his view would be obstructed, but to ask any reasonable being to hold that such momentary obstruction released him from the plain, simple and obvious duty which lay upon him of exercising reasonable care in looking at and for the train from the time he left South Railway Street until the moment when his vision was obscured by the little tool-house, is asking too much. He may not have looked during the passage of his team from South Railway Street till he actually passed the tool-house, and his horses were almost, if not quite, upon the track, certainly within a few feet of it. Certainly the evidence would justify a finding that he did not look. But under the circumstances he was bound to look. His view was uninterrupted. Had he looked he could and must have seen the train coming towards the crossing he intended to pass over, at least a mile away. The evening was clear, bright and without wind. Everybody else who was called as a witness was looking and saw the train and the danger and feared an accident unless the deceased stopped. He alone appears to have been stolid, careless and indifferent. If ever a man jogged along carelessly to his death he appears to have done so."

In *Admiralty Commissioners* v. *S.S. Volute* (1922), 1 A.C. 129, Viscount Birkenhead, L.C., at p. 137, said:

"Contributory negligence certainly arises when the negligence is contemporaneous, but are the only cases of contributory negligence cases where the negeligence is contemporaneous? Is it to be the rule that in all cases if the tribunal can find a period at which A's negligence has ceased and after which B's negligence has begun that then the negligence of A is to be disregarded? If such should be the rule it will be found that the cases of contributory negligence would be few.

"If two roads intersect each other at right angles and there is a large building at the point of intersection; and two people are running or riding or driving at a reckless pace, one down each street, and meet at the corner, it would be easy to say that both were in fault and equally so. If the courses of two motor-cars cross and there is no rule of the road such as that at sea requiring one to give way and the other to keep her course, and both hold on, both are equally to blame. In *The Margaret* (1881), 6 P.D. 76, a badly navigated barge came into collision with a schooner which was improperly carrying her anchor over her bows in a dangerous way, contrary to the rule. An impact ensued which would have done no damage but for the fact that the fluke of the anchor knocked a hole in the barge. Sir Robert Phillimore put the whole blame on the badly navigated barge, but the Court of Appeal thought that though the collision was solely due to her the damage was due to both, and divided it."

MCPHILLIPS, J.A.

Of course, there is no rule that we can apply of dividing the damage, a rule obtaining only in the Admiralty Court. In *Winch* v. *Bowell* (1922), [31 B.C. 186]; 2 W.W.R. 1031, this Court set aside a judgment for the plaintiff for damages caused by an automobile collision on the ground that on all the evidence, oral and physical, it appeared both drivers were negligent and one was not to blame more than the other.

Here, though, we have, as I view it, much the greater blame attachable to the plaintiff. There was upon his part positive and absolute disregard of that ordinary care which must be exercised, always varying in the light of the special circumstances of each case. The surrounding circumstances of the case, at least, called upon the plaintiff to look when he entered upon Menzies Street and observe whether there were any street-cars approaching and this he admits he did not do. *Sitkoff* v. *Toronto R.W. Co.* (1916), 36 O.L.R. 97, was a case of personal injury, a pedestrian being struck by a street-car. There it was held that no evidence was adduced upon which reasonable men could find that the proximate cause of the injury done was the defendant's negligence and that the plaintiff was properly nonsuited. The learned counsel for the plaintiff relied upon *The Toronto Railway Company* v. *Gosnell* (1895), 24 S.C.R. 582, but it is to be remarked that in that case it was pointed out that the driver of a cart struck by a car in crossing a track would not be guilty of contributory negligence in not looking if in fact it was far enough away to enable him to cross if it had been proceeding moderately and prudently, but here the plaintiff admits that he only saw the car 40 feet away when he was within two feet of the track. This clearly was placing himself, in effect, before an express train. There could only be one result: he could not then stop and certainly the street-car could not be stopped—the accident was then an inevitable one. In the present case, though, there could not be, in view of the conduct of the plaintiff, any actionable negligence for which the defendant in the circumstances could be held liable. *The Canadian Pacific Ry. Company* v. *Smith* (1921), 62 S.C.R. 134, was a case where the train struck the motor-car. The train whistle was not sounded or bell rung as required by statute. The driver of the motor-car swore, to his belief, that he did look for the train because he always did so instinctively, but he did not "remember actually turning [his] head and looking to see if there was a train or not." The trial judge took the case from the jury on the ground of contributory negligence. The Court of Appeal, however, ordered a new trial, the Supreme Court of Canada, though, notwithstanding

MCPHILLIPS, J.A.

COURT OF APPEAL

1923

March 6.

MILLIGAN v. B.C. ELECTRIC RY. CO.

the assumed negligence of the appellant (and I have assumed in the present case that the appellant was negligent) owing to the absence of statutory warnings held that the driver of the motor-car must be held negligent in attempting to cross the tracks without looking for the approaching train, as no evidence was given of circumstances which would warrant a jury in finding he was excused from doing so, and I cannot see in the present case anything to excuse the driver from looking for the approaching street-car when he entered upon the street, and if he had looked the accident would not have happened (at least one should be right in so assuming), but the recklessness of the plaintiff would seem to indicate that even if he had seen the street-car as he entered upon the street he would have persisted in his attempt to cross the track. The Chief Justice in *The Canadian Pacific Ry. Company* v. *Smith, supra,* at p. 135, said: [His Lordship quoted the judgment of the Chief Justice down to the word "train" in the seventh line from the bottom of p. 136 and continued].

The learned counsel for the respondent relied greatly upon *The Ottawa Electric Railway Co.* v. *Booth* (1920), 63 S.C.R. 444, where it was held that "stop, look and listen" before crossing a railway track was not a prescribed rule of conduct in Canada. The learned Chief Justice of Canada dissented in that case and it is to be noted that it was decided earlier in point of time to *The Canadian Pacific Ry. Company* v. *Smith, supra.* Mr. Justice Duff, in the *Booth* case, considered that the turning point of the case was really (see pp. 454-5),

MCPHILLIPS, J.A.

"to adopt the language of Lord Cairns in *Slattery's* case, 3 App. Cas. 1155 at p. 1167, whether the failure to sound the gong coupled with the excessive speed of the car on the one hand or, on the other hand, the want of reasonable care on the part of the deceased, was the *causa causans* of the accident."

Mr. Justice Anglin said at p. 458:

"There is no authority for the proposition that a duty to look and listen before crossing a railway or tramway track exists under all circumstances. No doubt ordinary prudence would dictate such a precaution unless there was something exceptional to warrant a belief that it was unnecessary or to excuse its not being taken. But the direction of the learned Chief Justice was strictly in accord with the law. The only standard is 'reasonable care, having regard to all the circumstances.' If under the circumstances the duty of taking reasonable care involved looking and listening before attempting to cross, the existence of that obliga-

tion was necessarily implied in the direction given. For aught that we know the jury may have found that the deceased did in fact both look and listen so far as reasonable care required him to do so and that he nevertheless was not negligent in attempting to cross possibly because he failed to realize the excessive speed at which the north bound car was approaching. *Toronto Railway* v. *King* (1908), A.C. 260 at p. 269. We should not assume the contrary. Neither should it be taken for granted that he did not in fact both look and listen."

In the present case, we have the clear evidence that the plaintiff did not look save at the one time and that was at a time when he could not safely advise himself as to whether there were cars approaching which would render it dangerous to cross the track. Further, the plaintiff did not look at all when entering upon Menzies Street to cross the tracks. Certainly this was not complying with the standard quoted by Mr. Justice Anglin—"reasonable care having regard to all the circumstances." *The Grand Trunk Railway Co.* v. *Labreche* (1922), 64 S.C.R. 15, was the case of the respondent's husband projecting himself in front of the on-coming train. Mr. Justice Anglin in that case said at p. 22:

"The evidence in my opinion leaves no room for doubt that the determining cause of Sarrazin's death was not the speed of the train, but his own act—whether culpable or wholly innocent is on this issue quite immaterial—in projecting himself almost immediately in front of the Ottawa express. That fact, of course, likewise affords a peremptory answer to the plaintiff's case if the jury's finding should be taken to mean that the speed of the train at 25 miles per hour in Turcot yard amounted to fault although s. 309 of the Railway Act did not apply."

Here we have what in effect was practically the same thing that occurred in the *Labreche* case—failure to look when "reasonable care having regard to all the circumstances" required that the plaintiff should have looked, that is, he should have looked when he entered upon Menzies Street where the street railway lines were. There was no obstacle in his way and his failure to exercise that reasonable care disentitles the plaintiff to the verdict accorded him by the jury, that is, he was guilty of contributory negligence. It was his conduct, the want of reasonable care, which was the *causa causans* of the accident, it being clear that precipitating the motor-car in front of the electric-car as he did, it was then impossible for the electric-car to be stopped in time to avoid the accident. In truth, the motor-car was carelessly and recklessly placed immediately

COURT OF APPEAL

1923

March 6.

MILLIGAN v. B.C. ELECTRIC RY. CO.

MCPHILLIPS, J.A.

in front of the electric-car then proceeding at a high rate of speed, and if the plaintiff had looked as he should have looked he could have avoided the happening and his car would not have suffered the damage it did. There can be but one answer upon the facts, and that is, the plaintiff was the author of the injury to his motor-car, the negligence was his, it was his want of reasonable care in the circumstances that was the *causa causans* of the accident; and in such a case the Court of Appeal may enter judgment, notwithstanding the verdict of the jury, for the defendant, and that, in my opinion, should be the result here (*McPhee* v. *Esquimalt and Nanaimo Rway. Co.* (1913), 49 S.C.R. 43, Duff, J. at p. 53).

I would allow the appeal.

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

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

Solicitors for appellant: *Robertson, Heisterman & Tait.*
Solicitors for respondent: *Elliott, Maclean & Shandley.*

MORRISON, J.

REX v. SMITH.

1923

Feb. 27.

Criminal law—Sale of beer—"Liquor"—B.C. Stats. 1921, Cap. 30, Secs. 26, 46 and 62; 1922, Cap. 45, Sec. 7.

REX v. SMITH

The accused was convicted of selling beer in contravention of section 46 of the Government Liquor Act as amended in 1922. On appeal by way of case stated as to whether the beer or liquid sold was "liquor" within the meaning of the statute and whether accused was properly sentenced to imprisonment for one month with hard labour under subsection (2) to section 7 of the Government Liquor Act Amendment Act, 1922:—

Held, affirming the conviction, that there is nothing inconsistent or embarrassing in the Legislature passing enactments containing what might be termed compartments, section 26 of the Act of 1921 with its penal clause 62 forming one, and section 46, with its penal clause as amended in 1922, forming the other.

MORRISON, J.

1923

Feb. 27.

REX
v.
SMITH

APPEAL by way of case stated from the police magistrate at Vancouver who convicted the accused and sentenced her to one month's imprisonment with hard labour. The facts are set out in the reasons for judgment. Argued before MORRISON, J. at Chambers in Vancouver on the 21st of February, 1923.

Brougham, for accused.

W. M. McKay, for the Crown.

27th February, 1923.

MORRISON, J.: The question involved came before me in the form of a case stated by H. C. Shaw, Esq., police magistrate for the city of Vancouver.

Mrs. E. C. Smith was convicted by him on the 11th of January, 1923, for unlawfully selling a liquid known as beer contrary to section 46 of the Government Liquor Act and amending Acts. The learned magistrate found as a fact that she sold, on the 4th of January, 1923, to W. C. Bremner and Wallace Shaw two bottles of the said liquid, which contained respectively 4.55 and 4.12 per cent. alcohol by weight, and he further held that the liquid was "liquor" within the meaning of the Act. Upon conviction he imposed a sentence of imprisonment with hard labour for one month in the common gaol under subsection (2) of section 7 of the said Government Liquor Act Amendment Act, 1922.

Judgment

The questions submitted are:

"1. Was I right in holding that the beer, or liquid, sold was liquor within the meaning of the statute?

"2. Was I right, in point of law, in sentencing the said Mrs. E. C. Smith to imprisonment in the common gaol with hard labour for one month under subsection (2) of section 7 of the Government Liquor Act Amendment Act, 1922?"

The task of answering these questions seems to me to be simplicity personified.

The Act begins by interpreting the word "liquor" as follows:

"'Liquor' includes all fermented, spirituous, and malt liquors, and all combinations thereof, and all liquids which are intoxicating, and any liquid which contains more than one per centum of alcohol by weight shall be conclusively deemed to be intoxicating."

Section 26 enacts that,

"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

MORRISON, J. 1923 Feb. 27. REX v. SMITH

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."

Section 62 provides a penalty for an infraction of that section, *viz.*:

"Every person who violates any provision of section 26 or 27 shall be liable, on summary conviction, for a first offence to imprisonment, with hard labour, for not less than six months nor more than twelve months, and for a second or subsequent offence to imprisonment, with hard labour, for not less than twelve months nor more than twenty-one months. If the offender convicted of a violation of any provision of section 26 is a corporation, it shall for a first offence be liable to a penalty of not less than one thousand dollars nor more than four thousand dollars, and for a second or subsequent offence to a penalty of not less than two thousand dollars nor more than six thousand dollars."

Section 46 enacts that:

"No person other than a Government vendor shall sell or deal in any liquid known or described as beer or near-beer or by any name whatever commonly used to describe malt or brewed liquor."

And by the amendment of 1922 to section 46, being subsection (2) to section 7, a specific penalty is provided, *viz.*:

"Where any person is convicted of an offence against this Act in respect of any violation of this section arising out of the selling or dealing in any liquid which is liquor within the meaning of this Act, the person so convicted shall be liable for a first offence to imprisonment, with hard labour, for not less than one month nor more than three months, and for a second or subsequent offence to imprisonment, with hard labour, for not less than three months nor more than twelve months. If the offender so convicted is a corporation, it shall for each offence be liable to a penalty of not less than one thousand dollars."

Judgment

The present information was laid under section 46 as amended, and the accused was convicted of an infringement of that specific section, carrying with it the specific penalty attaching thereto. That is what admittedly has happened. The learned magistrate was asked seriously to submit the above questions, and I am now with equal seriousness asked to say whether he was right or wrong, with a strong submission by learned counsel that he is wrong, wrapped up in an involved argument that the terms of the Act in question are so intractable, ambiguous, inconsistent and inextricably mixed up as to form a sort of Legislature shandy-gaff and all because the old familiar expression "beer" and "near-beer" are inserted in the section 46. Doubtless when one (learned counsel not excepted)

gets mixed up with these liquids anything may happen, even seeing more in an Act of the Legislature than the sober-sided framers intended. I shall not associate myself with any of the criticisms as to the phraseology or diction of the Act (the function of a judge being to adjudicate and not to criticize), notwithstanding it is easier to do the latter than the former.

I find no difficulty whatever in holding that what the Act is dealing with exclusively is "liquor" by whatever name it may be referred to. The question is one of percentages of alcohol and not nomenclature. Even ambrosia or lemonade, if they contained more than one per centum by weight of alcohol, would be "liquor" within the meaning of the Act. And I have no doubt that the Legislature had in view certain decisions of our Courts on this Act and particularly dealing with those liquids known as "beer" and "near-beer" when they enacted the section 46, striking specifically in the penal clause at the liquids "beer" and "near-beer." I see nothing inconsistent or embarrassing in the Legislature passing enactments containing what I might term compartments (section 26 and its penal clause 62 forming one, section 46 and its penal clause forming the other), so long as the person charged knows specifically the compartment within which he is placed and has a full opportunity of defending himself.

Judgment

The answer, therefore, to question 1 is in the affirmative. The answer to question 2 is also in the affirmative.

Appeal dismissed.

COURT OF APPEAL

1923

March 6.

IN RE IMMIGRATION ACT AND MAH SHIN SHONG

IN RE IMMIGRATION ACT AND MAH SHIN SHONG. *IN RE* IMMIGRATION ACT AND SUNG YIM HONG.

Criminal law—The Opium and Narcotic Drug Act—Conviction for having drugs in their possession—Fined and in default of payment imprisonment—Imprisoned—Held for deportation—Habeas corpus proceedings—Prisoners discharged—Right of appeal—Can. Stats. 1910, Cap. 27, Sec. 43; 1911, Cap. 17, Sec. 5; 1920, Cap. 31, Sec. 1; 1921, Cap. 42, Sec. 1; 1922, Cap. 36, Sec. 5.

Section 10B of The Opium and Narcotic Drug Act as enacted by Can. Stats. 1922, Cap. 36, Sec. 5, provides that notwithstanding The Immigration Act an alien who, at any time after his entry, is convicted under section 5A(2) of the Act "shall, upon the termination of the imprisonment imposed by the Court upon such conviction, be kept in custody and deported in accordance with section 43 of The Immigration Act unless the Court before whom he was tried shall otherwise order."

The two accused were convicted of having opium in their possession without first obtaining a licence, contrary to said section 5A(2) and were fined $200 and costs and in default of payment to imprisonment. Being in default as to payment they were imprisoned. Upon the termination of imprisonment they were kept in custody for deportation under said section 10B. On application writs of *habeas corpus* were granted and the accused were discharged from custody.

Held, on appeal, affirming the decision of HUNTER, C.J.B.C. (MARTIN and GALLIHER, JJ.A. dissenting), that the appeal should be dismissed.

Per MACDONALD, C.J.A.: The proceedings were criminal proceedings and therefore the Provincial Act giving an appeal from an order of discharge in *habeas corpus* is not applicable. The Court has no jurisdiction to hear the appeal and it should be quashed.

Per MCPHILLIPS, J.A.: The imprisonment imposed was not imprisonment within the purview of said section 10B; deportation would follow only where imprisonment was imposed independent of a fine.

Statement

APPEALS from the orders of HUNTER, C.J.B.C. of the 23rd of January, 1923, in *habeas corpus* proceedings discharging the accused from custody. Both accused were convicted of having opium in their possession without first obtaining a licence, contrary to section 5A of The Opium and Narcotic Drug Act, and they were each fined $200 and costs and in default of payment imprisonment at Oakalla Prison Farm for six months. On application for a writ of *habeas corpus* before HUNTER, C.J.B.C. the prisoners were released. The Crown appealed.

The appeal was argued at Victoria on the 5th and 6th of February, 1923, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

M. A. Macdonald, K.C., for appellant.

Bray, for respondents, took the preliminary objection that the King should not have been added as a party and should be struck out: see marginal rule 865, Annual Practice, 1923, p. 1127.

Macdonald, contra: The King was originally a party and the procedure is at the instance of the Minister of Justice.

Bray, raised the further objection as to the jurisdiction and contended that *In re Wong Shee* (1922), 31 B.C. 145 did not apply. Being a criminal matter it is outside the jurisdiction of this Province and there is no appeal.

Macdonald, contra: The right of appeal has been decided in *In re Wong Shee.* See also *Rex* v. *Jeu Jang How* (1919), 59 S.C.R. 175.

Bray, in reply: This statute says it is a criminal offence and therefore not appealable.

Macdonald, on the merits: An order was made releasing the accused. They were imprisoned for not paying the fines and we contend come within section 10B of the 1922 amending Act and should be held for deportation.

Argument

Bray: This is not imprisonment by the "Court" but by the magistrate: see *Rex* v. *Walker* (1913), 23 Can. Cr. Cas. 179 at p. 182; Halsbury's Laws of England, Vol. 9, p. 8, par. 1; *Basten* v. *Carew* (1825), 3 B. & C. 649. He is a domiciled Canadian and not an "alien" under the Act. Where there has been a fine and only imprisonment in default it does not come within section 10B. This is a criminal proceeding and not under the Immigration Act so there is no jurisdiction to review the order discharging the prisoners in *habeas corpus* proceedings.

Macdonald, in reply: As to the question of domicil see section 43 of the Immigration Act. As to Court, the words "by the Court" are merely surplusage, but in any case the police Court is a "Court": see *Regina* v. *Mason* (1872), 22 U.C.C.P.

COURT OF APPEAL

1923

March 6.

246 at pp. 252 and 257; *Royal Aquarium and Summer and Winter Garden Society* v. *Parkinson* (1892), 1 Q.B. 431 at p. 446.

Cur. adv. vult.

6th March, 1923.

IN RE IMMIGRATION ACT AND MAH SHIN SHONG

MACDONALD, C.J.A.: These two cases depend upon the same point of law.

The accused were convicted of infractions of The Opium and Narcotic Drug Act, Cap. 17, Can. Stats. 1911, and amendments thereto. It is declared by section 10B of the Act as amended in 1922, Cap. 36, section 5, that:

"Notwithstanding anything to the contrary in The Immigration Act, an alien who, at any time after his entry, is convicted under subsection 2 of section 5A of this Act shall, upon the termination of the imprisonment imposed by the Court upon such conviction, be kept in custody and deported in accordance with section 43 of The Immigration Act unless the Court before whom he was tried shall otherwise order."

MACDONALD, C.J.A.

It was conceded that The Immigration Act is resorted to only for the machinery of deportation. Parliament has declared that the penalty for the crime of which the accused were convicted, shall be that imposed by the Court, with, I think, the addition to it of deportation. The proceedings are criminal proceedings, and therefore the Provincial Act giving an appeal from an order of discharge in *habeas corpus* is not applicable to this case. The Court, I think, has no jurisdiction, and the appeal should be quashed.

MARTIN, J.A.

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

GALLIHER, J.A.

GALLIHER, J.A.: Mr. *Bray* raised the preliminary objection that His Majesty the King should not have been added as a party in this appeal, and Mr. *Macdonald* then asked that the Court grant permission for His Majesty to intervene. Although His Majesty is not named a party in the original proceedings, these proceedings were taken under The Opium and Narcotic Drug Act of Canada, 1920, section 5A, subsection 2 (*e*), at the instance of the Crown, and although not named, I would grant leave to intervene in this appeal.

On the merits, several objections were taken by Mr. *Bray*,

but two only are, I think, of substance. First: Where fine and imprisonment in default is imposed, is it within the amendment section 10B in The Opium and Narcotic Drug Act, Can. Stats. 1922, Cap. 36, Sec. 5?

The learned Chief Justice below, who granted the writ of *habeas corpus* and whose order is appealed against, we are informed by counsel (no reasons appearing in the appeal book) held that such a sentence was not within the section and counsel argued that the imprisonment is something in the nature of a distress. Had the sentence been for fine and imprisonment simply, there could have been no question, but it is for fine and in default of payment, imprisonment. The imprisonment is a part of the sentence imposed, something in the nature of a suspended sentence not to take effect except default is made in payment of the fine, but nevertheless a part of the sentence, which the accused may elect to accept rather than pay the fine imposed. In default of payment here the imprisonment term became operative and the convicted man suffered imprisonment under the sentence as I see it, just as effectually for the purposes of section 10B as if it had been a direct sentence of imprisonment to take effect immediately. I, therefore, with great respect, differ with the learned judge below.

MACDONALD, C.J.A.

The second point is, that this is a criminal proceeding and as such this Court has no jurisdiction to review the order discharging the prisoner on *habeas corpus* proceedings. In *In re Wong Shee* (1922), 31 B.C. 145, this Court held that in proceedings such as are taken under The Immigration Act of Canada, and which have been held to be civil and not criminal proceedings (see *Rex* v. *Jeu Jang How* (1919), 59 S.C.R. 175), the amendment of the Provincial Legislature to our Court of Appeal Act, by Cap. 21, Sec. 2, of 1922, gives an appeal to this Court. This is not disputed, but Mr. *Bray* urges that section 10B before referred to and which is relied on as authority for the deportation proceedings instituted here, being an amendment to The Opium and Narcotic Drug Act, which declares it a criminal offence to have opium in possession without a permit, must be regarded so that proceedings taken under it are criminal proceedings, and that where a person suffers

COURT OF APPEAL

1923

March 6.

IN RE IMMIGRATION ACT AND MAH SHIN SHONG

imprisonment for the crime, this is an added penalty by reason of such.

It is clear the magistrate could make this no part or parcel of any penalty he could impose. A person then who has suffered the penalty which the magistrate could and does impose, has purged himself of the offence (criminal in this case).

The Parliament of Canada has said in effect, since you are an alien and have violated our laws in the manner you have, and suffered imprisonment, we will treat you as an undesirable person and deport you under the procedure laid down in our Immigration Act.

While it is true the offender has placed himself in this category by committing a criminal offence, and in one sense it might be said to be an additional punishment, in the true sense I think it is not. It is, as I view it, rather that the offender has, by committing the act complained of, created a *status* so that under the Act he may be regarded as an undesirable, and a subject for deportation, and this, I think, is the purpose of the Act.

GALLIHER, J.A.

Mr. *Bray* urged that the word "Court" in section 106 meant Superior Court and referred us to several sections of the Criminal Code and of our own statutes, but I think the answer to that is, that the statute must be taken to be speaking with reference to the tribunal before which the accused was convicted.

I would, therefore, allow the appeal, set aside the order of the Chief Justice below, and order the party to be again taken into custody for deportation.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: In my opinion, the learned Chief Justice of British Columbia arrived at the right conclusion in making the rule absolute following upon the issue of the writ of *habeas corpus,* and Mah Shin Shong (otherwise known as Mah Get) was rightly discharged from the custody of the commissioner of immigration in that there is no statutory authority to deport an alien under The Immigration Act where he has been convicted under the provisions of The Opium and Narcotic Drug Act and a fine only imposed. There must be imprisonment. The sections of The Opium and Narcotic Drug Act which need

consideration upon this appeal are sections 2 and 5 of Cap. 36, Can. Stats. 1922. These sections read as follow: [The learned judge after quoting the sections continued].

Now, the conviction in the present case was in the following terms, leaving out the formal parts thereof:

"did have in his possession without lawful authority a drug, to wit, opium, without first obtaining a licence from the minister, contrary to section 5A, paragraph 2, subsection (*e*) of The Opium and Narcotic Drug Act, and I adjudge the said Mah Get for his said offence to forfeit and pay the sum of Two hundred dollars to be paid and applied according to law; and also to pay to the said Thomas McClymont, police magistrate, the sum of Six dollars and fifty cents for his costs in this behalf; and if the said several sums are not paid forthwith, I adjudge the said Mah Get to be imprisoned in the common gaol of the said County at Oakalla Prison Farm, in the said County of Westminster (and there to be kept at hard labour) for the term of six months unless the said sums and the costs to the said common gaol are sooner paid."

The conviction we here have to consider is a summary conviction and what was imposed was a fine of $200 and $6.50 for costs. No term of imprisonment was imposed, but as it will be seen, if the $200 and $6.50 for costs, being the extent of the fine, were not paid forthwith, then it was adjudged that Mah Get "be imprisoned in the common gaol . . . . for the term of six months unless the said sum and the costs to the said common gaol are sooner paid." It is immediately evident that the imprisonment imposed was not imprisonment within the purview of section 10B. The statute is not in its terms obligatory that imprisonment as well as a fine should be imposed save in default of payment of fine, as note the language:

MCPHILLIPS, J.A.

"In any case where a fine is imposed the sentence may adjudge a term of imprisonment or a further term of imprisonment not exceeding in any case twelve months to be served by the offender if such fine is not paid."

Here we have a fine imposed but no term of imprisonment. The magistrate had a discretion in the matter independent of the non-payment of the fine—"may adjudge a term of imprisonment," not having adjudged imprisonment, as I view it, within the terminology of the statute. It is not the sentence of imprisonment contemplated by and referred to in 10B. The language is, "upon the termination of the imprisonment imposed by the Court upon such conviction." To graphically illustrate the matter, if Mah Get had paid the fine and costs coincident with the conviction, he could not have been taken into custody

COURT OF APPEAL

1923

March 6.

IN RE IMMIGRATION ACT AND MAH SHIN SHONG

or required to serve even one minute of imprisonment. That he did not pay the fine does not admit of it being successfully contended that he had imposed against him imprisonment carrying in its train deportation. This would be a most unjust consequence—it would, in its result, mean that the impecunious offender would not only suffer imprisonment because of his impecuniosity but be deported and banished from Canada as well, the rich offenders going free. This view offends against natural justice and impels one to the conclusion that in such a case where the imprisonment was only to continue during the default in payment of the fine, which might be no default at all and in such case no imprisonment at all or for a day or more only, capable of being ended at any moment, that it cannot be deemed to be "imprisonment imposed by the Court" within the meaning of 10B (section 5, Cap. 36, Can. Stats. 1922). It is not difficult to define the intention of Parliament in the matter. It was that where the gravamen of the charge proved was such that imprisonment was imposed independent of a fine, that in such a case deportation would follow "unless the Court before whom he was tried shall otherwise order" (section 5—10B—Can. Stats. 1922, Cap. 36).

That is not the present case and I would refer to what is stated in Broom's Legal Maxims, 8th Ed., p. 127:

MCPHILLIPS, J.A.

"The judges will bend and conform their legal reason to the words of the Act, and will rather construe them literally, than strain their meaning beyond the obvious intention of Parliament. (T. Raym. 355, 356; *per* Lord Brougham, *Leith* v. *Irvine* [(1833)], 1 Myl. & K. 289.)"

And at p. 436 we find this:

"The 'principle,' remarked Lord Abinger 'adopted by Lord Tenterden (see *Proctor* v. *Mainwaring* [(1819)], 3 B. & Ald. 145), that a penal law ought to be construed strictly, is not only a sound one, but the only one consistent with our free institutions. The interpretation of statutes has always in modern times been highly favourable to the personal liberty of the subject, and I hope will always remain so' (*Henderson* v. *Sherborne* [(1837)], 2 M. & W. 236; Judgm., *Fletcher* v. *Calthorp* [(1845)], 6 Q.B. 887; cited and adopted, *Murray* v. *Reginam* [(1845)], 7 Q.B. 707)."

The enormity of the situation in the present case is this, that where the offender is without means and cannot pay his fine, that although he has, as it is ordinarily understood in law, paid the fine by undergoing the imprisonment, yet it shall be deemed that he has had imposed against him a sentence of imprison-

ment within the purview of the statute. This ignores the fact that it was imprisonment simply because of the non-payment of the fine, which imprisonment was only permissible during such time as the fine remained unpaid and capable of being put at an end at any time if the money were forthcoming.

I cannot persuade myself that the case is one which would entitle deportation. In truth, unless intractably so persuaded, it would not be proper to disagree with the view of the learned Chief Justice of the Court below, and that view is in consonance with the true rule of the interpretation of statutes that they shall be construed in a highly favorable manner to the personal liberty of the subject. I have already referred to the opinions of those great jurists Lord Tenterden and Lord Abinger, who so held. It is true that Parliament is paramount and Parliament speaking in apt words would conclude the matter even if it would appear to offend against natural justice. In such case it would be the responsibility of Parliament, and it would not be the province of the judge to comment thereon. In my opinion, though, there is the absence of the essential and apt words to cover the present case. I construe the statute strictly as I am entitled to, in fact required to do, where the personal liberty of the subject is at stake, and so doing my conclusion is as stated at the outset, that the order under appeal was rightly made, and the appeal should be dismissed.

MCPHILLIPS, J.A.

EBERTS, J.A. would dismiss the appeal.

EBERTS, J.A.

Appeal dismissed,
Martin and Galliher, JJ.A. dissenting.

Solicitors for appellant: *Congdon, Campbell & Meredith.*
Solicitor for respondents: *H. R. Bray.*

COURT OF APPEAL

1923

March 6.

REX v. MERE SINGH *ET AL.*

Criminal law—Convictions for common assault—"Loss of time" in and about prosecution and conviction—Allowance by judge for—Criminal Code, Sec. 1044, Subsec. 2—Interpretation.

REX v. MERE SINGH

"Loss of time" for which an allowance may be made under section 1044, subsection 2, of the Criminal Code is only in connection with costs and expenses incurred in and about the prosecution and conviction, and is not intended to cover compensation for loss of time through being incapacitated for work (MCPHILLIPS, J.A. dissenting).

APPEAL by way of case stated from the decision of HOWAY, Co. J., of the 28th of December, 1922, whereby he found five Hindus guilty of common assault on Amar Singh and Natha Singh in addition to the fines imposed. After due enquiry and examination he included under the terms of section 1044, subsection 2 of the Criminal Code the sum of $400, which he ascertained to be a reasonable amount for allowance for loss of time suffered by Amar Singh and Natha Singh by reason of the assault. In fixing the amount he had regard only to the fact that the two complainants had been in the hospital and incapacitated from work for eight weeks as a result of the assault. The question for the Court was:

Statement

"Is 'loss of time' in section 1044, subsection 2, of the Criminal Code limited in its application to loss of time 'in and about the prosecution and conviction for the offence' (section 1044, subsection 1)?"

The appeal was argued at Victoria on the 5th of February, 1923, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

J. E. Bird, for appellants, contended that the section must be read strictly and any allowance must be confined to expenses incurred in and about the prosecution and conviction and that time lost in recovering from injuries sustained could not be taken into consideration.

Argument

Petapiece, for respondent: The history of previous legislation or offences against the person shews it is intended that the section should be general in its application: see Daly's Criminal

Procedure, 2nd Ed., 394; *Lowe* v. *Horwarth* (1865), 13 L.T. 297.

Bird, in reply, referred to *Rex* v. *Cohen and Miller* (1922), 3 W.W.R. 1126.

COURT OF APPEAL

1923

March 6.

REX v. MERE SINGH

Cur. adv. vult.

6th March, 1923.

MACDONALD, C.J.A.: This case stated arose out of a trial for an assault in which a conviction was had. The learned judge says in the case stated:

"I also after due inquiry and examination, included, under the terms of section 1044, subsection 2, of the Criminal Code of Canada, the sum of $400 which I ascertained to be a reasonable amount for a moderate allowance for loss of time suffered by Amar Singh and Natha Singh by reason of the assault. In fixing the amount I had regard only to the fact that the two complainants had been in hospital and incapacitated for work for some eight weeks, as a result of the assault."

MACDONALD, C.J.A.

Section 1044 empowers a judge to condemn the convicted person in the payment of the whole or any part of the costs or expenses incurred in and about the prosecution and conviction, and, he may include in the amount to be paid, such moderate allowance for loss of time as he may ascertain to be reasonable. I think the meaning of the main section and subsection 2 is, that the allowance must be for loss of time in and about the prosecution and conviction. The question submitted is as follows:

"Is 'loss of time' in section 1044, subsection 2, of the Criminal Code, limited in its application to loss of time in and about the prosecution and conviction for the offence.' (Section 1044, subsection 1) ?"

My answer to that question is in the affirmative.

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

MARTIN, J.A.

GALLIHER, J.A.: I would answer the question submitted to us in the affirmative, and allow the appeal.

GALLIHER, J.A.

Subsection 2 of 1044, Criminal Code, must be read with the first section and can only be in connection with costs and expenses incurred in and about the prosecution and conviction, and could not be intended to cover compensation by way of damages for injuries received, which might be the subject of a civil action unconnected with criminal proceedings.

COURT OF APPEAL

1923

March 6.

REX v. MERE SINGH

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I am of the opinion that HOWAY, Co. J. arrived at the right conclusion in allowing the sum of $400 under the terms of section 1044, subsection 2 of the Criminal Code of Canada for loss of time suffered by Amar Singh and Natha Singh by reason of the assault. The subsection reads as follows:

"2. Such Court or judge may include in the amount to be paid such moderate allowance for loss of time as the Court or judge, by affidavits or other inquiry and examination, ascertains to be reasonable."

I would refer to Broom's Legal Maxims, 8th Ed., pp. 438-9, "The 'golden rule.' "

I cannot see how it is possible to come to any other conclusion and, with every respect to all contrary opinion, I am without hesitation of the view that the allowance was properly made and the learned judge was clothed with positive statutory authority and had ample jurisdiction to make the allowance. It is clear that Parliament so intended, and used apt words to carry out that intention. If authority is necessary to support the decision of HOWAY, Co. J., I would refer to *Lowe* v. *Horwarth* (1865), 13 L.T. 297.

The Court, consisting of Pollock, C.B., Bramwell, Channell and Piggott, BB. held the plea to be bad and gave judgment for the plaintiff in favour of the demurrer. The Imperial statute is in terms similar to section 1044 (2). In my opinion, Daly's Criminal Procedure, 2nd Ed., rightly construes the statutory authority dealing with the allowance for loss of time. At p. 436 it is stated:

"By subsec. 2 of sec. 1044, the Court may include in the amount of the costs or expenses a moderate allowance for loss of time. This must be ascertained by affidavits, or other inquiry and examination, and the amount must be such as is thus ascertained to be reasonable. This means an allowance for wages or salary for each day's work lost by the complainant from his work, through any injury sustained, or time lost by attending the trial. It is very doubtful if the word 'expenses' will also include any medical or hospital expenses incurred by the person injured. The 'costs or expenses' are those incurred in and about the prosecution and conviction for the offence, etc."

It is plain that the allowance for loss of time is in addition to "the costs or expenses incurred in and about the prosecution" section 1044 (1).

The question, as set forth in the case stated, reads as follows:

COURT OF APPEAL

1923

March 6.

REX v. MERE SINGH

[Already set out in statement, and judgment of MACDONALD, C.J.A.]

My answer to the question is in the negative. It was permissible to make an allowance and condemn the accused to pay the sum of $400 as being a reasonable sum for loss of time suffered by Amar Singh and Natha Singh by reason of the assault.

The law-making authority, I have no doubt, believed that the ends of justice would be, by this method, best carried out and expeditiously carried out and not leave the injured person wholly to the uncertainty and possible failure of recovery of anything, if resort could only be had to the civil Courts.

MCPHILLIPS, J.A.

EBERTS, J.A. would allow the appeal.

EBERTS, J.A.

Appeal allowed, McPhillips, J.A. dissenting.

SEALY v. STEPHENSON *ET AL.*

COURT OF APPEAL

1923

March 6.

SEALY v. STEPHENSON

Partnership—Two promissory notes made prior to death of one partner—Assets and liabilities taken over on death by survivor—Two notes renewed by survivor as to balance due—Powers of survivor—Liability of estate of deceased.

Two promissory notes were held by the plaintiff against a partnership which was later dissolved by the death of one partner. The surviving partner took over the business and assumed all liabilities. He then renewed the two notes by giving one note for the balance due on the two. In an action on the note against the surviving partner and the executor of the estate of the deceased partner it was held that the estate of the deceased partner was liable on the note.

Held, on appeal, affirming the decision of GREGORY, J. (MCPHILLIPS, J.A. dissenting), that the powers of partners, as such, with regard to partnership obligations remain after dissolution for the purpose of the beneficial winding-up of partnership affairs, the surviving partner had power to sign the note on behalf of the dissolved partnership for which the estate of the deceased partner was liable.

COURT OF APPEAL

1923

March 6.

SEALY v. STEPHENSON

Statement

APPEAL by defendant Stephenson as executor of the estate of E. C. Stephenson, deceased, from the decision of GREGORY, J. of the 27th of March, 1922, in an action on a promissory note made by Stephenson & Crum in 1917, in favour of the plaintiff for $950. The facts are, that the defendants E. C. Stephenson and S. H. Crum formerly carried on business in partnership in Hazelton as contractors and builders. In 1912 the plaintiff loaned the firm $400 for which he took the firm's note for that amount. In June, 1913, plaintiff loaned Stephenson $1,000 for which amount he received Stephenson's personal note, and the money was deposited by Stephenson to the firm's account. In November, 1913, Stephenson died and his brother F. L. Stephenson was appointed his executor. An arrangement was then arrived at between the executor and Crum whereby the sum of $15,000 was arrived at as the deceased's share in the business and Crum was to pay this amount, but shortly after this the executor went overseas and this sum was never paid. In March, 1915, the plaintiff had an adjustment of accounts with Crum. He surrendered the two notes of $400 and $1,000 respectively and took a new note for $950, signed in the old firm's name by Crum, said note being signed 10 months after the defendant partner's death. In an action against the executor of the estate of E. C. Stephenson, and S. H. Crum to recover the amount of the note, it was held that the plaintiff was entitled to judgment.

The appeal was argued at Victoria on the 29th of January, 1923, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Argument

Davie, for appellant: The question is whether the surviving partner (the partnership being dissolved by the death of Stephenson) had a right to sign a note in the partnership name. The note was given to take up a note of the partnership and a note of deceased. The question is (a) whether the executor is liable and (b) if so, can he sue in this way or must he bring an administration action? As to an estate being liable for transactions of surviving partner see Lindley on Partnership, 8th Ed., p. 261; *In re Fraser. Ex parte Central Bank of*

London (1892), 2 Q.B. 633; *Abel* v. *Sutton* (1800), 3 Esp. 108. The judge below followed *In re Head. Head* v. *Head* (1893), 3 Ch. 426, but the decision in that case has no bearing on this case whatever. This is a new contract: see *Friend* v. *Young* (1897), 2 Ch. 421; *Hopkins* v. *Abbott* (1875), L.R. 19 Eq. 222. After the note was given Crum skipped out with the remaining assets. The decision in *Lewis* v. *Reilly* (1841), 1 Q.B. 349, is questioned and as stated in Lindley requires reconsideration; see further *Lodge* v. *Prichard* (1863), 1 De G.J. & S. 610; *Ridgway* v. *Clare* (1854), 19 Beav. 111.

Mayers, for respondent: There was a partnership liability of $950 at the death of Stephenson on the two firm notes that was never discharged: see *Daniel* v. *Cross* (1796), 3 Ves. 277; *Butchart* v. *Dresser* (1853), 10 Hare 438, and on appeal 4 De G.M. & G. 541; *In re Clough* (1885), 31 Ch. D. 324; *Dickson* v. *National Bank of Scotland* (1917), S.C. (H.L.) 50; *Smith* v. *Jameson* (1794), 5 Term Rep. 601. On right of creditor of firm as against separate creditors see Lindley on Partnership, 8th Ed., 701. The cases in the Prairie Provinces are *Ruttle* v. *Rowe* (1919), 13 Sask. L.R. 80; *Langstaff* v. *Langstaff et al.* (1920), *ib.* 265 at p. 270; *Brown* v. *Fox* (1921), 31 Man. L.R. 365 at p. 372; and see Williams on Executors, 11th Ed., Vol. 2, pp. 1573-5. On recital in the judgment see *Hancocke* v. *Prowd* (1681), 1 Wm. Saund. 328 at p. 335. A joint partnership on death of one becomes joint and several: see *Thorpe* v. *Jackson* (1837), 2 Y. & C. 553. Argument

Davie, in reply: An action must be brought for administration under the Partnership Act. Separate debts are paid first.

Cur. adv. vult.

6th March, 1923.

MACDONALD, C.J.A.: In *Wood* v. *Braddick* (1808), 1 Taunt. 104 at p. 105, Mansfield, C.J. said:

"The power of partners with respect to rights created pending the partnership, remains after the dissolution."

In the same case, Heath, J., at p. 105, said: MACDONALD, C.J.A.

"Is it not a very clear proposition, that when a partnership is dissolved, it is not dissolved with regard to things past, but only with regard to things future? With regard to things past, the partnership continues, and always must continue."

COURT OF APPEAL

1923

March 6.

SEALY v. STEPHENSON

In *Lewis* v. *Reilly and Watson* (1841), 4 P. & D. 629 at p. 630, a bill had been drawn and accepted before the dissolution of partnership, and after dissolution one of the partners indorsed and discounted the bill without the consent of his late partner. Lord Denman, C.J. said:

"The partnership was dissolved, but the partnership could not be dissolved as to that bill."

The other members of the Court agreed with him.

Now, in the case at bar, the obligations for which the note sued on were given, were incurred before the dissolution of partnership; they consisted of two promissory notes. After the dissolution, that is to say, after the death of Mr. Stephenson, the surviving partner renewed this note by giving one note for the amount remaining due on the two. As to that obligation, the partnership continued but the giving of the new note extended the time of payment six months. The question is, was this a furtherance of the beneficial winding up of the partnership business?

The cases to which we were referred by Mr. *Mayers* do not quite cover the point; what was done by one of the partners of a dissolved firm was the natural consequence of what was begun before dissolution. For instance, in *Butchart* v. *Dresser* (1853), 10 Hare 438; 4 De G.M. & G. 541, the partnership contracted to buy shares and after the dissolution it was held that one of the partners, without the authority of his late partner, could pledge the shares to pay for their purchase. In other words, one of the partners might carry on to completion the past business of the partnership for the beneficial winding up of the affairs of the firm.

MACDONALD, C.J.A.

The facts of this case are very similar to those in *In re Head. Head* v. *Head* (1893), 3 Ch. 426. There the fresh deposit slip was in a form which had the effect of extending the time, it was not repayable until three months after its issue. Here the only effect of the renewal note was to extend the time of payment of the old date for six months, therefore there is no difference in principle between the two cases. It is true that that case was not argued on the same lines as those adopted at our bar. In that case it was contended that there had been a novation, but the fact that it was not contended that the exten-

sion of time was something unnecessary for the winding up of the partnership appears to indicate that that question was not regarded seriously. I therefore think that the appeal should be dismissed.

I also think the form of the judgment is correct.

MARTIN, J.A.: In my opinion the learned judge has reached the right conclusion herein, because the transaction being founded on a partnership liability is within the principle long established (see cases in Smith's Mercantile Law, 11th Ed., Vol. 1, p. 41) and lately well illustrated by the decision of the House of Lords in *Dickson* v. *National Bank of Scotland* (1917), S.C. (H.L.) 50.

MARTIN, J.A.

As to the form of the judgment, that is, in the circumstances, the proper one, seeing that the defence of *plene administravit* has been rightly found against the executor, and that, upon the evidence, there are no debts of that estate, and no assets of the partnership—Chitty's Forms, 14th Ed., 625.

GALLIHER, J.A. would dismiss the appeal.

GALLIHER, J.A.

MCPHILLIPS, J.A.: This appeal has some remarkable features. According to the plaintiff, the late E. C. Stephenson was liable to him for money lent to him personally and the plaintiff said he looked to him for payment, yet, strange to say, some two years after E. C. Stephenson's death, the plaintiff takes a promissory note from Crum, the surviving partner of the firm of Stephenson & Crum. The death of Stephenson dissolved the partnership, but Crum, it would appear, carried on in the same name, having become possessed of the partnership assets accepting the liabilities of the firm by an agreement with the executor. The plaintiff was asked why he took this promissory note from Crum signed Stephenson & Crum, two years after the date of Stephenson's death. The questions and answers follow:

MCPHILLIPS, J.A.

"Why did you take the firm's note if you were looking to him? Because he was a friend of mine and I thought it was all right, Stephenson & Crum.

"Your friend had been dead two years? That is the only redress I had."

In this phase of the matter, it might be well said upon this

COURT OF APPEAL

1923

March 6.

SEALY v. STEPHENSON

point alone, that the Stephenson estate is relieved, and I think, looking at all the evidence, that the plaintiff was aware that Crum was carrying on the business in the old name on his own account, certainly there was no authority from the executor of the Stephenson estate to in any way carry on or pledge the assets of the Stephenson estate, the business as continued was Crum's business. In *Goldfarb* v. *Bartlett and Kremer* (1920), 89 L.J., K.B. 258 it was held that no notice of the terms to which the partners had agreed (in the present case the agreement after the death of Stephenson, which in itself constituted dissolution, was that Crum should take over the assets and pay off the liabilities) on the dissolution of the partnership being given to the holder of the current bill, the retiring partner ceased to be liable as a principal debtor on the bill and became liable only as a surety for the continuing partner and that as the holder of the bill had given time to the continuing partner, the retiring partner was discharged from his liability. I also consider, in view of all the facts and circumstances, that it is a fair inference of fact and I draw that inference that the plaintiff was fully aware of the terms agreed upon between the executor of the Stephenson estate and Crum, and it is evident that he was anxious to get a bill from Crum carrying on business in the name of Stephenson & Crum, the old name. No doubt Sealy saw that Crum was in possession of all the assets of the partnership and he wished the bill of the live business carried on by Crum in the old name. This new bill was taken, as I have pointed out, two years after Stephenson's death and when E. L. Stephenson, the executor of the estate of E. C. Stephenson was participating in the Great War. The whole transaction calls for disapproval. The plaintiff now looks to the estate of the late E. C. Stephenson to pay his debt, Crum in the meantime having dissipated the assets of the partnership as they existed at the time of the death of the late E. C. Stephenson. There is this circumstance, too, not to be lost sight of, that an advertisement calling for claims against the estate of the late E. C. Stephenson had been published following E. C. Stephenson's death and before the executor went to the Great War, and the plaintiff failed to file any claim, indicating

MCPHILLIPS, J.A.

that he was looking to the continuing or new business to pay him the debt. This evidence is also pertinent. The plaintiff is asked on re-examination:

"And the note was given you think while he had gone to the Front? I don't know just the date he left.

"Your impression is he was at the Front? Yes.

"And you had no communication with him about the business and you took the new note from Players & Crum? Yes, my Lord.

"Expecting that the business as you saw it there could pay it? Certainly, my Lord, I believe Mr. Players had a power of attorney to act on their behalf. That is what I understood."

It was established upon the argument at this bar, and I think conceded (in any case it was established), that Players had no authority whatever to act for the executor in any way in connection with the continuing or new business, or anything to do with the adjustment of the liabilities of the old business, and the executor had no connection therewith. Therefore, the situation works out in this way: the plaintiff has the bill of the late E. C. Stephenson for a debt due to him upon a loan made solely upon his friend E. C. Stephenson's credit, but some two years after his death the surviving partner, after the dissolution brought about by the death of E. C. Stephenson, takes the bill of Stephenson & Crum and gives six months' further time. This is only comprehensible upon the basis that the plaintiff desired to take the continuing business in the old name as his debtor, being actuated by the belief that he would, in that way, be the more secure. Then when Crum dissipates the assets, the attempt now is to look to the Stephenson estate, a most unconscionable proceeding to say the least. However, quite apart from all these considerations, the Stephenson estate is not liable upon the new bill, whatever may be the liability upon the original bill given by the late E. C. Stephenson. Upon this part I would refer to what is stated in Lindley on Partnership, 8th Ed., at pp. 261-2. The two exceptions [there] referred to are dealt with at pp. 263-4.

MCPHILLIPS, J.A.

The Partnership Act of British Columbia is in the same terms as the Imperial Act.

Now, the circumstances under which the new note sued upon was given was stated by the plaintiff to be the following:

[The learned judge set out the evidence of the circumstances

COURT OF APPEAL

1923

March 6.

SEALY v. STEPHENSON

under which the new note sued upon was given and continued].

It is to be noted that Crum was not called as a witness and there is nothing to shew that the giving of the new note was in the course of winding up the old business, and I venture to say that it would be a matter of vivid imagination upon all the facts to so deem it.

It is clear that the plaintiff entered into a new contract with Crum and Players when he took the new note, and it was the business note of the then business carried on by Crum and Players in the old name, and by no stretch of imagination can it be said that the new note was a note given or "necessary to wind up the affairs of the partnership and to complete transactions begun but unfinished at the time of the dissolution": section 41, Cap. 175, Partnership Act, R.S.B.C. 1911. The learned judge relied upon *In re Head* (1894), 63 L.J., Ch. 549, but with great respect and deference to the learned judge, in my opinion, that case supports the defence of the executor of the estate of the late E. C. Stephenson, as upon the facts of the present case, as in the *Head* case, what took place constituted a novation and the same effect, in my opinion, follows, *i.e.,* the release of the estate of the deceased partner. Here, as in the *Head* case, the transaction amounted to the money being paid on the old notes and re-lent to the going concern carried on by Crum and Players in the old firm name. What Lord Justice Lindley said, at p. 550, aptly fits the present case: "If my view is right, the money had been paid and re-lent on a totally different contract."

MCPHILLIPS, J.A.

That the note is signed "Stephenson & Crum" clothes it with no magic entitling it to be considered a note given by Stephenson & Crum as being "necessary to wind up the affairs of the partnership and to complete transactions begun but unfinished at the time of the dissolution." Two years, or nearly so, had elapsed from the date of the death of E. C. Stephenson, the executor had gone to the Great War, the business was being actively conducted to the knowledge of the plaintiff and with success (as he thought with large assets) and he was most anxious undoubtedly to get a security of the going concern, and made all his plans to get it and did get it. The further

language of Lindley, L.J., is exceedingly apposite to the present case: "It would be grievously unfair to treat the estate of the deceased partner as still liable for this sum," and I would refer to what Kay, L.J. said at p. 551, equally applicable to the facts of the present case:

"The whole transaction seems to me to be as completely a new contract with the surviving partner as if the money had been drawn out and had been paid back on a deposit account, upon the surviving partner giving a promissory note for the amount."

And what is not to be forgotten is this: Crum had obligated himself with the executor in consideration for a transfer of the assets of the partnership to discharge this as well as all other liabilities of the partnership, so that the transaction was after all in the ordinary course of things, carrying out that obligation and referable to it, and cannot be, in any way, deemed a transaction in the winding-up. The plaintiff, of course, now that Crum has wasted the assets, seeks to charge the estate of the deceased partner. I have previously called in question his conduct in the matter and said it was unconscionable, which I believe it to be. In the *Head* case, Lindley, L.J. characterized the attempt there "grievously unfair." I might almost say that there is frailty of language to well portray what is being attempted. The giving of the new note was not authorized in any way by the executor and he was overseas at the time, and it was about two years after the death of E. C. Stephenson, and, *i.e.*, about two years after the dissolution, it was not given in consonance with the statutory authority (section 41, Partnership Act). It was not necessary and was not pretended to be given in the way of winding up the affairs of the partnership nor to complete transactions begun but unfinished at the time of the dissolution, and, in such cases, only could there ever be a possibility of supporting the transaction, as note the enactment (section 41) concludes with the words, "but not otherwise," so that it is a condition precedent and must be made out that within the purview of the enactment Crum had the statutory authority to give the new note, as unless given within the powers conferred by the statute it cannot be held to be an obligation binding upon the estate of the deceased partner, as admittedly the executor was not communicated with nor had

MCPHILLIPS, J.A.

COURT OF APPEAL

1923

March 6.

SEALY v. STEPHENSON

he any knowledge of what was being done and knew nothing of it for five years after. The note was given in 1915 and first heard of by the executor in 1920, and at this point I would refer to the fact that in the argument of Mr. *Mayers,* the learned counsel for the respondent, frankly admitted that he could not contend that Players was clothed with any authority from the executor in connection with the estate of the late E. C. Stephenson. The learned counsel for the respondent relied greatly upon *Dickson* v. *National Bank of Scotland* (1917), S.C. (H.L.) 50, but with deference, that was a case which the present is not. There, the uplifting of the deposit was necessary as stated "to wind up the affairs of the partnership, or to complete transactions begun but unfinished at the time of the dissolution" of the firm within the meaning of the Partnership Act. Unless this was done the money would not be available, but here there was no such necessity. The old notes existed and constituted evidence of a debt. Why give a further note in connection with the winding-up? Of course there was no necessity, the reason of the thing was that it was a convenience in the way of carrying on the then continuing business, which, of course, was not in any way a winding up of the old business, but it was a debt that Crum was liable for under his undertaking with the executor and it was presumptively an advantage to him, and in the end admitted of his dissipating all the assets or the appropriating of them to his sole use. In the *Dickson* case the money had to be got in to wind up, but where the necessity here to give a new note? I would refer to what Lord Shaw said at pp. 54-5.

MCPHILLIPS, J.A.

Apart from all other considerations, the present case in the end resolves itself into the short point—was the giving of the note something that the surviving partner could do in view of the controlling provisions of the Partnership Act (section 41)? I have no hesitation in answering the question in the negative. The facts will not support the necessity in the way of winding up the affairs of the partnership, nor can it be said to have been the completion of a transaction begun but unfinished at the time of the dissolution, and if the giving of the new note was not within the language of the enactment the new note is not

binding upon the estate of the deceased partner, and it is not binding in my opinion. One further circumstance may be referred to as indicating that the new note was not really the note of the dissolved partnership is to observe that the note is signed "Stephenson & Crum" with the signature of "S. H. Crum" underneath the partnership name. This well indicates that the note was not the note of the dissolved partnership but the note of Crum carrying on business in the old firm name, and that was what the plaintiff really wanted and got, but when the assets disappeared this claim is now made against the estate of the deceased partner. In my opinion, there was no right in Crum to give the promissory note he did. If it was intended to be the note of the old firm, as it would be, the giving of a note without authority, statutory or otherwise, being given after dissolution (see *Heath* v. *Sansom* (1832), 4 B. & Ad. 172; 110 E.R. 420; 38 R.R. 237; *Smith* v. *Winter* (1838), 4 M. & W. 454; 51 R.R. 678; *Lewis* v. *Reilly* (1841), 1 Q.B. 349) is discussed in Lindley on Partnership, 8th Ed., p. 262, and the learned text-writer states "The case is certainly anomalous and requires reconsideration" (see Story on Bills, 197, and *Abel* v. *Sutton* (1800), 3 Esp. 108. The cases go further than is suggested in *Garland* v. *Jacomb* (1873), L.R. 8 Ex. 216 at p. 220, for the notice of the dissolution is what creates the difficulty). Then we have Pollock on Partnership, 11th Ed., p. 114, note (*k*), reading as follows:

MCPHILLIPS, J.A.

"*Lewis* v. *Reilly* (1841), 1 Q.B. 349, 55 R.R. 262. 'It is perhaps doing no violence to language to say that the partnership could not be dissolved as to this bill, so as to prevent it from being indorsed by either defendant in the name of the firm,' Lord Denman, C.J., 1 Q.B. at p. 351. But it is difficult to admit the correctness of the decision: see Lindley, 262. The earlier case of *Smith* v. *Winter* (1838), 4 M. & W. 454, 51 R.R. 678 (not cited in *Lewis* v. *Reilly*), assumes that authority in fact must be shewn for such a use of the partnership name even for the purpose of liquidating the affairs of the firm."

Here there was admittedly no authority, in fact, for Crum to use the partnership name in giving the note sued upon, and, as stated in Pollock on Partnership, when referring to *Lewis* v. *Reilly, supra,* note (*k*) at p. 114, "The earlier case of *Smith* v. *Winter* (1838), 4 M. & W. 454; 51 R.R. 678 (not cited in *Lewis* v. *Reilly*), assumes that authority in fact must be shewn

COURT OF APPEAL

1923

March 6.

SEALY v. STEPHENSON

for such a use of the partnership name even for the purpose of liquidating the affairs of the firm." Sir Frederick Pollock, when considering section 38 of the Imperial Act (section 41, Cap. 175, R.S.B.C. 1911, is the same in terms) at p. 115, states:

"On this subject the language of the Indian Contract Act (s. 263) is more general. It says:

"'After a dissolution of partnership, the rights and obligations of the partners continue in all things necessary for winding up the business of the partnership.'

"And Lord Eldon spoke more than once of a partnership after dissolution as being in one sense not dissolved until the affairs of the firm are wound up. (1 Swanst. 508, 2 Russ. 337, 342, 18 R.R. 132 (1818)). But Lord Lindley formerly thought a more guarded statement desirable, and is now of opinion that the Act correctly represents the effect of the actual decisions, notwithstanding the wider language of some *dicta* (Lindley, 263, 264). Paulus incidentally mentions a similar limited rule as existing in the Roman law:

"'*Si vivo Titio negotia eius administrare coepi, intermittere mortuo eo non debeo; nova tamen inchoare necesse mihi non est, vetera explicare ac conservare necessarium est; ut accidit, cum alter ex sociis mortuus est.*' (D. 3, 5, *de negot. gest.* 21, §2)."

MCPHILLIPS, J.A.

I am, therefore, of the opinion that the appeal should succeed and the action be dismissed.

EBERTS, J.A.

EBERTS, J.A. would dismiss the appeal.

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitor for appellant: *C. F. Davie.*
Solicitor for respondent: *A. M. Manson.*

REX *EX REL.* TULEY v. RODGERS.

COURT OF APPEAL

1923

March 6.

REX v. RODGERS

Criminal law—Sale of liquor—Constables given money by police inspector to make purchase—Charge of unlawful selling—B.C. Stats. 1915, Cap. 59, Sec. 87; 1921, Cap. 30, Secs. 26 and 47.

A sum of money was given two constables by the chief inspector of Provincial police who, under his instructions, bought whisky with it from the accused. It was found by the magistrate that the money was provided by the Provincial Government. A conviction of the accused on a charge of unlawfully selling liquor contrary to the provisions of the Government Liquor Act, 1921, was on appeal to the Supreme Court affirmed.

Held, on appeal, affirming the decision of McDONALD, J., that the accused could not rely on section 47 of the Act which provides that "nothing in this Act shall apply to or prevent the sale of liquor by any person to the Government" and the conviction should be sustained.

APPEAL by accused from the decision of McDONALD, J., affirming the decision of the police magistrate at Vancouver, whereby he convicted the appellant of unlawfully selling liquor contrary to the provisions of the Government Liquor Act. The facts are that the chief inspector of Provincial police gave a sum of money to two Provincial constables, who, under his instructions, bought whisky from the accused. The question put by the magistrate in a case stated was whether he was right in holding that the sale to the constables was in the circumstances illegal in view of the provisions of section 47 of the Government Liquor Act.

Statement

The appeal was argued at Victoria on the 2nd of February, 1923, before MACDONALD, C.J.A., MARTIN, GALLIHER, McPHILLIPS and EBERTS, JJ.A.

J. W. deB. Farris, K.C., for appellant: In making the conviction the magistrate gave as a reason that accused did not know it was a sale to the Government but this is not sound. The Crown was acting through its agents and servants. The maxim *"omnia præsumuntur rite et solenniter esse acta donec probetur in contrarium* applies in this case. It must be assumed they were acting within their authority. This was a sale to

Argument

COURT OF APPEAL

1923

March 6.

REX v. RODGERS

the Government and therefore within the provisions of section 47 of the Government Liquor Act.

Argument

W. M. McKay, for the Crown: We say Rodgers must know he was dealing with the Government, to come within section 47. The burden is on the accused under section 82(1) of the Act, and he must shew the sale was such as to entitle him to relief under section 47. It is not a purchase contemplated by section 47. The whole Act must be read and the Legislature never intended that section 47 would give relief in such a case: see *Rex* v. *Ferguson* (1922), 31 B.C. 100. On the question of authority see *Keighley, Maxsted & Co.* v. *Durant* (1901), A.C. 240.

Farris, in reply: When language is unequivocal and clear it must be followed.

Cur. adv. vult.

6th March, 1923.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The magistrate's statement of the case finds that two Provincial constables purchased whisky from the accused, and that these constables received the money with which they purchased it from the Provincial Government; that the purchase was made on the instructions of the chief inspector of the Provincial police, and that it was sworn that the liquor so purchased was for and became the property of the Crown. It is not, I think, open to doubt that had the liquor been purchased by the Provincial Government, the defendant could not be convicted. But it was not so found; the money was received from the Government (true) but for what purpose? The purchase was made under the instructions of the chief inspector, but what authority had he to purchase or give instructions to purchase liquor? It was sworn but not found as a fact that it was for the Crown; that is all.

It is quite clear to me that on these facts it cannot be said that the liquor was purchased by the Provincial Government, and hence the appeal should be dismissed.

MARTIN, J.A.

MARTIN, J.A.: By section 3 of the Government Liquor Act, B.C. Stats. 1921, Cap. 30, the Government is empowered to establish stores for the sale of liquor, such sales to be conducted by "vendors" under section 5, and every other person is by sec-

tion 26 prohibited from selling liquor. Under section 95 a purchasing agent "shall purchase in the name and on behalf of the Government all liquors required for the Government liquor stores," and by section 47 it is declared that "Nothing in this Act shall apply to or prevent the sale of liquor by any person to the Government," and that expression (Government) by section 2 means His Majesty in right of the Province, acting by the Lieutenant-Governor in Council."

What happened here is on the facts before us that the chief inspector of Provincial police gave a certain sum of money to two Provincial constables who, pursuant to his instructions bought with it whisky from the accused and upon this evidence the learned magistrate assumes to "state" in his reserved case that the constables "received the money with which they purchased the liquor, from the Provincial Government." But with all respect, that is not "stating" facts to us but a matter of law, and it begs the whole question. Upon what ground can it be said that if an inspector of police, or even the superintendent of police, gives money to a constable and tells him to buy liquor with it that such purchase is one "by the Government"? The *maxim omnia præsumuntur rite et solenniter esse acta* was invoked, but that has application only (in such a case as the present) to acts of officials which are done in the ordinary course of their official duty, *i.e., prima facie* in the exercise of their authority. But what evidence is there before us that it is part of the duty of his office for an inspector of police to buy whisky for any purpose? Nor is there anything, to my knowledge, which would justify us in taking judicial notice of such a practice. It would be indeed a startling result if any official of the Provincial Government who might happen to have Government money in his hands and chose to employ it in purchasing liquor for any public purpose that he might arbitrarily and irresponsibly decide on, yet nevertheless that such an act must be held as a matter of law to be "a sale to the Government."

MARTIN, J.A.

Viewing the matter in the light of the whole enactment I am of opinion that the saving clause in said section 47, upon which the accused relies, obviously relates to formal sales to

COURT OF APPEAL

1923

March 6.

the Government as authorized by that Act, and all sales which are outside that Act are outside its protection, but within its prohibition as declared by said section 26.

The appeal, therefore, should be dismissed.

REX v. RODGERS

GALLIHER, J.A.: The Act, Statutes of British Columbia, 1921, Cap 30, is entitled "An Act to provide for Government Control and Sale of Alcoholic Liquors." The word "Government" is defined as "His Majesty in right of the Province acting by the Lieutenant-Governor in Council." Giving that meaning to the word "Government" in section 47 of the Act, it would read "Nothing in this Act shall apply to or prevent the sale of liquor by any person to His Majesty in right of the Province acting by the Lieutenant-Governor in Council."

Under the Act all purchases of liquor for and on behalf of the Government must be made by the purchasing agent, section 95, but turning to the case as stated by the magistrate we have no finding of fact that the liquor here was so purchased. The only findings of fact we have are (a) the liquor was purchased from the accused by two Provincial constables, regularly sworn in; (b) that they received the money with which the purchase was made from the Provincial Government, and, (c) that it was purchased under special instructions from one Miller, chief inspector of Provincial police. There was no finding by the magistrate that it was purchased for and became the property of the Crown. The magistrate merely dealt with that part by saying, such was sworn to.

GALLIHER, J.A.

For some reason neither party seemed to want the case sent back for restatement. They had agreed upon the case to be stated in the first instance, and when it was before MCDONALD, J., so that dealing with the case as stated, I would not be justified in saying the magistrate was wrong and would therefore answer the question in the affirmative.

MCPHILLIPS, J.A.: This is an appeal from the decision of MCDONALD, J., affirming the decision of police magistrate Shaw, wherein he convicted the appellant of unlawfully selling liquor contrary to the provisions of the Government Liquor Act. I am of the opinion that the conviction and judgment

MCPHILLIPS, J.A.

affirming the same were correct, no error in law being established. The section of the Act under which the learned counsel for the appellant relies is section 47, which reads as follows:

"Nothing in this Act shall apply to or prevent the sale of liquor by any person to the Government."

We have the word "Government" interpreted in the Act. "'Government' means His Majesty in right of the Province, acting by the Lieutenant-Governor in Council." Therefore to establish that the purchase of the liquor was a purchase by the Government it was necessary to establish that it was a purchase by His Majesty acting by the Lieutenant-Governor in Council, and no such evidence was adduced. It would not come within the ordinary scope of the duties of the Provincial constables nor even under the ordinary scope of the chief inspector of police to make purchases of liquor and, in any case, it would be necessary to shew that the purchase was made acting under the authority of the Lieutenant-Governor in Council and nothing of that kind was proved. Further, upon the evidence, as given in the case stated, it is clear the liquor could not be said to have become the property of the Crown.

Recently their Lordships of the Privy Council had occasion to consider the question of when it could be said that there was an effective act of the Crown and in that case, *Mackay* v. *Attorney-General for British Columbia* (1922), 1 A.C. 457, it was held

MCPHILLIPS, J.A.

"that a contract made by the Minister for the purchase of land for a public purpose does not bind the Crown unless the acquisition of the land has been authorized by an Order in Council, or a resolution in Council amounting to an order, even if the contract is sealed."

Viscount Haldane delivered the judgment and at p. 461 said:

"The character of any constitution which follows, as that of British Columbia does, the type of responsible Government in the British Empire, requires that the Sovereign or his representative should act on the advice of Ministers responsible to the Parliament, that is to say, should not act individually, but constitutionally. A contract which involves the provision of funds by Parliament requires, if it is to possess legal validity, that Parliament should have authorized it, either directly, or under the provisions of a statute."

And further on said:

". . . . the mere assent of the ministers of the day to the contract could not, as has already been pointed out, under a constitution, such as that of British Columbia, make the contract a legally binding one, and accord-

COURT OF APPEAL

1923

March 6.

REX v. RODGERS

MCPHILLIPS, J.A.

ingly the basis on which the claim under the arbitration proceedings was rested, disappears."

It is, therefore, apparent that it is idle argument to contend that the sale in the present case was a sale to the Government. It may also be said that the scheme of the Government Liquor Act is well indicated in all its provisions and there is the positive inhibition of the sale of liquor save by and through the Government liquor stores and the person authorized to purchase liquor is the purchasing agent: see sections 94, 95. This rebuts the view that any other officers of the Crown have authority to purchase liquor on behalf of the Crown. It follows, in my opinion, that it is not established that the sale of the liquor was a sale to the Government and as a necessary sequence, the conviction must be held to be valid and the appeal should be dismissed.

EBERTS, J.A.

EBERTS, J.A. would dismiss the appeal.

Appeal dismissed.

Solicitor for appellant: *G. S. Wismer.*
Solicitor for respondent: *W. M. McKay.*

HUNTER, C.J.B.C.

1923

Jan. 31.

CLAPPIER v. CLAPPIER AND CLERY.

Practice—Divorce—Costs against co-respondent on solicitor and client scale—Discretion of Court—Divorce and Matrimonial Causes Act, R.S.B.C. 1911, Cap. 67, Secs. 35, 37—Divorce rule 59.

CLAPPIER v. CLAPPIER AND CLERY

There is complete discretion vested in the Court under section 35 of the Divorce and Matrimonial Causes Act with regard to fixing costs. In a proper case, costs may be awarded on solicitor and client scale.

Statement

MOTION, by petitioner, for an order directing that a successful petitioner in a divorce cause, be allowed to tax his costs against the co-respondent on the solicitor and client scale.

Heard by HUNTER, C.J.B.C., at Victoria, on the 29th of January, 1923.

Bass, in support of the motion: The Court has full discretion in the matter of costs: see sections 19 and 35, Divorce and Matrimonial Causes Act, R.S.B.C. 1911, Cap. 67; Brown & Watts on Divorce, 9th Ed., p. 214 *et. seq.*; *Rice* v. *Shepherd* (1862), 12 C.B. (N.S.) 332; 6 L.T. 432; *Ottaway* v. *Hamilton* (1878), 3 C.P.D. 393 at pp. 399, 401; *Russell* v. *Russell* (1892), P. 152; *Butler* v. *Butler* (1890), 15 P.D. 126; *Palmer* v. *Palmer and Stockley* (1914), P. 116; *Wade* v. *Wade* (1903), P. 16; *Norris* v. *Norris, Lawson and Mason* (1861), 4 Sw. & Tr. 237; *Robinson* v. *Robinson and Wilson* (1898), 78 L.T. 391; Dixon on Divorce, 4th Ed., 261 and cases there collected.

Maclean, K.C., contra: The applicant has been unable to point to one case in which it has been decided that a co-respondent is liable in any circumstances for solicitor and client costs of the petitioner. It is submitted that the rule governing the granting of solicitor and client costs is that laid down in *Turner* v. *Collins* (1871), L.R. 12 Eq. 438, where it was held that the Court cannot, or at least will not, make an "unsuccessful party pay costs as between solicitor and client, unless (1) there is a fiduciary relation between the parties, or (2) there has been something in the nature of scandal, *e.g.*, gross charges of fraud made, and not sustained; but he may have to pay the costs of trustees as between solicitor and client whether there is any fund out of which they can be paid or not. In this case no charges whatever were made by the co-respondent against the petitioner, so it is submitted that this case clearly does not fall within either branch of the above mentioned rule.

Argument

31st January, 1923.

HUNTER, C.J.B.C.: In this case the petitioner, who has secured a divorce from his wife, and a verdict from a jury for $2,000 against the co-respondent, Clery, now applies for a direction that the costs as against Clery be taxed as between solicitor and client.

Judgment

No authority in divorce proceedings has been produced either

HUNTER, C.J.B.C.

1923

Jan. 31.

CLAPPIER v. CLAPPIER AND CLERY

for or against the application, so that it appears to be necessary to deal at some length with the question, as the case cited by Mr. *Maclean* is only an illustration of the principle that as a general rule only party and party costs are allowed in ordinary civil proceedings.

By section 35 of the Divorce and Matrimonial Causes Act, R.S.B.C. 1911, Cap. 67,—

"The Court on the hearing of any suit, proceeding, or petition . . . . may make such order as to costs as to [the] Court . . . . may seem just."

And by section 37:

"The Court shall make such rules and regulations concerning the practice and procedure under this Act as it may from time to time consider expedient, and shall have full power from time to time to revoke or alter the same."

And by section 59 of the Rules:

"The same fees and costs as between solicitor and client, and party and party, and generally, shall be payable in Divorce and Matrimonial Causes and Matters as are payable in similar analogous proceedings . . . . in the Supreme Court."

This latter rule evidently contemplates that there may be cases where solicitor and client costs might be allowed. Even if it were not so I do not think that any rule or practice could fetter the complete discretion vested in the Court by section 35 of the statute, and therefore, it is clear that there is jurisdiction to make the order in a proper case.

Judgment

In this case, I think there were special circumstances which justify the order. The husband and wife were living amicably together and had living issue of their marriage when he went overseas obeying the call of duty. On his return he found that his home had been destroyed by the adulterer and he was contemptuously turned away by his wife, who shut the door in his face and threw his clothes out after him. When she found herself pregnant by the adulterer she tried to lure her husband into resuming cohabitation with her in order to cover up the affair, but he steadfastly refused, although willing that she should share the house with him. After the birth of the child he commenced proceedings and while she swore in her pleadings that he was the father, she swore at the trial that while the husband was not the father neither was the co-respondent, in short that she had had promiscuous intercourse. I have no

doubt he is the father and I was satisfied from her demeanour in Court that it was under his influence that she swore she was worse than she really was in order to minimize the amount of the verdict and save his pocket as much as possible. I am satisfied she was in truth a hardworking woman who looked after her children and that all would have been well had it not been for her infatuation for the lecherous invader of the home. The husband, who was without any fault at all in the matter, and had in fact continually corresponded with his wife while at the front, expressed his desire in the witness-box that any damages awarded should be set aside as a fund for the children and that he did not want any of it for himself. The verdict in my opinion was altogether incommensurate with the irreparable wrong done to the husband, who after a long absence at the continual risk of his life returned to find himself deprived of a hitherto affectionate and hardworking wife by a man who was not married, and as far as I know, ought to have been at the front himself. If there ever was a case in which the direction asked for would be just, it is this one, and I make the order accordingly.

Judgment

Order granted.

W. H. MALKIN CO. LIMITED v. CROSSLEY *ET AL.*

Debtor and creditor—Appropriation of payments—Partnership—Dissolution—Business continued by company newly formed—Notice to plaintiff's selling agent—Sufficiency of—Goods subsequently supplied by plaintiff—Payments made on account by company—Application of.

A partnership of three was dissolved and a limited company formed by two of them which took over the assets and assumed the liabilities. A selling agent of the plaintiff was notified of the change. The plaintiff supplied goods after the change for which certain payments were made.

Held, that notification to the selling agent of the change was sufficient notification to the plaintiff and he could charge only the company for goods thereafter supplied.

Held, further, that payments made by the company to the plaintiff from

COURT OF APPEAL

1923

March 6.

W. H. MALKIN CO. LTD. v. CROSSLEY

time to time, no appropriation being made by either party and the plaintiff keeping one general account, should be applied first in satisfaction of the partnership debt.

Hooper v. *Keay* (1875), 1 Q.B.D. 178 followed.

Statement

APPEAL by defendants (other than Crossley's Grocery Limited) from the decision of GRANT, Co. J. of the 2nd of November, 1922, in an action to recover $809.14, balance due in groceries supplied and delivered to the defendants. In 1921 the defendants, J. E. Crossley, C. I. Crossley and D. O. Crossley, started five grocery stores in Vancouver and carried them on until the 25th of April, 1922, when they formed a limited company called Crossley's Grocery Limited, this company being carried on and owned by J. E. Crossley and C. I. Crossley, the third, D. O. Crossley dropping out. Between the 25th of April and the 16th of May, 1922, there was purchased from the plaintiff groceries to the value of $4,200 odd and duly delivered, for which $3,500 was paid, leaving a balance of $809.14 owing. It was held by the trial judge that all three Crossleys were individually liable.

The appeal was argued at Victoria on the 12th and 15th of January, 1923, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Argument

Grossman, for appellant: The evidence is that on the 29th of April, notice was given of the change to Crossley's Grocery Limited, and plaintiff's selling agent was notified. It was his duty to inform his principals. It was sufficient notice: see Bowstead on Agency, 6th Ed., 375. On various dates in July cheques were given totalling $3,500. The appropriation was to the earlier debt: see *Grant* v. *Matsubayashi* (1922), 31 B.C. 375; *Hooper* v. *Keay* (1875), 1 Q.B.D. 178 at p. 179. It was appropriated to Crossley's Grocery.

E. A. Burnett, for respondent: A dissolution must be precise and clear so that the notice will be without doubt in the minds of those to whom it is given. The creditor has the right of appropriation: see *Cory Brothers & Co.* v. *Owners of Turkish Steamship "Mecca"* (1897), A.C. 286. The Clayton rule does not apply as there are different debtors. As to the time within

which an appropriation must be made see *Seymour* v. *Pickett* (1905), 1 K.B. 715. We are going on the maker of the note, not on the warranty of authority.

Grossman, in reply.

COURT OF APPEAL

1923

March 6.

W. H. MALKIN CO. LTD. v. CROSSLEY

Cur. adv. vult.

6th March, 1923.

MACDONALD, C.J.A.: The action is against a partnership for a balance of an account. The partnership was dissolved on the 26th of April, 1922, and a limited company, of which two of the three partners were the sole members, took over the assets and agreed to discharge the liabilities. They notified plaintiff's selling agent of the change and that thereafter all orders for goods should be charged to the Limited Company.

The notification is not denied, and therefore must be taken as a notification to the plaintiff, who says it was not aware of it.

Plaintiff continued to charge goods supplied to the parties against the partnership until about the 17th of May, when plaintiff says it became aware of the change.

MACDONALD, C.J.A.

One of the members of the Limited Company gave a note to the plaintiff for $4,200, covering about $1,000 of the partnership account, and the balance, that of the Limited Company, charged up in the partnership account. This was done without authority of the third partner. The Limited Company made payments from time to time on the note reducing it to the amount sued on herein, being a sum less than the original partnership debt. No appropriations were made of these payments by either party, and the plaintiff rendered a statement of account shewing a general balance of the amount sued on.

In my opinion the case falls distinctly within the decision in *Hooper* v. *Keay* (1875), 1 Q.B.D. 178. The appeal should be allowed and the action should therefore be dismissed.

MARTIN, J.A.: I agree that this appeal should be allowed.

MARTIN, J.A.

GALLIHER, J.A.: I think we must hold on the evidence, that Gould, who was the travelling city salesman for the plaintiff, received notice of the change from Crossley's Grocery, to

GALLIHER, J.A.

COURT OF APPEAL

1923

March 6.

W. H. MALKIN CO. LTD. *v.* CROSSLEY

the limited company on the 29th of April, 1922. This is sworn to by J. E. Crossley in his examination for discovery. Gould, though present in Court during the trial, was not called. It would be his duty on receiving this notice to acquaint the plaintiff with same, and as its agent, notice to him must be taken as notice to it. Any goods ordered on and subsequent to that date and delivered, should be paid for by the Company.

With regard to the appropriation of payments, the case is, in my opinion, covered by *Hooper* v. *Keay* (1875), 1 Q.B.D. 178.

GALLIHER, J.A.

In respect of the note for $4,289.57, given June 6th, 1922, and signed "Crossley Grocery, *per* J. E. Crossley," it is only necessary to say that J. E. Crossley had no authority to sign same.

The appeal should be allowed and the judgment below set aside.

MCPHILLIPS, J.A.

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

EBERTS, J.A.

EBERTS, J.A. would allow the appeal.

Appeal allowed.

Solicitors for appellant: *Grossman, Holland & Co.*
Solicitors for respondent: *Daykin & Burnett.*

IN RE ARBITRATION ACT AND WOODS.

COURT OF APPEAL

1923

March 6.

IN RE ARBITRATION ACT AND WOODS

Arbitration—Land taken by public works—Road allowance through farm —View of premises—Part of building on land taken—Arrangement between arbitrators for owner to take material—"Misconduct"—R.S.B.C. 1911, Cap. 189.

During the hearing of evidence on an arbitration as to compensation for land taken under the Public Works Act it was arranged among the arbitrators that the material of that part of a shed which was on the land taken be retained by the owner and his damages on account of the portion of the shed taken down were then allowed at $75. On motion the award was set aside and sent back to the arbitrators for reconsideration.

Held, on appeal, reversing the decision of MCDONALD, J. (MARTIN and MCPHILLIPS, JJ.A. dissenting), that there was no misconduct on the part of the arbitrators and no ground for setting aside the award.

APPEAL by the Public Works Department from the decision of MCDONALD, J., of the 11th of November, 1922, setting aside an award of arbitrators on the value of a road allowance through his farm in Comox District taken by the Department of Public Works. A majority award was given fixing the compensation at $379.95. On motion to set aside the award it was held by MCDONALD, J. that the award should be set aside because (a) the umpire and the arbitrator for the Department, viewed the ground without the consent of and in the absence of the owner's arbitrator and (b) the arbitrator for the Department, gave an undertaking on behalf of the Department before the award was made.

Statement

The appeal was argued at Victoria on the 18th of January, 1923, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Carter, D.A.-G., for appellant: As to the view of the *locus in quo* which was objected to the third arbitrator appeared before the view was completed and all three were there together for some time in addition. This was before they assumed office. The undertaking complained of was an item in the award to which no substantial objection can be taken. On the question of

Argument

COURT OF APPEAL

1923

March 6.

IN RE ARBITRATION ACT AND WOODS

arbitrator's conduct see *In re Enoch and Zaretzky, Bock & Co.* (1910), 1 K.B. 327 at p. 334; *Ripstein* v. *City of Winnipeg* (1918), 3 W.W.R. 965 at p. 968; *Attorney-General* v. *Kelly* (1920), 31 Man. L.R. 1; (1922), 1 A.C. 268 at p. 280; Halsbury's Laws of England, Vol. 1, pp. 458 and 461. It is a contradiction in terms to send back an award when they have been found guilty even of legal misconduct.

Argument

R. M. Macdonald, for respondent: Sending an award back depends on the nature of the misconduct: see Halsbury's Laws of England, Vol. 1, p. 477, par. 994. The extension of the road took in part of the respondent's shed. We were entitled to the value of land and damage to the building: *Fetherstone* v. *Cooper* (1803), 9 Ves. 67; *Cooper* v. *Shuttleworth* (1856), 25 L.J., Ex. 114 at p. 115.

Cur. adv. vult.

6th March, 1923.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The award is regular on its face, therefore it can be attacked only on extrinsic grounds.

The grounds upon which it is sought to sustain the judgment appealed from are, that the arbitrator appointed by the Government and the umpire had a view of the *locus in quo* which is alleged to have been irregular. This was taken before the umpire entered upon his duties, not only so, but the arbitrator appointed by the owner arrived on the scene during the view and no objection was taken by anyone to this when the arbitration was entered upon, nor until after the award was made. This ground, in my opinion, entirely fails.

The second ground of attack is based on what is called misconduct of the Government arbitrator during the arbitration. In taking this strip of land required to widen the road the Government interfered with a shed belonging to the owner. Mr. Wark when discussing this with Mr. Smith, the owner's arbitrator, suggested that the material of that part of the shed which was on the land taken, should be retained or taken back by the owner. That this being so, his real damages on account of the shed would be allowed at $75. This Mr. Smith agreed to do and it was awarded accordingly.

Now, if there was any misconduct in the matter, both these arbitrators were equally guilty, but in my opinion, there was no misconduct.

As was pointed out in *Attorney-General* v. *Kelly* (1920), 31 Man. L.R. 1, it is the business of the arbitrators appointed by the parties to endeavour to reach a common basis on all items in dispute. It is only when they fail that the umpire is called upon to decide. The persons appointed by the parties in that case were called assessors, but the Privy Council, in (1922), 1 A.C. 268, said, that these assessors were arbitrators, so that they were in no different position to that occupied by the arbitrators of the parties in this case. But apart from the propriety of what was done, it must be presumed that Mr. Woods consented to this arrangement, and therefore cannot now complain of it. The onus of proof was, of course, upon him to shew misconduct on the part of the arbitrators. Any arrangement to which he gave his consent could not be said to savour of misconduct. The assessment of damages applicable to the shed in its widest sense was clearly within the submission. There was therefore nothing which could be said to be a going beyond the scope of the arbitration in awarding a sum of money as damages applicable to the shed. Even if an allegation of misconduct could in the circumstances of this case be asserted, it could at best only be on proof that the act complained of was done behind the back of the owner.

MACDONALD, C.J.A.

Now, while both Mr. Woods and Mr. Smith have made affidavits in their attempt to bolster up the claim of misconduct on Mr. Wark's part, there is not a word denying that Mr. Woods was aware of the arrangement or denying that he had consented thereto.

In these circumstances I regard the application to set aside the award as without the shadow of a foundation.

The appeal should be allowed.

MARTIN, J.A.: This appeal arises from an award for compensation for land taken under the Public Works Act, R.S.B.C. 1911, Cap. 189, which empowers the arbitrators to "estimate and award the amount to be paid to any claimant" (section

MARTIN, J.A.

COURT OF APPEAL

1923

March 6.

IN RE ARBITRATION ACT AND WOODS

26). It appears that when the two arbitrators and the umpire appointed under section 16 heard the matter, an undertaking was given by one of them, R. J. Wark, arbitrator for the minister of public works, that a letter would be sent immediately by that department authorizing the claimant to take down and make use of certain material contained in a building on the appropriated land and that in consequence of such undertaking the "sum awarded" (section 28) was reduced by the umpire and arbitrator Wark to a sum substantially below what it would otherwise have been fixed at. I have no doubt that such a consideration and arrangement ought to have been excluded from the consideration of the matter and also that the claimant's arbitrator had no authority to agree to such a course, which is not contemplated or provided by the statute, and clearly, to my mind, constitutes misconduct within the meaning of the Arbitration Act, R.S.B.C. 1911, Cap. 11, section 14: nowhere in the statute is such a course sanctioned, and it is not a question of the "neutrality" of an arbitrator, because being appointed "by one party only, he is not expected to be neutral" (whatever that inappropriate and non-legal expression may mean, it is something quite different from "impartial," and imports a passive and a negative state), though the umpire is, but of the importation into the proceedings of the element of assessing the compensation on the basis of a promise by one of the arbitrators instead of in money to be paid as the statute requires. Of course, if it could be shewn that the claimant actually did at the hearing agree to reduce the amount of his claim in consideration of such a collateral offer, which he might feel justified in accepting and relying on *dehors* the arbitration, that would be a different matter, but such is not the case before us, and the arbitrator the claimant appointed is not in the very different position of a counsel conducting a trial on his behalf and so presumably authorized to bind him by an agreement within the scope of his authority.

MARTIN, J.A.

It was objected that this point was not raised in the notice of motion, but I think that paragraph 6 thereof does so in effect. It was also objected that where misconduct is found the Court may remove the arbitrator or umpire and set aside the award under section 14, but cannot remit the matter for reconsidera-

tion, but that is not the conclusion that should, in my opinion, be placed upon the Act, because the power given by section 13 to remit "in all cases of reference to arbitration" is not limited by the additional power to remove or set aside for misconduct conferred by the following section 14. It is correctly I think stated in Halsbury's Laws of England, Vol. 1, p. 478, that:

"In such a case [misconduct] the Court has also power to set the award aside, and the question whether, in any particular case where the arbitrator or umpire has been guilty of misconduct, the Court will remit the award to his reconsideration or will set it aside depends on the nature of the misconduct."

And it is further said, on the same page:

"It is difficult to give an exhaustive definition of what amounts to misconduct on the part of an arbitrator or umpire. The expression is of wide import, including on the one hand bribery and corruption and on the other a mere mistake as to the scope of the authority conferred by the submission."

MARTIN, J.A.

What has been done here while technically misconduct, is really a "mistake as to the scope of the authority," and therefore the justice of the case will be met by remission as aforesaid.

I need only add as regards the alleged view or inspection of the premises taken by one arbitrator and the umpire, that the evidence thereof is so indefinite and unsatisfactory that it would not be safe to rely upon it and so it should be disregarded.

It follows that the appeal should be dismissed.

GALLIHER, J.A.: After a careful analysis of this case, I find myself in agreement with the conclusions of the Chief Justice whose reasons I adopt.

GALLIHER, J.A.

I would allow the appeal.

MCPHILLIPS, J.A.: In my opinion the learned judge made the proper order in referring the matter back to the arbitrators. There was jurisdiction to do this, and the order should not, with all deference to contrary opinion, be disturbed.

MCPHILLIPS, J.A.

EBERTS, J.A. would allow the appeal.

EBERTS, J.A.

Appeal allowed,
Martin and McPhillips, JJ.A. dissenting.

Solicitor for appellant: *J. W. Dixie.*
Solicitors for respondent: *Bird, Macdonald & Company.*

COURT OF APPEAL

1923

May 3.

REX *EX REL.* WILKIE v. GOSLETT.

Intoxicating liquor—Charge of keeping "liquor" in part of hotel other than guest-room—In store-room attached to hotel but entered only from outside—Application to beer—B.C. Stats. 1921, Cap. 30, Sec. 43.

REX *v.* GOSLETT

On the conviction of the accused for keeping "liquor" in a part of his inn other than a private guest-room, the evidence disclosed that 22 bottles of beer were found in a store-room attached to the main building but entered from the outside. On the refusal of the judge of the Supreme Court to quash the conviction on a case stated:—

Held, on appeal, affirming the decision of GREGORY, J. (MCPHILLIPS, J.A. dissenting), that the prohibition in section 43 of the Government Liquor Act applies to "beer" as the exclusion of beer from the term "liquor" should not go further than is necessary to give full effect to section 46.

Rex v. *Caskie* (1922), 31 B.C. 368 distinguished.

APPEAL by accused from the order of GREGORY, J. of the 8th of January, 1923, dismissing an appeal by way of case stated from the conviction of the accused by the stipendiary magistrate on the 6th of December, 1922, whereby the appellant was convicted of unlawfully keeping liquor in the Cobble Hill Hotel or Inn in a place other than a private guest-room, to wit, said liquor being found in the kitchen, pantry and other places not being a guest-room contrary to section 43 of the Government Liquor Act. On the morning of the 19th of November, 1922, the police made a raid on the said Cobble Hill Hotel of which the accused was manager. Twenty-two bottles of beer were found in a store-room which was part of the main building but had to be entered by an outside door. It was not proved that the beer was intoxicating, no analysis of it having been submitted in evidence. It was inferred by the magistrate that the beer was intoxicating as one witness described the liquor as beer, which is a name commonly applied to an intoxicating liquor, and found as a fact that the beer was intoxicating. He also found that the store-room in questiou was a part of the hotel.

Statement

The appeal was argued at Vancouver on the 6th and 7th of March, 1923, before MACDONALD, C.J.A., GALLIHER and MCPHILLIPS, JJ.A.

Lowe, for appellant: The charge is under section 43 of the Act but beer does not come within this section as it is not "liquor" within the Act: see *Rex* v. *Caskie* (1922), 31 B.C. 368; *Re Lambert* (1900), 7 B.C. 396; *Richards* v. *Wood* (1906), 12 B.C. 182. Where there is a reasonable doubt the party sought to be charged should receive the benefit: see *Parry* v. *Croydon Gas Co.* (1863), 15 C.B. (N.S.) 568 at p. 576; *Rex* v. *Garvin* (1909), 14 B.C. 260 at p. 264; *Rex* v. *Macdonald* (1917), 28 Can. Cr. Cas. 311; *Re The Edmonton Hide and Fur Co.* (1919), 48 D.L.R. 181; *Proctor* v. *Mainwaring* (1819), 3 B. & Ald. 145. There was no proof that the liquor was intoxicating: see *Regina* v. *Bennett* (1882), 1 Ont. 445; *Regina* v. *Kennedy* (1885), 10 Ont. 396 at p. 400; *Regina* v. *Kennedy* (1889), 17 Ont. 159. Argument

Alexis Martin, for respondent: The word "person" includes hotel-keeper. Section 46 does not take "beer" out of the term "liquor" for all purposes of the Act. The *Caskie* case does not apply here as in that case the charge was for the "sale" of liquor, the charge here being the "keeping of liquor" unlawfully on the premises.

Lowe, in reply.

Cur. adv. vult.

3rd May, 1923.

MACDONALD, C.J.A.: This is an appeal from a conviction under the Government Liquor Act. Sections 26 and 46 of that Act deal with the same character of transaction; 46 with selling or dealing in beer and 26 with selling or keeping or exposing liquor for sale. Speaking broadly, they both deal with the offence of selling; neither of them deal with the offence of having liquor in possession in a prohibited place. In this case there is no suggestion that the beer in question was kept or exposed for sale; it was kept for the private use of the owner. In the case of *Rex* v. *Caskie* [(1922), 31 B.C. 368], which was a case of selling beer not of having in possession, this Court decided that the definition of liquor contained in section 2 of the Act was quite wide enough to include the liquid called beer or near-beer mentioned in section 46, but that as the penalty for selling liquor as defined in section 2 was MACDONALD, C.J.A.

COURT OF APPEAL

1923

May 3.

REX v. GOSLETT

severer than that which would be applicable under 46, and as the Legislature had specially dealt with the subject of selling beer by enacting section 46, it must have intended that the liquid mentioned in 46 should be excluded from the definition given in section 2, so far as is necessary for giving effect to section 46. If it were otherwise, section 46 would be wholly superfluous.

In such a situation the rules of construction of statutes provide a safe and sensible guide. If the sections cannot be entirely harmonized the duty of the Court is to give them a construction which will destroy neither, but will as far as possible give effect to both. Section 46 being the later section, there being nothing in the Act which shews that it is not the governing section so far as beer is concerned, ought to be given full effect to the extent to which it goes, namely, to the offence of selling beer, but it should not be extended beyond that; in other words, it can only be held to exclude beer from the operation of section 26 to which the definition of liquor is applicable so far as is necessary to give full effect to section 46.

MACDONALD, C.J.A.

The contention of the appellant is that the Court held in *Rex* v. *Caskie, supra,* that in no circumstances could beer be, for the purposes of the Act, considered as liquor. But this is, I think, a mistake. All that the Court held was that a sale of beer was not a sale of liquor within the definition of liquor in section 2, and this it held from necessity in order to give section 46 a meaning. But in this case there is no such necessity. The offence does not fall within the purview of either sections, but within section 43, and hence there is no necessity to cut down the ordinary meaning of the definition of liquor in section 2. In other words, that definition as the Act stood before 1922 includes beer in all cases except where there is a conflict between section 26 and section 46, arising out of the difference of penalty applicable under each.

The appeal should, therefore, be dismissed.

GALLIHER, J.A.

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

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: This appeal involves the determination as to whether the conviction was a proper one under section 43

of the Government Liquor Act (Cap. 30, B.C. Stats. 1921), the facts being that the defendant, a hotel-keeper, had upon the hotel premises, *i.e.*, "an inn," and not in a "private guest-room" 22 bottles of beer, admittedly his property and bought by him under permit at a Government liquor store. It must be conceded that the defendant properly acquired the beer, and having become possessed of it, what was he entitled to do with it? Surely he was entitled to take it to his home, his place of residence, and in this case that was the hotel, but it is said and it has been so held in the present case, that beer being liquor within the purview of the Government Liquor Act, could not be lawfully kept upon the hotel premises, although that was his home, and it would not appear to be possible for the hotel-keeper to justify his possession of liquor upon the hotel premises in "a private guest-room," as that means a room of a guest of the hotel; it could not be the room of the hotel-keeper. This impels one to the conclusion that the hotel-keeper cannot be deemed to be a "person" within the meaning of section 43 and, therefore, not affected by its provisions. It is only necessary to carefully read section 43 to be convinced that this is the correct view. There is nothing startling in the view that the Legislature intended to allow a hotel-keeper, living in his hotel, the same privilege that any other citizen has, that is, the right to have liquor in his home, provided it is liquor legally acquired, and it was legally acquired in the present case. However, it is not necessary, according to my view of the present case, to rely solely upon this point, as I consider that the decision of this Court in *Rex* v. *Caskie* [(1922), 31 B.C. 368] is determinative of the question. Section 46 still standing part of the Act, it is clear that beer and near-beer cannot be said to be covered by the word "liquor"; they stand outside the meaning given to "liquor" in the interpretation clause of the Act. Beer and near-beer are dealt with specially, and being dealt with specially, it can only be the special provisions which govern (*Wood* v. *Riley* (1867), L.R. 3 C.P. 26; *Pretty* v. *Solly* (1859), 26 Beav. 606 at p. 610; *Rex* v. *Caskie, supra,* MARTIN, J.A.). I would refer to what I said in *Rex* v. *Caskie* upon this point:

MCPHILLIPS, J.A.

"In this matter you have the dictionary giving the meaning and speci-

COURT OF APPEAL

1923

May 3.

REX v. GOSLETT

fically defining beer and portraying the intention of the Legislature, and it follows that which must be done is to give effect to the plain intention. Beer and near-beer are not within the term "liquor," but stand outside of and unaffected by the interpretation clause."

I cannot persuade myself that there has been any infraction of the Act upon the facts of the present case, nor does it seem at all reasonable that the Act could be read in such a way as to uphold the conviction—with every respect to all contrary opinion. Here we have the defendant lawfully purchasing from a Government liquor store, 22 bottles of beer, and taking it home, being the proprietor of an inn. He is convicted because he has in possession this same beer. Where could he have safely put it? The conviction would seem, in its terms, to imply that there would have been no infraction of the Act if the hotel-keeper had placed the beer in a private guest-room. This would have been a puerile answer for the hotel-keeper to make. How could he be deemed to be in possession of a guest-room in the hotel or a guest of the hotel? It is only necessary to state the proposition to shew its fallaciousness and the impossibility of it being said that section 43 applies to or can affect the hotel-keeper. In any case, it being only beer that the defendant was in possession of, section 43, in my opinion, has no application.

MCPHILLIPS, J.A.

When there is an enactment that strikes at conditions that have long obtained, it is not unreasonable to expect that the Legislature will use apt words to define that which will be deemed an infraction of the Act. The Court is not to legislate, therefore, unless the Court finds in unmistakable language that that which was previously lawful is now unlawful, no conviction can be supported. I would refer to Broom's Legal Maxims, 8th Ed., p. 127:

"The judges will bend and conform their legal reason to the words of the Act, and will rather construe them literally, than strain their meaning beyond the obvious intention of Parliament (T. Raym. 355, 356, *per* Lord Brougham, *Leith* v. *Irvine* [(1833)], 1 Myl. & K. 277 at p. 289)."

And at p. 436, we find this:

"'The principle' remarked Lord Abinger, 'adopted by Lord Tenterden (see *Proctor* v. *Mainwaring* [(1819)], 3 B. & Ald. 145), that a penal law ought to be construed strictly, is not only a sound one, but the only one consistent with our free institutions. The interpretation of statutes has always in modern times been highly favourable to the personal liberty of the subject, and I hope will always remain so.'"

COURT OF APPEAL

1923

May 3.

REX v. GOSLETT

(*In re Immigration Act and Mah Shin Shong* (1923), [*ante* p. 176]; 1 W.W.R. 1365).

In my opinion, the appeal should succeed, the question submitted in the case stated should, with great respect to the learned judge, have been answered in the negative, and it would follow, in my opinion, that the conviction be quashed.

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitors for appellant: *Moresby, O'Reilly & Lowe.*
Solicitor for respondent: *Alexis Martin.*

THE CORPORATION OF THE DISTRICT OF SAANICH AND THE ATTORNEY-GENERAL FOR THE PROVINCE OF BRITISH COLUMBIA v. McFADDEN.

MURPHY, J.

1922

Sept. 28.

COURT OF APPEAL

1923

March 6.

CORPORATION OF SAANICH v. McFADDEN

Highway—Obstruction erected by landowner—Expenditure of public money thereon—Establishment of highway—Dedication—Evidence—R.S.B.C. 1911, Cap. 99, Sec. 6—B.C. Stats. 1914, Cap. 52, Sec. 332.

Under section 332 of the Municipal Act a municipal corporation may bring an action for a mandatory injunction to compel a landowner to remove obstructions placed by him on a road within the municipality and to restrain him from interfering with or obstructing same.

Where it is proved that a road has been an existing travelled road on some portion of which public money was expended prior to 1905 it is a public highway by virtue of section 6 of the Highway Act.

One of the essentials of dedication is an actual intention on the part of the owner to dedicate and where an owner has signed documents and performed acts which are consistent with the belief on his part that the road in question was built under statutory powers, such documents and acts will not necessarily be taken to be evidence in support of an intention to dedicate.

Bailey v. *City of Victoria* (1920), 60 S.C.R. 38 followed.

Per MARTIN and MCPHILLIPS, JJ.A. (dissenting as to cross-appeal): That there was evidence of dedication of this portion of the road. It was constructed and maintained with public money for ten years without complaint and to the knowledge of the owners, and there was public user throughout that period.

MURPHY, J.

1922

Sept. 28.

COURT OF APPEAL

1923

March 6.

CORPORATION OF SAANICH v. MCFADDEN

Statement

APPEAL by defendant from the decision of MURPHY, J., in an action tried by him at Victoria on the 7th, 8th, 11th and 12th of September, 1922, for a mandatory injunction to compel the defendant to remove fences and stones erected and placed by him across Brookleigh Road or otherwise known as Elk Lake Cross Road running through section 57 of Lake District, Vancouver Island, and to restrain the defendant from obstructing free passage on said road. The road in question ran westerly from East Saanich Road to West Saanich Road or as otherwise known as Giles Road and the defendant was a part owner of lot 57 which was on both sides of the Victoria & Sidney Railway right of way. Originally the road after crossing the railway right of way going west turned northerly and then westerly to Giles Road but in 1889 the road was changed and turned south on the westerly side of the right of way for about 200 yards and then westerly to Giles Road and there was evidence of expenditure of public moneys on this road after 1889.

Harold B. Robertson, K.C., for plaintiffs.
F. C. Elliott, for defendant.

28th September, 1922.

MURPHY, J.: As to the objection that plaintiff Corporation has no *status* to bring this action, I hold this untenable, because of section 332 of the Municipal Act, Cap. 52, B.C. Stats. 1914. That section, I think, is fully as empowering as the legislation considered in *London County Council* v. *South Metropolitan Gas Company* (1904), 1 Ch. 76, where it was held the municipal corporation could maintain an action.

MURPHY, J.

As to the Attorney-General it is objected that as he was not made a party until after the *interim* injunction had been obeyed by defendant there is no cause of complaint by the general public. The answer is that defendant is in this action asserting a right which, if unfounded, does infringe the public's right of user of a public highway.

On the merits I hold plaintiffs are entitled to succeed with regard to that portion of the road in question herein which runs from point R. to the old railway crossing as shewn on Exhibit 7. I hold on the evidence that this was an existing

travelled road on some portion of which public money was expended prior to April 8th, 1905, and that, therefore, it is a public highway by virtue of section 6 of the Highway Act, R.S.B.C. 1911, Cap. 99. I do not agree with the theory of the defence as to the origin of this portion of road. I hold on the evidence that it was a continuation of the road running easterly from the West Saanich Road and not a trail from Mark's house to his bar. I hold also on the evidence that it ran northerly in its present position from the point R. on Exhibit 7 to the old railway crossing. The roads leading into the Victoria and Sidney track were, I hold on the evidence, branch roads from this main artery. It is not established by the evidence that public money was expended on this specific section of the road prior to April 8th, 1905, but it is established, in my opinion, that there was a travelled road from the old West Saanich Road to the East Saanich Road, of which this section was a part long prior to that date, and that public money was expended on various portions of such road, both on section 57 and further to the east. This, I hold, makes this section a public highway under section 6 of the Highway Act, *supra*. I find that bars were at times placed across the road of which this section formed part running from the old West Saanich Road to the East Saanich Road, both near the Chinese shacks and near the point R. on Exhibit 7, but that it is not proven by whom or for what purpose such bars were erected.

This fact of itself does not conclude the question of highway or no highway, even when section 6 of the Highway Act does not apply. *Johnston* v. *Boyle* (1851), 8 U.C.Q.B. 142; *Gordon* v. *Trotter* (1920), 19 O.W.N. 354.

In my opinion, however, section 6 of the Highway Act is on the evidence decisive in favour of the plaintiffs in this issue, as that section makes no provision for exempting roads that otherwise fall within its ambit because owners have erected bars which from time to time were actually set up across the roads.

As to the road along the south side of section 57, plaintiffs' case rests solely on dedication. In view of the decision in *Bailey* v. *City of Victoria* (1920), 60 S.C.R. 38, I hold dedication not proven. That case shews one of the essentials of

MURPHY, J.

1922

Sept. 28.

COURT OF APPEAL

1923

March 6.

CORPORATION OF SAANICH v. MCFADDEN

dedication is an actual intention on the part of the owner to dedicate. Such intention, in my view, is not brought home to defendant. I do not think Mould, his co-owner, could bind defendant, and if he could, I do not think, in view of the above decision, intention to dedicate is proven even as against Mould. His telling Pim to build along the section line and his signing a communication to the Council commending work done on the Brookleigh Road and requesting further expenditure and his building of a new fence are all acts compatible with a belief on his part that plaintiffs built this portion of road under their statutory powers. It is to be remembered that, according to their contention, they could have done so without compensation to the owners because of the road reservation in the Crown grant.

As against defendant the case for such dedication is weaker. True he wrote Exhibit 20, but that refers to the existing fact that the road has been built, stating he either gave the 20 feet or said land was expropriated. In this connection the power to take without compensation is not to be forgotten. Such a statement does not express an intention to dedicate. It would strongly support the existence of such intention, if there was any evidence on which to found an argument that defendant had such intention at the time the road was built, but I can find none on the record. True he had allowed uninterrupted use of the road for some ten years, but in that

MURPHY, J.

he was merely passive and his attitude is at least as referable to a belief that the road had been legally constructed under plaintiffs' statutory powers as to an intention on his part to dedicate.

The same remarks apply to his statements about taxes and about this portion being a public highway. Looking at his discovery evidence as a whole on this point, I think the true view is that it shews not an intention on his part to dedicate but a belief that this piece of road had been constructed by the Council under their legal powers. Had the necessity of consent on his part been ever actively present to his mind, he would have insisted, I think, on a removal of the grievance which he thought (erroneously as I find) he had in connection with the road on the east side of section 57, before assenting to dedication.

In the result, therefore, the plaintiffs succeed as to the road on the east side of section 57 and fail as to the road along the southern boundary. Plaintiffs will have the general costs of the action, and defendant the costs of the issue upon which he succeeded.

From this decision the defendant appealed and the plaintiffs cross-appealed. The appeal was argued at Victoria on the 22nd, 23rd and 24th of January, 1923, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

F. A. McDiarmid, for appellant: They are trying to establish a public highway but there is not sufficient evidence of public expenditure on the road. The Victoria & Sidney Railway was built in 1894 and it was after that that the road in question on reaching the west side of the railway was constructed southerly and the fact that bars were put across this portion shews there was no dedication and there were obstructions put up further on on this road. The bars were there when McFadden bought section 57. The action should be dismissed as a right of action only exists in the Attorney-General: see *Delta* v. *V.V. & E. Ry. & N. Co.* (1908), 14 B.C. 83 at p. 88; *Corporation of Oak Bay* v. *Gardner* (1914), 19 B.C. 391; *Weir* v. *Fermanagh Co. Council and Enniskillen R.D.C.* (1913), 1 I.R. 193; *Vestry of Bermondsey* v. *Brown* (1865), L.R. 1 Eq. 204. Under the Act public money must have been spent on the road prior to 1905. The cases of *Johnston* v. *Boyle* (1851), 8 U.C.Q.B. 141, and *Gordon* v. *Trotter* (1920), 19 O.W.N. 354 relied on below do not apply as the roads were already dedicated before the fences were put up. Here there was never dedication. There must be proper proof of compliance with the Act: see *Rex* v. *Sanderson* (1832), 3 U.C.Q.B. (o.s.) 103. There was no evidence of expenditure on the road within the Act: see *Regina* v. *Hall* (1866), 17 U.C.C.P. 282; *Regina* v. *Plunkett* (1862), 21 U.C.Q.B. 536; *Regina* v. *Great Western Railway Co.* (1872), 32 U.C.Q.B. 506; *Re Lawrence and the Township of Thurlow* (1873), 33 U.C.Q.B. 223; *Regina* v. *Rankin* (1858), 16 U.C.Q.B. 304; *Folkestone Corporation* v. *Brockman* (1914), 83 L.J., Q.B. 745; *Byrnes* v. *Bown* (1851), 8 U.C.Q.B. 181.

Argument

MURPHY, J.

1922

Sept. 28.

COURT OF APPEAL

1923

March 6.

CORPORATION OF SAANICH v. MCFADDEN

Argument

Harold B. Robertson, K.C., for respondents: The road in question was there in 1889, and there had been expenditure of public money upon it. There is no question but that it comes within the statute. On the question of dedication there was a wrong inference from admitted facts. The Court of Appeal can deal with this: see *McKay Bros.* v. *V.Y.T. Co.* (1902), 9 B.C. 37 at p. 44; *Owners of S.S. Draupner* v. *Owners of Cargo of S.S. Draupner* (1910), A.C. 450. There was acquiescence on the part of the owners: see *Hope* v. *Surrey and the V.V. & E. Ry. & N. Co.* (1914), 20 B.C. 434 at p. 435.

McDiarmid, in reply, referred to *Mann* v. *Brodie* (1885), 10 App. Cas. 378; *Bailey* v. *City of Victoria* (1920), 60 S.C.R. 38; *Rowland* v. *City of Edmonton* (1915), 50 S.C.R. 520 at p. 522; *City of Victoria* v. *MacKay* (1918), 56 S.C.R. 524.

Cur. adv. vult.

6th March, 1923.

MACDONALD, C.J.A.

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

MARTIN, J.A.

MARTIN, J.A.: During the argument we intimated that the appeal should be dismissed as to the cross-appeal. I am of the opinion that the uncontradicted evidence supports a dedication and therefore that appeal should be allowed.

GALLIHER, J.A.

GALLIHER, J.A.: I agree in the conclusions reached by the learned trial judge, and would dismiss the appeal and cross-appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: The learned trial judge, in my opinion, arrived at the right conclusion in holding that that part of Brookleigh Road in section 57, Lake District, running north from the southern boundary of section 57, Lake District, to the old railway crossing was a public highway, but, with great respect, I do not agree with the decision of the learned judge that that part of Brookleigh Road, which is on section 57, Lake District, running from the south-west corner of section 57, Lake District, to where it joins with that part of Brookleigh Road, found to be a public highway is not also a public high-

way. The evidence is voluminous, but certain cogent facts stand out which, in my opinion, establish beyond the question of a doubt that there was, firstly, consent upon the part of the then joint tenants of the land taken and used by the Corporation of the District of Saanich for this highway, the appellant being one of the joint tenants, there then being no partition of the lands. Secondly, if there can be any doubt about the express consent thereto by the joint tenants, of which the appellant was one, then there was dedication of the land upon the part of the joint tenants thereof, and acceptance and user thereof by the Corporation, with the expenditure of public money thereon. Coincident with the taking of the land and the user thereof the then joint tenants moved the fence enclosing their land back to the line fronting on the highway so established, and there has been the public use of the highway for over ten years, open and notorious user always known to the appellant throughout these many years. It is quite impossible, upon my view of the facts and the law, to now admit of the appellant contending to the contrary, in this connection, and the facts of the present case are infinitely stronger than those present in *Bailey* v. *City of Victoria* (1920), 60 S.C.R. 38. I would refer to what Mr. Justice Anglin said at pp. 58-9.

MCPHILLIPS, J.A.

In the present case, there was established the express consent of one of the joint tenants to the establishment of the highway, and, in my opinion, he had authority from the appellant, in the exercise of the general authority from the appellant with which he was clothed in his, the appellant's, absence, to consent on his behalf, and the appellant knew of the establishment of the highway, the changing of the fence line and the expenditure of public money and the user by the public of the highway, all of which facts found an estoppel against the appellant now contending to the contrary, especially in view of the lapse of time, a period of over ten years (*Simpson* v. *Attorney-General* (1904), A.C. 476 at pp. 477, 493, 494; *Mann* v. *Brodie* (1885), 10 App. Cas. 378; *Barraclough* v. *Johnson* (1838), 8 A. & E. 99).

The evidence fully establishing all these facts I have adverted to is to be found in the appeal book. The fence was put along

MURPHY, J.

1922

Sept. 28.

COURT OF APPEAL

1923

March 6.

CORPORATION OF SAANICH v. MCFADDEN

MCPHILLIPS, J.A.

the highway line in 1910, and the appellant knew that it was, and that the road was then established and public money spent on it and used by the public ever since. Without this road at this point, it would be impossible to get from the East Saanich Road to the West Saanich Road, the two main arteries of traffic in the Saanich Peninsula. The user of this road and its public maintenance is a matter of public notoriety all these years, and admittedly the appellant was cognizant of it, in truth, admits it in the clearest terms in his evidence.

In Meredith & Wilkinson's Canadian Municipal Manual, p. 577, we find this stated:

"Open and unobstructed user of a way by the public for a substantial time is evidence from which both dedication and acceptance may be inferred and where there has been established for a number of years a travelled track, with a fence on one side and a gutter on the other, passing over the lands of others, on which statute labour is performed under municipal supervision and which is otherwise used for municipal purposes, dedication and acceptance of it as a public highway is established."

(*Palmatier* v. *McKibbon* (1894), 21 A.R. 441; *Reaume* v. *City of Windsor* (1915), 7 O.W.N. 647, affirmed on appeal 8 O.W.N. 505; *O'Neil* v. *Harper* (1913), 28 O.L.R. 635).

There was a contention made that the appellant had raised no objection about that portion of the road held not to be a public highway by the learned trial judge because he was of the opinion that the Corporation had expropriated it, but he knew differently as early as the year 1912, and not until the year 1921 did he assert any right to close the road, when he undertook to fence this public road used by the public as a public highway from the year 1910. The following evidence of the appellant, when under cross-examination, has reference to this portion of the road. Where the name Mould appears, he was the owner with the appellant of the land in question, *i.e.*, they were joint tenants of the land, being the owners in fee thereof: [The learned judge set out the evidence and continued].

It is quite evident that the appellant, upon all the facts, must be held to be estopped from setting up any right to the possession of the land so long in use as a public highway. Then there is this significant fact that a petition went into the Corporation for the further expenditure of moneys, *i.e.*,

the gravelling of the highway in question, and that petition is signed by Mould as well as the appellant, Mould signing for the appellant.

It was a case of partnership in the land as between Mould and the appellant, and it was not until 1913 that a division or partition of the land was made between Mould and the appellant, and when that was done the road in question in its entirety was recognized by the appellant, and upon his discovery evidence the appellant made answer as follows: [The learned judge set out the evidence at length and continued].

There can be no question of complete knowledge being in the appellant of the fact of the existence of the public road, and he even expresses the desire that the road should be continued, and unquestionably Mould had assented throughout to the establishment of the road and as early as 1910 it was known to the appellant. Then we have the appellant further saying, in his discovery evidence:

"You admit that it is a public highway? Oh, yes."

There has been, in my opinion, effectually established, proof of dedication in fact of the highway along the southern boundary of section 57 (*Attorney-General* v. *Biphosphated Guano Company* (1879), 11 Ch. D. 327 at pp. 338-9; *Attorney-General* v. *Esher Linoleum Company, Limited* (1901), 2 Ch. 647 at pp. 650-51).

In the present action the Attorney-General for British Columbia is a plaintiff as well as the Corporation of the District of Saanich, and the Attorney-General is asserting the public right of user of the highway, and in this connection, I would refer to what Mr. Justice Sargant said in *Attorney-General* v. *Hemingway* (1916), 81 J.P. 112 at p. 115:

"I think the test is put by Maule, J., whether they had so acted as to induce a reasonable belief on the part of the public that the road in question was a highway, and that on the direction to the jury was deemed to be a proper direction when the matter came before the Divisional Court. I am referring to the case of *Grand Surrey Canal Company* v. *Hall* [(1840), 1 Man. & G. 392], *supra*. That case was referred to with approval and applied by Buckley, J., in the case of *Attorney-General* v. *Esher Linoleum Co. Ltd.*, *supra*. It does not really rest merely on the public having been allowed to come there, because there is Mr. Hitching's own evidence—the direct evidence that he did allow the public to come there without discrimination. He may have been misinformed

MURPHY, J.
1922
Sept. 28.
COURT OF APPEAL
1923
March 6.
CORPORATION OF SAANICH v. MCFADDEN

as to what the effect of that would be. He seems to have some sort of hazy notion that so long as the fee simple of the land remained in the company it was impossible that any public right of way should be acquired over it. I think that is really the view he had; but there is no question whatever that he did permit the public, and intended to permit the public, to use the road between those two *termini*. In those circumstances, it seems to be perfectly clear law that the public became thereby entitled to a right over the land along this path exceeding such right as might have been possessed by a limited class of persons to use the harbour for trading purposes."

The highway being established following upon all the facts and circumstances surrounding its establishment, the acts of Mould and the appellant, the owners of the fee in the land, being joint tenants thereof, the acceptance by the public of the dedication of the highway evidenced by the public user and the expenditure of public money thereon by the Corporation, the fee in the highway passed to the Crown, and upon this point I would refer to what Mr. Justice Duff said in the *Bailey* case at pp. 54-5:

"It may be that under the British Columbia statutes the results would be as suggested, namely, that the title to the fee would pass to the Crown instead of to the municipality, but the fact that this collateral and unexpected result would ensue would hardly be of sufficient importance to counterbalance the fact that it was the settled and unqualified determination of both parties to the transaction that the highway was to be established."

MCPHILLIPS, J.A.

In the present case it was established and it has been maintained and used in a public way with the expenditure of public money for more than ten years. Can it be effectively contended, in view of all these facts, coupled with the statutory effect, that the fee in the land in the highway became vested in the Crown, that nevertheless the appellant may fence off the highway as he has done and debar the public from the right of user thereof so long enjoyed? In my opinion, there can be but one answer to this, and that a negative one. In the British Columbia Highway Act (Cap. 99, R.S.B.C. 1911), sections 4 and 5 read as follow:

"4. All roads, other than private roads, shall be deemed common and public highways.

"5. Unless otherwise provided for, the soil and freehold of every public highway shall be vested in His Majesty, his heirs, and successors."

In my opinion the appellant is precluded upon all grounds from asserting any title or ownership in the land in question

now forming part of a public highway and for over ten years enjoyed by the public as such, with the expenditure of public money thereon, there being sufficient evidence of consent, dedication and acceptance, and as well there was acquiescence and laches. Here the appellant was fully cognizant of the fact of the establishment and public user of the highway. The appellant, in his statement of defence, sets up that the plaintiffs are trespassers upon the land in use as the highway and that the trespass first took place in 1910 and is still continuing, and the learned trial judge, as to a portion of the highway, has given effect to this defence in declaring that it is not a highway. It is stated in Smith's Equity, 5th Ed., p. 766, that,

"A plaintiff seeking the interference of the Court to restrain a trespass must be prompt in making his application. Relief will be refused if he has stood by and allowed another to spend money on his property upon the faith that no objection will be made (*Gordon* v. *The Cheltenham Railway Company* (1842), 5 Beav. 229; *Marker* v. *Marker* (1851), 9 Hare 16)."

It would certainly be most inequitable that the appellant should be now entitled to do that which in the *interim* of time he was by interlocutory injunction restrained from continuing, namely, the maintenance of a fence and stones across the Brookleigh Road and thereby preventing the user of the same as a public highway. The appellant is, in the language of Mr. Justice Anglin, in the *Bailey* case, at p. 58, "estopped by his conduct . . . . from denying the existence of the highway claimed."

Upon the whole, I am of the view that the appeal should be dismissed and the cross-appeal allowed, which would result in a declaration that Brookleigh Road throughout its whole course through section 57, Lake District, is a public highway, and that the appellant be perpetually enjoined from in any way interfering with or obstructing the said road, it being a public highway.

EBERTS, J.A. would dismiss the appeal and cross-appeal. EBERTS, J.A.

Appeal dismissed, and Cross-appeal dismissed, Martin and McPhillips, JJ.A. dissenting.

Solicitors for appellant: *Courtney & Elliott.*
Solicitors for respondents: *Robertson, Heisterman & Tait.*

HUNTER, C.J.B.C.

1923

March 28.

MONTGOMERY v. MCKENZIE

MONTGOMERY v. McKENZIE.

Indecent assault—Damages—Evidence—Burden of proof—Costs.

In an action for damages for indecent assault the burden of proof is on the plaintiff, and substantially the same degree of proof is required as in a criminal case because if the facts the plaintiff alleges did occur, a criminal offence was perpetrated. Where the evidence in such a case throws such an atmosphere of doubt about the facts, that it is impossible to come definitely to any one conclusion the action should be dismissed.

In the case of the dismissal of an action for indecent assault the defendant is not entitled to costs where the evidence shews he is a party to the moral degradation a woman must undergo in drinking whisky with him in a toilet.

Statement

ACTION for damages for indecent assault. The facts are set out in the reasons for judgment. Tried by HUNTER, C.J.B.C., at Vancouver, on the 19th, 20th and 28th of March, 1923.

J. A. MacInnes, and *Aubrey,* for plaintiff.
Long, for defendant.

Judgment

HUNTER, C.J.B.C.: Inasmuch as we have had an elaborate argument by both learned counsel who have canvassed this case backward and forward and have gone into the evidence in detail, I do not think any advantage would be gained by reserving judgment.

The action is of a very peculiar character. It is for an indecent assault alleged to have been perpetrated on the plaintiff by the defendant in his garage on the night in question. The writ was indorsed for $10,000, but counsel announced at the start of the trial that the object in bringing the action is not so much for money damage as to inflict punishment on the defendant for this indecent assault.

The plaintiff's story in short is, that she went to the defendant's garage by appointment with her friend, Mrs. Toye; that she visited the place about half past nine or ten o'clock p.m.; that after some conversation in the office about cars, somebody suggested a drink. I do not think it appears in her evidence anywhere that she says

definitely who it was, but anyway, somebody suggested a drink. In pursuance of that suggestion they turned off the light in the office, went through the show-room into a rear hallway, the defendant suggesting that it would not be well to have drinking going on in the front of the premises. According to the evidence of one witness there was a drink taken in the hallway by the plaintiff, but, according to other evidence there was no drinking done until they got into the toilet; that after drinking in the toilet, they went into the show-room, and at the invitation of the defendant she was asked to enter a car and sit down, and they had some talk about the car, and that after that they went into a larger car, known as a Chalmers car, which was then in the front of the building, near one of the show-windows; that according to her story, given at the trial, the car had the curtains down and that she was followed into the car by the defendant, and after some talk he got out and turned off the room lights and re-entered the car, and then, according to her, made improper advances to her and technically speaking, at all events, assaulted her person. She then says that after this took place she at once got out of the car and in getting out met her friend, Mrs. Toye, to whom she made complaint that she had had a dreadful time and asked her not to leave her.

Judgment

The defendant's account in brief is that he admits the drinking episode, but absolutely denies there was any assault, and suggests, in fact, even claims it is a case of blackmail. The *factum probandum* in dispute is the indecent assault and as the parties themselves are the only eye witnesses to what happened, and as they contradict each other on material points, it is necessary to weigh the possibilities as disclosed by the collateral evidence, and I might say one would not expect the full facts in regard to an alleged occurrence of this kind would be disclosed for the simple reason that none of the parties implicated in the affair can emerge without their reputation, to some extent, being damaged. In fact, I might say, after having read over the evidence and hearing the elaborate arguments, that it is a welter of contradictions and inconsistencies. To begin with, the plaintiff says that after entering the place

HUNTER, C.J.B.C.

1923

March 28.

MONTGOMERY v. MCKENZIE

at the rear she did not know it was a toilet. I have had the advantage or otherwise, depending upon the view one might have of such matters, of having seen the place, and I think it is impossible for anyone to enter that place without realizing at once its character by the use of his eyes and the use of his nose. Unquestionably they went there to avoid being seen, as has been stated, the defendant naturally thinking it would be unwise to have this kind of thing going on in the front of his garage, and then of course it may have occurred to someone that the Seattle visitor should feel at home when he was imbibing the liquor. The plaintiff says she did not take a drink in this place and that I find it difficult to accept. In the first place, according to her, they were there ten or fifteen minutes and the conditions were such I think it is beyond the bounds of reason to accept the suggestion that four people could be jammed together in this place with a bottle of whisky without drinking. I cannot imagine that four persons would stay in that water-closet unless they were drinking and intending to drink and not simply engaged in some desultory conversation. If there was to be no drinking done, I should think the conversation would take place somewhere else. Now, Mrs. Montgomery says she does not remember what they talked about in this place, but they were there ten or fifteen minutes talking. With regard to the occurrence itself in the car, she says it took place in the car which was in the show-window after the lights were turned out, but the trouble with that statement is, that her only corroborative witness, Mrs. Toye, says she was at the time sitting in another car with Mr. McRae, although she is contradicted as to that by Mrs. Montgomery, who says that they were in the office; immediately when the lights were put out she got out of the car in which she was, and she then met Mrs. Montgomery who had emerged from the car in which she was. If that evidence is true, Mrs. Montgomery's story must be absolutely untrue, because it is a physical impossibility that any assault could have taken place if Mrs. Toye's evidence is correct. Mrs. Montgomery says in her discovery the curtains of the car were up. She says too, the car had a permanent top. I am not disposed to lay any stress on the latter statement, but

Judgment

it is a matter for comment when she says in her discovery the curtains were up, whereas, at the trial she says the curtains were down. Over and above all that, it seems to me, unless a man had taken leave of his senses altogether, that he would choose some other place, especially as there were cars in the back of the show-room, in order to make an advance, or an attack of this kind on the plaintiff. I will assume now for the moment there was some substratum of truth in Mrs. Montgomery's story. If there were a substratum of truth in her story and there had been some improper proposal or advance made to her, or if there had been an assault, it is material to ask what would a normal woman have done under the circumstances? In the first place, one would expect a normal woman would resent the suggestion that she should drink whisky out of a bottle in the toilet, but, passing that, what would she have done after an alleged attack of this sort, assuming she did not go to the length of complaining to the police? I do not think, if she were a woman in a normal condition of mind that she would drive for a considerable period of time immediately after alone with the same man in a car around town on a foggy night. I should have thought, under circumstances of this sort, she would at once have cut loose her acquaintance with him; that she would have said, "Take me, in company with the rest of these people, to my home at once," or have gone out of the garage asking the other woman to go with her, and if she did not do that, to have gone alone and immediately taken a street-car home, but instead of that, we find that she drove around for a considerable period of time in a car with this man alone, and then afterwards, in company with the others, drove home, and at the conclusion of the adventure, she says, apparently in a friendly way, "You will be sure to phone Allie in the morning." That, to my mind, is significant. I should think a woman placed in the position she said she was, if she said anything at all, would have said, "I would like you to phone Mrs. Toye in the morning." She would never use her friend's first name under those circumstances, especially as that was the first occasion on which she was left alone with him. More than that, I would have expected, feeling herself insulted,

Judgment

HUNTER, C.J.B.C.

1923

March 28.

MONTGOMERY v. MCKENZIE

it is true, but there having been no actual physical injury that a woman in her position, out of consideration and regard for her young and unmarried daughters, would have said to herself, "It is true that I have been insulted by this man, but it is one of those disagreeable experiences every woman is liable to encounter when she gets alone with a man of lewd intentions. I will say nothing about it." Of course there is no doubt that there are several inconsistencies in the evidence given by the defendant. He is the only one who says the drinking incident took place after the alleged indecent assault in the car. He also says there were three or four rounds of drinks, which, to my mind, is impossible, because he said in answer to a question by myself, indicating with his hands, there were only about four inches of liquid in the bottle, whereas the common fraudulent quart bottle is generally suspected of containing only about 13 drinks, and it would be impossible for there to have been three or four rounds of ordinary sized drinks among four persons out of what he said was in the bottle.

The net result of the matter is, that it is impossible to say what the real facts were in this case. There are a number of different conclusions one could come to; one could come to the conclusion that there was an assault on the plaintiff, as she suggests, without her consent, and without any provocation or excuse. Another conclusion would be, that there was an advance or an interference with her person, but that she had laid herself open to some action of the kind by her previous conduct, in fact, that there was a sort of contributory negligence, if one could apply the expression to the circumstances. Another conclusion would be there had been a suggestion or approach of the kind which we have been considering, but that it was magnified by the plaintiff who was then suffering from a morbid imagination or was under a temporary hallucination. She admitted that she had been suffering from some nervous trouble for some period of time, and had been undergoing treatment for the same. Another conclusion one might come to is that it was a case of pique or chagrin, that the plaintiff expected different treatment; that she expected wine (the lady says she drinks wine but not whisky) and the usual midnight

Judgment

cheer, and a substantial contribution to her purse, but she was put off with a couple of swigs of whisky out of a bottle in a water-closet and a jaunt in the car and that did not seem to be the treatment which ought to be accorded to a lady of her station, and of course the final suggestion is the claim made by the defendant that it is a pure case of blackmail. In connection with that there seems to have been an interview by the plaintiff with a chiropractor, and it also appears she is indebted to him to a considerable amount, and it might be that he had, by mental suggestion, got the plaintiff to actually believe that the car incident had taken place. And so, while she might not have intended to blackmail him, but had worked herself up to the belief that she had been assaulted, yet that is the way it might appear to him.

The result is, that there has been such an atmosphere of doubt thrown about the facts in this case, that it is impossible for anyone to come definitely to any one conclusion, but the fact remains that the burden of proof is on the plaintiff. In a case of this kind, almost the same degree of proof, if not quite the same degree, is required, that is required in a criminal case, because if the facts she alleges did occur, then a criminal offence was perpetrated. I therefore come to the conclusion that the burden of proof has not been sustained by the plaintiff, and the action must be dismissed.

Judgment

With regard to the costs. If I thought that any person could imagine that this Court, as the result of this case, could be used for the purpose of blackmail, I would then allow the costs to follow the event, but I am not persuaded that any question of public policy of that kind is in issue here. On the other hand, I think the Court ought to mark its disapproval of the conduct of the defendant. I do not think the Court ought to allow costs to any man who is a party to the moral degradation that any woman must undergo by drinking whisky in a toilet. There will therefore be no costs.

Action dismissed without costs.

LAMPMAN, CO. J.

1923

April 6.

REX v. LOUIE FONG

REX v. LOUIE FONG *ET AL.*

Criminal law—Gaming-house—Shop—Games carried on in room behind—Presumption—Criminal Code, Secs. 226, 228, 641 and 986.

Where the keeper of a shop permits persons to play at games of chance or mixed games of chance and skill in a room behind his shop, although no proof of gain is submitted, it will be presumed that he allows games to be played in the hope of "gain" in his business and his premises is a "common gaming-house."

Statement

APPEAL by the accused from a conviction by the police magistrate at Victoria on a charge of keeping a common gaming-house. The facts are sufficiently set out in the judgment. Argued before LAMPMAN, Co. J. at Victoria on the 20th of March, 1923.

Aikman, for the accused.
C. L. Harrison, for the Crown.

6th April, 1923.

Judgment

LAMPMAN, Co. J.: This is an appeal from a conviction of the accused by the police magistrate for the City of Victoria, on a charge of being found in a common gaming-house.

On the 6th of January last between 11 and 12 o'clock at night, the chief of police, with assistants, raided the premises, No. 564 Fisgard Street, in the City of Victoria, and in a room he found 19 men. In the front there is a shop used as a butcher and tobacco shop, and farther in behind this was the room in which the men were found. Off this room was the bedroom of one Lay, who was convicted as being the keeper of the place. At the time of the raid a game called "tin-gow," a mixed game of chance and skill, was being played by some of the men and in the place there were found three boxes of dominoes, two dice, some lottery tickets and some odd bits of money amounting in all to $5, the money being on the table or picked up from the floor after it had been brushed or knocked from the table in the process of seizing it by the police. The question for decision is, whether or not the place was a gaming-house, and the real point for decision is whether or not the Chinaman Lay kept the place for gain.

There is no evidence to indicate that Lay received any part of the proceeds from the betting. The circumstances under which the playing was going on shew that Lay is the manager of a Chinese company which carries on the business and that after the business is closed for the day Lay allows his friends and customers to come to the premises and play games for money amongst themselves. Mr. *Harrison* for the Crown, contends that Lay allowed this to go on for some gain which resulted to himself. On the night in question, Lay had gone to bed and had left a friend in the front of the premises where the groceries, meat and tobacco are kept to keep an eye on the place, and after the players had left, this friend was to wake Lay up, who would lock the outside door.

In a case which I tried some months ago, I held that a Chinaman who allowed his refreshment-room to be used as a gambling-room, kept the place for gain, as the evidence shewed that the players and lookers-on bought tobacco and refreshments from the keeper of the place while they were in the place, although the keeper got no portion of the money which was bet during the game.

Judgment

The case which I have now to consider is not such a strong case against the accused, but I am forced to the conclusion that Lay would not have allowed these men to stay in the room which they were using for the purpose of gambling, unless he expected some gain to result from it. The language of Mr. Justice Osler in *Rex* v. *James* (1903), 7 Can. Cr. Cas. 196, is applicable to this case, as I do not think Lay would have allowed himself to be bothered with such a crowd (19 men) around his premises until late at night unless there was some expectation of benefit to him. He says these men were his friends and customers of the shop; he probably thought that by allowing them to come and remain he would be inducing them to remain as his customers. This decision goes further probably than any of the reported decisions which were quoted to me, but still I think that the facts shew that the place was kept for gain. It follows that the appeal must be dismissed. The costs are fixed at $35 and disbursements.

Appeal dismissed.

MURPHY, J.

WILSON v. WELCH.

1923

May 14.

Practice—Appeal—Security for costs—Demand—Application—Costs of.

On an appeal being taken, a demand for security for the costs of the appeal should first be made. If this is not complied with, and an application in Chambers is necessary, the costs of the application should be to the applicant in any event.

WILSON v. WELCH

Statement

APPLICATION for security for costs of the appeal. Heard by MURPHY, J. at Chambers in Vancouver on the 9th of May, 1923.

R. M. Macdonald, for the application.
Hossie, contra.

14th May, 1923.

Judgment

MURPHY, J.: Application for security for costs of appeal. A demand had been made for such security and was not complied with and a summons was then taken out. It was admitted the order must go but it was argued costs of the application should be costs in the appeal. In my opinion, the demand when made should have been complied with. It is pointed out that the statute requires the amount to be fixed by a judge and that therefore an order is necessary. In *Rogers* v. *Reed* (1900), 7 B.C. 79, a scale of such costs was laid down. I think the proper practice should be that previous to any application to the Court a demand for security should be made and should be complied with by furnishing security according to the scale in *Rogers* v. *Reed, supra.* If this is not done and an application has in consequence to be made, costs of such application should, unless there be some reason to the contrary, be costs to applicant in any event. In exceptional cases, as pointed out in *Rogers* v. *Reed, supra,* the scale there laid down may require variation, and in such cases an application to the Court may be necessary to determine the amount, in which event the question of costs would be dealt with on such application. Any other practice seems to me to put litigants to expense without object, since the order must be made and since the amount thereof has been the subject of judicial decision. In the case at bar costs will be to applicant in any event.

Order accordingly.

REX *EX REL.* REILLY v. SMITH.

COURT OF APPEAL

1923

May 3.

REX v. SMITH

Criminal law—Intoxicating liquors—Beer—Conviction for sale of under section 46 of Act—Penalty under section 7 of 1922 amendment—Application—B.C. Stats. 1921, Cap. 30, Sec. 46; 1922, Cap. 45, Sec. 7.

The sale of "liquor" is prohibited by section 26 of the Government Liquor Act (except as therein provided) and the definition of "liquor" in section 2 thereof is such as would ordinarily include "beer." Section 46, however, prohibits (except by a Government vendor) the sale of "any liquid known or described as beer or near-beer or by any name whatever commonly used to describe malt or brewed liquor." Section 62 imposes a penalty for the violation of section 26 and section 63 imposes a less severe penalty for "an offence against this Act for which no penalty has been specifically provided." In *Rex* v. *Caskie* (1922), 31 B.C. 368 (decided before the 1922 amendment to section 46) it was *held* that when the charge is for selling beer the offence must be treated as one under section 46 and the penalty imposed should be under section 63 and not under section 62. By section 7 of the 1922 amendment to the Government Liquor Act, section 46 aforesaid was amended by adding a subsection imposing a further penalty: "Where any person is convicted of an offence against this Act in respect of any violation of this section arising out of the selling . . . . any liquid which is liquor within the meaning of this Act":—

Held, MARTIN and MCPHILLIPS, JJ.A. dissenting, that notwithstanding that the said amendment to section 46 was not happily worded, the new penalty provided thereby was effectively made applicable to the sale of beer or near-beer in violation of section 46.

Rex v. *Caskie* (1922), 31 B.C. 368 discussed.

APPEAL by accused from the decision of MORRISON, J. of the 27th of February, 1923 (reported *ante,* p. 172), affirming the conviction of the police magistrate at Vancouver on appeal from him by way of case stated, the conviction being for unlawfully selling "a liquid known as beer" contrary to section 46 of the Government Liquor Act, B.C. Stats. 1921, and section 7 of the amending Act of 1922. The sentence imposed was imprisonment with hard labour for one month. The facts are set out fully in the judgment of MORRISON, J., *supra.*

Statement

The appeal was argued at Vancouver on the 11th of April, 1923, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

COURT OF APPEAL

1923

May 3.

REX v. SMITH

J. W. DeB. Farris, K.C., for appellant: The question is whether the 1922 amendment gives the magistrate power to impose a gaol sentence. On the interpretation of the Act see *Jay* v. *Johnstone* (1892), 62 L.J., Q.B. 128 at p. 130; *North British Railway* v. *Budhill Coal and Sandstone Co.* (1909), 79 L.J., P.C. 31 at p. 34. In the case of *Rex* v. *Caskie* (1922), 31 B.C. 368, it was held beer was not "liquor" so that section 7 of the 1922 amendment should not apply to this case.

Argument

W. M. McKay, for the Crown: It was held in *Rex* v. *Caskie* (1922), 31 B.C. 368 that the penalty clause for an infraction of section 46 was section 63. This amendment was passed to make the penalty more severe and it directly applies to an offence under section 46.

Farris, in reply: If section 62 does not apply to beer for the same reason the amending section cannot apply to beer.

Cur. adv. vult.

3rd May, 1923.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: This is a case stated by way of appeal from the conviction of the accused for selling beer contrary to the provisions of section 46 of the Government Liquor Act and amending Act. The amendment is contained in the statutes of 1922, Cap. 45, section 7, and appears to have been made to add a new penalty to the Act following the decision of this Court in *Rex* v. *Caskie* [(1922), 31 B.C. 368]. The Court held in that case that the selling of beer was not the selling of liquor within section 26 of the main Act. By section 26 it was made an offence to sell liquor, but not satisfied with this the Legislature added a subsequent section, namely, section 46, by which it was made an offence to sell any liquid known or described as "beer or near-beer or by any name whatever commonly used to describe malt or brewed liquor." Section 62 of the Act provides a severe penalty by imprisonment for the contravention of section 26 and its sister section 27. All other offences under the Act were penalized under section 63 by fines for a first offence and the Court held in the above case that the less severe penalty applied to the offence created by section 46. By the amendment of 1922 above referred to, a new penalty is provided and made

applicable to offences against section 46. The language in which the amendment is couched is not very happy. The difficulty arises out of the use of the words "selling or dealing in any liquid which is liquor within the meaning of this Act, it being contended by appellant's counsel that the Court had declared in *Rex* v. *Caskie* that the liquid mentioned in section 46 was not liquor within the meaning of the Act.

As I pointed out in *Rex* v. *Goslett* [*ante,* p. 216], a judgment to be pronounced contemporaneously with the judgment in this case, that is not the meaning of the judgment in *Rex* v. *Caskie.* The object of the Legislature in passing said section 7 is not open to a moment's doubt, and therefore the Court should hesitate to put a construction on it which will defeat that object and render the amendment itself wholly nugatory. What the Legislature manifestly intended was to impose a new penalty for the selling or dealing in the liquid mentioned in said section 46; the context clearly indicates this, and therefore, I think the appeal should be dismissed.

MACDONALD, C.J.A.

MARTIN, J.A.: This is an appeal by way of a case stated, from a conviction of the police magistrate of Vancouver for unlawfully selling "a liquid known as beer" contrary to section 46 of the Government Liquor Act of 1921, Cap. 30, the conviction being affirmed by Mr. Justice MORRISON. The appellant was sentenced to imprisonment with hard labour for one month in ostensible pursuance of subsection (2) of section 7 of the amending Act of 1922, Cap. 45.

In *Rex* v. *Caskie* [(1922), 31 B.C. 368], we, on the 28th of June last, decided that convictions under said original section 46 were subject only to the penalty of a fine pursuant to section 63, and that the other penalties imposed by section 62 were directed to infractions of sections 26 and 27. In effect the decision was that "the liquid known or described as beer" under section 47 was excluded from the definition of "liquor" as defined by the interpretation section 2 of the Act; that is the *ratio decidendi* of the whole judgment. And when the Legislature later (on 16th December last) made the said amendment to section 47, it must be presumed that it had in mind and

MARTIN, J.A.

COURT OF APPEAL

1923

May 3.

REX v. SMITH

intended to act upon the interpretation this Court had put upon that section. See *Jardine* v. *Bullen* (1898), 7 B.C. 471, and the cases cited in my judgment which was affirmed by the Full Court, to which I shall only add the case of *North British Railway* v. *Budhill Coal and Sandstone Co.* (1909), 79 L.J., P.C. 31, cited to us. It is to be observed that the British Columbia Interpretation Act, Cap. 1, R.S.B.C. 1911, has no section which corresponds to subsection (4) of section 21 in the Interpretation Act, Cap. 1, R.S.C. 1906, which negatives that presumption in Federal Acts.

Bearing this in mind the said amendment added to said section 46 by way of a new subsection (2) is as follows:

"No person other than a Government vendor shall sell or deal in any liquid known or described as beer or near-beer or by any name whatever commonly used to describe malt or brewed liquor."

When carefully considered this amendment does not, in my opinion, owing to the loose manner in which it is expressed,

MARTIN, J.A.

advance the matter because it does not do more than purport to cover the case of "any violation of this section arising out of the selling or dealing in any liquid which is liquor within the meaning of this Act," apparently oblivious of the fact that this Court has declared that "liquor," as defined by the Act, is an article which is wholly excluded from the purview of "this section," which we have held is a special one dealing with a special subject-matter, *i.e.*, "the liquid known or described as beer or near-beer," etc.

I have carefully considered the reasons given by the learned judge and the learned magistrate below, but if I may say so with all respect, the point seems to have escaped them that we held it is not "any violation of this section" (46) to sell that which "is liquor," *i.e.*, "liquor" as defined by the Act, because that special section does not apply to that subject-matter.

The questions reserved, should, in my opinion, be answered in the negative, and the appeal allowed.

GALLIHER, J.A.

GALLIHER, J.A.: I am of the opinion that the amendment of 1922, Cap. 45, section 7, covers this case. The decision of the Court in *Rex* v. *Caskie* [(1922), 31 B.C. 368] is strongly

urged against this view, but the question now is: Does the amendment to the law as it then stood differentiate that case? As the law stood when *Rex* v. *Caskie* was decided, section 46 read as follows:

"No person other than a Government vendor shall sell or deal in any liquid known or described as beer or near-beer or by any name whatever commonly used to describe malt or brewed liquor."

This was a particular section levelled against the sale of beer or near-beer. Section 26 of the Act, on the other hand, was levelled at the sale of "liquor" generally and the interpretation clause defined the word "liquor" as:

"'Liquor' includes all fermented, spirituous, and malt liquors, and all combinations thereof, and all liquids which are intoxicating, and any liquid which contains more than one per centum of alcohol by weight shall be conclusively deemed to be intoxicating."

By that definition beer or near-beer of a certain alcoholic strength came within the definition, yet we held, and I think rightly, in the *Caskie* case, that as we had the general section 26 and the particular section 46, that for the purpose of applying the penalty where a conviction was had under 46, which is dealt with as a separate section and for a particular named offence, *viz.*, sale of beer or near-beer, the penalty should not be under the general section applicable to 26, *viz.*, 62, but rather the lesser penalty under 63. It was to meet this situation that the amendment of 1922 was made. That amendment reads as follows:

GALLIHER, J.A.

"Where any person is convicted of an offence against this Act in respect of any violation of this section arising out of the selling or dealing in any liquid which is liquor within the meaning of this Act, the person so convicted shall be liable for a first offence to imprisonment, with hard labour, for not less than one month nor more than three months, and for a second or subsequent offence to imprisonment, with hard labour, for not less than three months nor more than twelve months. If the offender so convicted is a corporation it shall for each offence be liable to a penalty of not less than one thousand dollars."

It is contended that the amendment does not affect the object aimed at, and stress is laid upon the words "dealing in any liquid which is liquor within the meaning of this Act." I must admit the words are not happily chosen and an amendment could have been so worded as to leave no doubt, but where we find that the amendment itself provides a penalty for the

COURT OF APPEAL

1923

May 3.

REX v. SMITH

particular offence named in 46 the words "liquid which is liquor within the meaning of this Act" have, I think reference to a liquid containing more than one per centum of alcohol by weight.

I think the intention of the Legislature is clear and I think the construction I have given to the words is a reasonable and not a strained construction.

GALLIHER, J.A.

If I am right in this view, then I am not in conflict with *Rex* v. *Caskie, supra.* I would dismiss the appeal.

McPHILLIPS, J.A.: This appeal really brings up for consideration the same point that has been passed upon in *Rex* v. *Caskie* [(1922), 31 B.C. 368], and in my opinion is determined in favour of the appellant by that case, notwithstanding the amendment of 1922 adding a subsection (subsection (2), Cap. 45, 1922) to section 46 of the principal Act (Government Liquor Act, Cap. 30, 1921). The subsection does not refer at all to the subject-matter dealt with in section 46, as contained in the principal Act and which still stands, but is a substantive provision providing the penalty for "selling or dealing in any liquid which is liquor within the meaning of the Government Liquor Act."

MCPHILLIPS, J.A.

Now, beer and near-beer, are not in my opinion, with all respect to contrary opinion, within the meaning of liquor as set forth in the Government Liquor Act, and as I interpret the judgment of this Court in *Rex* v. *Caskie* it was so held, the amendment has not swept into the meaning of liquor, beer or near-beer. It was a simple matter for the Legislature to have used apt words to effectuate this had that been the intention of the Legislature, but it has not been done and the Court can only look at the language used and give it its plain meaning taking the whole Act into consideration. Section 46 standing as it still does as originally enacted and being previous to the added subsection judicially considered by this Court and held to have the effect of excepting beer and near-beer from the meaning of the term liquor the subsection which is substantive in its nature cannot be held to be inclusive of beer or near-beer, *i.e.,*

being specially named beer and near-beer are placed in a special category and excepted from the meaning given to the term liquor in the Act.

To hold this does not necessarily mean that subsection (2) is in its terms wholly inoperative, as there may be liquors other than beer or near-beer which will come within the meaning of the words used in subsection (2), *i.e.*, "selling or dealing in any liquid which is liquor within the meaning of this Act." The words "violation of this section" (subsection (2), Cap. 45, 1922) can have relation to the last disjunctive words of section 46 (Cap. 30, 1921), "any liquid known or described . . . . by any name whatever commonly used to describe malt or brewed liquor." If it had been the intention of the Legislature to impose the penalty for a first offence of imprisonment with hard labour for not less than one month in the case of selling or dealing in beer or near-beer, it was a simple matter to use apt words and so provide, but I fail to find those apt words, and where the liberty of the subject is at stake (as in this case, the case stated of the learned police magistrate, reads: "I convicted the accused and I imposed for her said offence a sentence of imprisonment with hard labour for one month in the common gaol"), it is incumbent upon the Court to be satisfied beyond peradventure that the enactment supports the conviction imposed. In my opinion it does not.

MCPHILLIPS, J.A.

The amendment relied upon is wholly ineffective in my opinion, as previous thereto, by the decision in *Rex* v. *Caskie,* beer and near-beer were judicially interpreted to not be within the meaning of the term "liquor," therefore it is reasonable to assume that the Legislature intended to still leave beer and near-beer outside the meaning of "liquor." In any case, all that the Court can look at and weigh is the language used and give to it the ordinary and plain meaning to be attached thereto. That ordinary and plain meaning rebuts the effect given to the language in the Courts below. In this connection I would refer to what Lord Coleridge, C.J. said in *Jay* v. *Johnstone* (1892), 62 L.J., Q.B. 128 at p. 130:

"Now, it is a well-known principle of construction, sanctioned by the Court of Appeal, if sanction were necessary, in the case of *Greaves* v. *Tofield* [(1880)], 50 L.J., Ch. 118; 14 Ch. D. 563, that, where an Act

COURT OF APPEAL

1923

May 3.

REX v. SMITH

of Parliament uses the same term which was used in a former Act of Parliament referring to the same subject, and passed with the same purpose, and for the same object, and that term has had a judicial interpretation put upon it, then we must assume that the Legislature uses that term in the sense which has been affixed to it by judicial interpretation."

I would also refer to what the Lord Chancellor (Lord Loreburn) said in *North British Railway* v. *Budhill Coal and Sandstone Co.* (1909), 79 L.J., P.C. 31 at p. 34.

Here with the judgment of this Court before it in *Rex* v. *Caskie* can there be any doubt but what the Legislature well knew that beer and near-beer were excluded and not within the meaning of "liquor" as defined in the Government Liquor Act? The answer is imperative that the legislation must be looked at as being enacted with that knowledge and the language not being intractable, in truth failing to cover "beer" the punishment imposed of imprisonment, cannot stand. I would refer to what is stated in Broom's Legal Maxims, 8th Ed., p. 127:

MCPHILLIPS, J.A.

"The judges will bend and conform their legal reason to the words of the Act, and will rather construe them literally, than strain their meaning beyond the obvious intention of Parliament. (T.Raym. 355, 356; *per* Lord Brougham, *Leith* v. *Irvine* [(1833)], 1 Myl. & K. [277 at p.] 289)."

And at p. 436 we find this:

"'The principle,' remarked Lord Abinger, 'adopted by Lord Tenterden (see *Proctor* v. *Mainwaring* [(1819)], 3 B. & Ald. 145), that a penal law ought to be construed strictly, is not only a sound one, but the only one consistent with our free institutions. The interpretation of statutes has always in modern times been highly favourable to the personal liberty of the subject, and I hope will always remain so. (*Henderson* v. *Sherborn* [(1837)], 2 M. & W. 236; judgm., *Fletcher* v. *Calthrop* [(1845)], 6 Q.B. [880 at p.] 887, cited and adopted, *Murray* v. *Reginam* [(1845)], 7 Q.B. [700 at p.] 707)."

In my opinion the case stated from the learned police magistrate should have been answered as to both questions, in the negative. It follows that, in my opinion, the appeal should succeed.

EBERTS, J.A.

EBERTS, J.A. would dismiss the appeal.

Appeal dismissed,
Martin and McPhillips, JJ.A. dissenting.

Solicitor for appellant: *W. F. Brougham.*
Solicitor for respondent: *W. M. McKay.*

IN RE STILLWATER LUMBER & SHINGLE COMPANY LIMITED v. CANADA LUMBER & TIMBER COMPANY LIMITED *ET AL.*

MURPHY, J.

1923

May 5.

IN RE STILLWATER LUMBER & SHINGLE CO. v. CANADA LUMBER & SHINGLE CO.

Bankruptcy—Proceeding against debtor of bankrupt—Sale of assets—Division of proceeds amongst shareholders while obligation under a contract pending—Judgment for breach—Application to set aside transaction and for refund of moneys divided.

If a Company sells its assets and divides the proceeds amongst its shareholders at a time when it is bound to carry out a contract and such division avoided the satisfaction of a judgment subsequently obtained for breach of the contract, the transaction is an illegal one and will be set aside and the shareholders must refund the money so obtained.

PROCEEDING in bankruptcy by the trustee of the Stillwater Lumber & Shingle Company (in bankruptcy) to set aside a transaction whereby the assets of the Canada Lumber & Timber Company were sold and the proceeds divided amongst the shareholders and for a refund of the moneys so received by certain shareholders of said Company. At the time of the sale of its assets the Canada Lumber & Timber Company was under obligation to carry out a certain contract with the Stillwater Lumber and Shingle Company and said Company subsequently obtained judgment owing to the breach thereof. Heard by MURPHY, J. at Vancouver on the 1st of May, 1923. Statement

Mayers, and *Gillespie,* for the trustee.
Cantelon, for defendants.

5th May, 1923.

MURPHY, J.: In my opinion, the question of jurisdiction of this Court was passed upon by the Court of Appeal in *Stillwater Lumber & Shingle Co.* v. *Canada Lumber & Timber Co.* (1923), [*ante,* p. 81]; 1 W.W.R. 1332. The issues herein against the defendant Company are identical with the issues raised in the Supreme Court in that case. The additional issues in these proceedings against the two other defendants are Judgment

MURPHY, J.

1923

May 5.

IN RE STILLWATER LUMBER & SHINGLE CO. v. CANADA LUMBER & SHINGLE CO.

identical in character and are in fact part and parcel of the same transaction.

It is argued that the fact that the occurrences giving rise to this litigation took place prior to the coming into force of the Bankruptcy Act was not before the Court of Appeal. This, however, is, I think, an error. That such was the case was apparent on the face of the proceedings. Further express reference to this point is made by MARTIN, J.A. in his judgment in the case cited.

The large number of cases reported in the Canadian Bankruptcy Reports, shewing the Bankruptcy Courts have jurisdiction to deal with, *inter alia,* Provincial statutes, answers the other objection taken to jurisdiction even if recourse to such statutes has to be had to decide the case at bar.

On the merits, I can see no defence to the claim made herein. In view of the uncontrovertible facts, it is idle to argue that the payments made to the three defendants herein has not had the effect of defeating a creditor. The claim herein arises out of a contract made previous to such payments, a fact that strengthens applicant's position. This being so, applicant is entitled to judgment: *Mackay* v. *Douglas* (1872), L.R. 14 Eq. 106; *Newlands Sawmills Ltd.* v. *Bateman* (1922), 3 W.W.R. 649. The like result follows if the matter be considered from the standpoint of company law. On the facts, these payments were clearly payments out of capital. If a Company has its paid up capital intact and has all its liabilities provided for, it may well be that moneys which would otherwise be regarded as capital can be dealt with as profits. The proposition, however, that a company can sell all its assets (other than a problematical claim which in fact results in much less than is necessary to meet its liabilities) and divide the proceeds amongst its shareholders at a time when it is bound to carry out a contract, which obligation results in a judgment against it, and by such division avoid satisfaction of such judgment needs, I think, only to be stated to carry with it its own refutation. If authority is needed the following cases seem to amply furnish it: *Holmes* v. *Newcastle-upon-Tyne Abattoir Co.* (1875), 45 L.J., Ch. 383; *Flitcroft's Case* (1882), 52 L.J., Ch. 217, *sub nom. In re*

Judgment

Exchange Banking Co.; Towers v. *African Tug Company* (1904), 1 Ch. 558. Likewise the people who got the money are the people who should return it. *Hardy* v. *Metropolitan Land and Finance Co.* (1872), 41 L.J., Ch. 257. Further, Paterson, through whose instrumentality the two Mrs. Paterson obtained the payments, must I think, in view of the evidence, be regarded as their agent. His knowledge is their knowledge. He must be held to have known that these payments were illegal. Judgment as prayed with costs.

ORPHEUM THEATRICAL COMPANY LIMITED v. ROSTEIN *ET AL.*

Landlord and tenant—Lease—Covenants—Breach by lessee—Claim of forfeiture by lessor—Acceptance of rent after breach but before action—Acceptance of moneys paid as rent after action—Knowledge of company's (lessor) secretary as to breach—Estoppel.

Although a lessor may have the right to claim forfeiture of the term under a lease owing to breach of certain covenants by the lessee as to subletting and the use to be made of the premises, he may nevertheless be estopped by his conduct from claiming such forfeiture where in a long course of dealing with his lessee he stands by and tacitly agrees to the breaches which occur from time to time, thereby causing the lessee and others interested to believe that their acts are not to be used as a foundation to enforce a forfeiture.

In the case of a lessor being a limited company it may not be bound by the knowledge of its secretary and manager as to the manner in which covenants were being broken but in the circumstances of the present case the lessor, a limited company was held bound by such knowledge, as after a written warning by the company the lessee did not commit any new breach and endeavoured to comply strictly with the terms of the lease.

Acceptance of rent by a lessor after breach by the lessee, but before action, shews a definite intention to treat the lease as subsisting and precludes

MACDONALD, J.

1923

April 10.

the lessor from taking advantage of any breach that had previously taken place.

Acceptance by the lessor of moneys paid as rent after an action for possession is brought by him, may not be a waiver of forfeiture for breach of the lessee's covenants.

ORPHEUM THEATRICAL CO. *v.* ROSTEIN

ACTION by a lessor against the lessee to enforce forfeiture and obtain re-entry on the ground of breach of the lessee's covenants under the lease. The facts are sufficiently set out in the reasons for judgment. Tried by MACDONALD, J. at Vancouver on the 2nd, 5th and 6th of March, 1923.

Wilson, K.C., and *Symes,* for plaintiff.
A. H. MacNeill, K.C., and *Pepler,* for defendants.

10th April, 1923.

MACDONALD, J.: On the 30th of September, 1915, by indenture of lease, the plaintiff demised to the defendant Rostein, all of the Orpheum Building, situate on Granville Street, Vancouver, B.C., except that portion used for theatre purposes. The property thus leased, consisted of stores and rooms and is specifically described in the plan attached to the lease. The lease was for a term of 10 years at a rental, increasing, from time to time, during such period. It contained ordinary, as well as special covenants. Plaintiff now alleges, that it is entitled to re-entry, and to take possession of the demised premises on the ground, that the defendant Rostein has broken certain of the covenants in the lease, which were to be observed and performed on his part. During the early years of the tenancy, there is no doubt that there were numerous breaches of the covenants in the lease without any objection from the plaintiff, or its representative. This was during the war, at a time when the tenancy was proving unprofitable to such defendant, through his inability to sub-let the different portions of the premises to advantage. This may have influenced the actions of the plaintiff, as the nature of the property and conditions in the lease, and the close association between this defendant and James Pilling, secretary of the plaintiff company, satisfies me that the plaintiff was well aware,

Judgment

that the lease was obtained by the defendant Rostein, so that he might sub-let with financial benefit to himself.

The breaches of covenant complained of are outlined in the statement of claim and, without discussing them all in detail, I find that, contrary to the provisions of the lease, the defendant Rostein used part of the demised premises, not being shops, for other than professional or business offices, notably through sub-letting certain rooms to the Orpheum Club for social purposes. Then he allowed one Shaw, his sub-tenant, to use one of a number of rooms leased by him, as a residence. He also failed to have the sub-tenants attorn to the plaintiff and did not comply with the form required by the plaintiff for a sub-lease. Objection was taken to an alteration, or addition, to the premises by constructing an additional room in the elevator shaft. This, I find, was not borne out by the evidence and, as a matter of fact, there was no structural alteration of the premises, contrary to the terms of the lease. Further, as to the use of the rooms known as the Orpheum Club, I allowed an amendment to the particulars, delivered by plaintiff, alleging, that these rooms were used "for an illegal and improper purpose" in 1921, namely, gambling, and the evidence supports such allegation. While card-playing may have taken place in 1922 for money, still, it was not of the same nature, as that of the previous year and not being illegal or improper, did not constitute a breach of the covenant in this respect. I cannot, upon a reasonable construction of the evidence, find, that the manner in which these rooms were used as a club, proved to be an annoyance to the plaintiff, though, as already mentioned, such utilization was a breach of another covenant in the lease.

In considering the breaches that may have occurred, it is contended that any stipulation or covenant, permitting a forfeiture on that account, should be construed most strongly against the lessor. Further, that forfeitures are not favoured by the Courts. It was, however, decided in *Doe dem. Davis* v. *Elsam* (1828), M. & M. 189 that provisoes for re-entry in leases are to be construed like other contracts and not with the strictness of conditions at common law. In that case, the lease, provided for re-entry, should the lessee carry on certain business

MACDONALD, J.

1923

April 10.

ORPHEUM THEATRICAL CO. v. ROSTEIN

in the premises and, upon a breach being proven, Lord Tenterden, C.J. said (p. 191):

"I do not think provisions of this sort are to be construed with the strictness of conditions at common law. These are matters of contract between the parties, and should, in my opinion, be construed as other contracts. The parties agree to a tenancy on certain terms, and there is no hardship in binding them to those terms. In my view of cases of this sort the provisoes ought to be construed according to fair and obvious construction, without favour to either side."

In this connection, the necessity for strict compliance with a lease, and the question of motive, that may actuate a landlord in asserting forfeiture, not affecting his rights, was considered by Lord Esher in an application for relief from forfeiture in *Barrow* v. *Isaacs & Son* (1891), 1 Q.B. 417. There, the tenant had failed to obtain the consent of his superior landlord, to an under-letting of a portion of the demised premises. There was no doubt that such consent was required, to be not arbitrarily refused and no objection could be made, by a reasonable man, to the sub-tenant, so there was no valid ground of objection, but still a failure to obtain such consent operated as a forfeiture and no relief was granted. The right of the landlord, under the circumstances, was referred to, as follows (p. 419):

"It is obvious that there has been a breach of the covenant. His consent was not asked. There is a breach of the covenant, and upon a breach he has a right of re-entry. Therefore at law it is impossible to doubt that the plaintiff's right of re-entry was made out. He was entitled at law to recover against the defendants the possession of the premises—that is to say, to get rid of the lease, which was a long lease, and of great value to the defendants . . . . the plaintiff insists upon exercising that right."

Judgment

Parties being so required, to fully abide by the terms of a lease, and the defendant Rostein having failed to observe covenants in his lease, should the election, by the plaintiff, to forfeit the lease, on that account, prevail? Or did concurrent or subsequent events destroy the plaintiff's rights of forfeiture, either through the plaintiff having acquiesced in such breaches of covenant and being estopped from taking advantage of forfeiture or, by its actions, having waived its election to avail itself of such breaches as a ground for destroying the tenancy.

While the plaintiff Company had its president and secretary resident in Vancouver, there was no evidence to shew nor do I think that it had a local board of directors. I am quite

satisfied, that, from the time that the lease was granted, and during the years when said James Pilling was acting as secretary and manager of the plaintiff Company, he was well aware of the manner in which the defendant was carrying out the terms of the lease. He had an office in the Orpheum Building and was in close touch with the defendant Rostein during that period. I think the president of the plaintiff Company, who was, and is, a clerk in the employ of its solicitors, did not actively interest himself in the performance by the tenant, of the terms of the lease. As payment of rent was duly made from time to time, he left the observance or non-observance of other conditions to the sole consideration of said Pilling. And this situation continued during the tenure in office of Farrish, his successor. Then, after W. A. Hartung became the secretary and representative of the plaintiff Company, its policy was changed, as to the treatment of the lessee. It became then quite apparent that it had determined, through its solicitors, to require the defendant Rostein, to strictly comply with the provisions of the lease. The position, thus assumed by the plaintiff, is fully outlined in a letter from its solicitors to such defendant on the 30th of October, 1922. This letter refers to there having been several breaches of the covenants in the lease, during the past and that he is "henceforth required to fulfil each and every one of the covenants to be observed, performed and contained in the said lease." He was also given notice that no person, other than the board of directors, by formal resolution, had authority to waive any one or more of the covenants of the lease. His attention was drawn particularly to certain breaches of the covenants, *viz.*: (1) Rent not being paid in advance; (2) a bootblack shining stand having been placed at the entrance of the office building; (3) the janitor residing on fourth floor; (4) excessive burning of electric lights; (5) usage of premises for betting; (6) dirty condition of basement; (7) closing of one elevator and creating another room. He was also notified, by the letter, that the plaintiff

Judgment

"would, without further notice, exercise its right of re-entry on breach on your part of any covenant contained in the said lease. Therefore it is suggested that you read it carefully and fulfil its conditions."

It was apparent that it was not the intention of the plaintiff,

MACDONALD, J.

1923

April 10.

ORPHEUM THEATRICAL CO. v. ROSTEIN

to claim a right of re-entry for anything that had occurred prior to the date of such letter and it was so admitted at the trial. The letter might be considered more in the nature of a warning, than such a notice as would have been required (prior to taking advantage of a breach of the covenant in a lease), if the tenancy had existed in either England or Ontario. There the tenant would have been afforded statutory protection in such event. This legislation is worthy of consideration, as shewing the manner in which the tenant was given assistance to prevent drastic treatment at the hands of his landlord. In Ontario, subsection 1 of section 13 of The Landlord & Tenant's Act, R.S.O. 1897, Cap. 170, was taken from subsection 1 of section 14 of the English Conveyancing Act, 1881 (44 & 45 Vict., Cap. 41), which provides that:

"(1) A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of, and if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of a remedy, and to make reasonable compensation in money to the satisfaction of the lessor for the breach."

Judgment

Such a notice would require to have been sufficiently specific to enable the tenant to know, with reasonable certainty, what he was required to do, so that he might have an opportunity of remedying the breach, before an action was brought. See *Fletcher* v. *Nokes* (1897), 1 Ch. 271. It ought "to give the tenant precise information of what is alleged against him and what is demanded from him": *Horsey Estate Limited* v. *Steiger* (1899), 2 Q.B. 79 at p. 91.

In this Province, there is no similar statutory provision and it is contended that forfeiture may, at the option of the landlord, without any such notice, take place upon the breach of any covenant in a lease and, in this case, without any relief to the defendants. The position of a tenant, before the passage of this enabling legislation in England, was adumbrated by Lord Buckmaster, L.C., in *Fox* v. *Jolly* (1916), 1 A.C. 1 at pp. 7-8, as follows:

"Before the passing of the Conveyancing Act of 1881, a right of re-entry reserved in a lease conditional upon breach of a covenant to repair could be enforced by the landlord at common law without the tenant having opportunity to meet the complaint, and often without his knowing that the breach had in fact occurred. It is true that the Courts of Equity attempted to mitigate the harshness of this procedure, and in several reported cases restrained the landlords from exercising their rights where the breach was one which, by accident or surprise, the tenant had been unable to rectify. There was, however, no general rule relating to such relief on which reliance could be placed. In these circumstances the Conveyancing Act of 1881 was passed, and it was to extend and render certain the rights of tenants in such cases that s. 14 of that statute was framed."

At p. 13, in the same connection, a portion of the judgment by North, J. in *Fletcher* v. *Nokes* (1897), 1 Ch. 271, was referred to as follows:

"'Suppose that s. 14 had not been passed, and the previous law had remained in operation, and the landlord had brought an action against the tenant for breach of covenant, the first thing which the landlord would have been compelled to do would have been to give particulars of the breaches on which he relied, in order that the tenant might know what he had to meet. I think that s. 4 was intended to place the tenant in a better position than he was in before. He was to have the option of doing, before action was brought, all those things the neglect of which would have been the ground of relief against him if s. 4 had not been passed.'"

Then, under the facts of this case, can the defendant Rostein, with such lack of legislation, avoid the result of his breaches of covenants, which occurred after the 30th of October, 1921? The first contention, on his part, is that any election to forfeit, by the plaintiff, through breach of the covenants, was waived and his right to forfeiture destroyed through the acceptance of rent by the plaintiff after commencement of the action. Plaintiff accepted rent on the 7th of November, 1921, for that month, but did not wait for the expiry of the month before commencing its action. Subsequently, it refused payment of the rent for December, 1921, and January, 1922. Then in February, 1922, rent was paid in advance by defendant Rostein for that month, but the plaintiff sought to apply the amount as payment, for use and occupation of the premises. This course, it could not adopt and the tenant was entitled to consider the payment, as made in the manner that he desired, namely, in payment of rent for the month of February. There is no

Judgment

MACDONALD, J.

1923

April 10.

ORPHEUM THEATRICAL CO. v. ROSTEIN

doubt that receipt of the rent, on the 7th of November, before the commencement of the action, precluded the plaintiff from taking advantage of any forfeiture that had occurred up to that time. See *Rex* v. *Paulson* (1921), 1 A.C. 271 at pp. 282-3:

"The authorities appear to their Lordships to establish that the landlord, by the receipt of rent under such circumstances, shews a definite intention to treat the lease or contract as subsisting, has made an irrevocable election so to do, and can no longer avoid the lease or contract on account of the breach of which he had knowledge. They further think the presence in a lease or contract of a provision requiring a waiver to be expressed in writing, such as exists in the present case, does not render inapplicable the principle established, and does not enable the landlord at the same time to blow hot and cold, to approbate and reprobate the same transaction."

Compare *Davenport* v. *Reginam* (1877), 3 App. Cas. 115.

While the plaintiff, by the receipt of the rent in November may have elected to treat the lease as still subsisting and could not assert a forfeiture, still, it is contended by plaintiff, that the receipt of rent, after the commencement of the action, *viz.*, in February, 1922, was in a different position, and did not affect the plaintiff's right to recover possession. In *Jones* v. *Carter* (1846), 71 R.R. 800; 15 M. & W. 718 at pp. 724-6, Parke, B., said as follows:

"Though the lease is declared to be void for breach of covenant, it is perfectly well settled that the true construction of the proviso is, that it shall be void at the option of the lessor . . . . if he elect that it shall end, the lease must be determined . . . . and if once rendered void, it could not again be set up. An entry or ejectment, in which an entry is admitted, would be necessary in the case of a freehold lease, or of a chattel interest, where the terms of the lease provided that it should be avoided by re-entry. Whether any other act unequivocably indicating the intention of the lessor would be sufficient to determine this lease, which is made void at the option of the lessor, we need not determine because an ejectment was brought, and proceeded with to the consent-rule, by which the defendant admitted an entry, the entry would certainly be an exercise of the option; and, once determined, the lease could not be revived.

Judgment

"It is said there was no authority upon the point now under consideration; but there is a case at Nisi Prius materially bearing upon it, in which Lord Tenterden expressed a clear opinion that the receipt of rent after an ejectment brought for a forfeiture was no waiver of such forfeiture: *Doe d. Morecraft* v. *Meux* [(1824)], 1 C. & P. 346. A case was desired, but we cannot find that any was argued. We entirely agree in Lord Tenterden's opinion. The precise point that he decided was, that on the trial of an ejectment for a forfeiture (in which of course the entry was admitted), the receipt of rent after the bringing of that ejectment was too late, and the lease was not rendered valid."

The effect of distress, upon forfeiture pending an action, was considered in *McMullen* v. *Vannatto* (1894), 24 Ont. 625. It was an action for ejectment begun in June, 1893. A year's rent fell due in October of that year for the year thereafter. Plaintiff levied distress in October and was paid thereunder a year's rent. Upon amendment, allowed at the trial, these facts were proven and it was submitted that they operated as a waiver of forfeiture. Boyd, C. in his judgment, at p. 630, mentioned the *dictum* of Aston, J. in *Doe* v. *Batten* [(1775)], 1 Cowp. 243, in which it was stated, that acceptance of rent after action brought through distress, operated as a waiver of the forfeiture under the lease and referred to such *dictum,* as not being the law on the subject "having regard to the fact that the bringing of ejectment, pure and simple, is an unequivocal and irrevocable election to end the tenancy, and the subsequent acceptance of rent or distress for it, will not operate as a waiver." He cited *Grimwood* v. Moss (1872), L.R. 7 C.P. 360, and referred to distress for the rent, that became due after breach and writ issued, as *per se* not setting up the former tenancy "which ended on the election to forfeit, manifested by the issue of the writ." He considered, however, that such distress and payment of rent thereunder might be evidence of a new tenancy, on the same terms, from year to year and that it was a proper question to be submitted to the jury. He also dealt with the question of costs, up to the time when such defence was allowed by amendment.

Judgment

In *Laxton* v. *Rosenberg* (1886), 11 Ont. 199, plaintiff, in an action for possession, received from the defendant a payment on account of rent, which was shortly afterwards returned to the defendant. Armour, J., in his judgment, stated that (p. 208):

"The payment of the rent after action was brought had no effect whatever upon the action either as a bar to it, or as a waiver of the notice to quit, or of the right to bring the action."

He referred to the authorities and then added, that the payment was one of intention and that it was clear, upon the evidence, that the defendant was making the payment with the design that it would affect the action, and that the plaintiff was receiving it, without any intention of interfering with the action. Here it was not alleged in the defence that the

MACDONALD, J.

1923

April 10.

ORPHEUM THEATRICAL CO. v. ROSTEIN

payment made by defendant Rostein in February was intended to create a new tenancy, nor was any amendment applied for, with a view of making this contention. Plaintiff sought to apply it, in the manner I have indicated, but could not evade the position that it should be applied as rent of the premises, so, in my opinion, if the plaintiff had a good cause of action, when it was commenced, and right to recover possession, it was not affected by the payment of rent in February following.

The question then arises, whether another defence set up by the defendant Rostein should prevail, *viz.*, that on equitable grounds the plaintiff was not entitled to bring its action, through having waived the breaches complained of, and having, by its conduct so acted, as to be estopped from asserting a right of action on account of such breaches. While the breaches, which were found to have occurred, were unimportant, still, their weight, except as to the feasibility with which they might be remedied, should relief be applied, has no bearing upon the legal position of the plaintiff. As to such breaches, there was no reference in the letter of 30th October of Shaw occupying one of the rooms ostensibly rented for tailoring purposes, as his residence, but there is no doubt it was so occupied, though the manner of occupation was not fully discussed. It may, strictly speaking, have been an infringement of the terms of the lease. Then no fault was found in such letter with the use of rooms by the Orpheum Club, for social purposes, though, as I have already mentioned, such an occupation was not in accordance with the terms of the lease. In my opinion, these two breaches did not materially affect the plaintiff and are utilized simply in an effort to support the action and destroy the lease. They continued after the receipt of such letter of the 30th of October, though the attention of the defendant Rostein was not then directed to them. I am quite satisfied that said James Pilling had been well aware of the manner in which the premises were so being used and made no complaint in that respect. With such knowledge, at a time when sub-letting of the premises was likely to be difficult, on account of lack of business in the Orpheum Theatre, he was also aware that defendant Rostein felt his position financially dangerous, as he might be

Judgment

required to pay rent, with the risk of not being recouped through rentals from his sub-tenants. He discussed the matter with said defendant and encouraged him to grapple with the situation. Such defendant did so and eventually succeeded in obtaining, from several of the sub-tenants, new leases expiring just prior to the expiration of his lease with the plaintiff. He thus secured himself, in a measure, to meet the rent accruing in succeeding years and advised Pilling to that effect. The latter expressed his satisfaction and concurred in arrangements thus made, as being for the benefit of all parties concerned. Four of these sub-leases were executed in 1921 and two of them in 1922, the last one being on September 1st, 1922. The necessity of these sub-leases being formally approved by plaintiff, in accordance with the original lease, had been completely lost sight of and consistently ignored since 1915. The defendant Rostein, in executing these leases, pursued the practice thus established for years, of not referring the matter in any way to his landlord or its representative. He bound himself, for lengthy periods to his tenants, who were engaged in business. He was required to fulfil all his sub-leases and, in particular, became responsible to the tenants of whom Pilling had knowledge. He considered, that he was justified in relying upon the acquiescence and approval of the plaintiff, through its local representative and warranted in the course he pursued in subletting. Did the plaintiff by such course of conduct and treatment of the lease, not become, somewhat in the same position as the party referred to by the Lord Chancellor in *Vigers* v. *Pike* (1842), 8 Cl. & F. 562 at pp. 651-2, in discussing the effect, in equity, of acquiescence, as follows:

Judgment

"The doctrine of carrying equities by acquiescence, I consider to be one of the most important to be attended to; for otherwise there is great danger of the principles of a Court of Equity, thus improperly exercised, producing great injustice. A man who, with full knowledge of his case, does not complain, but deals with his opponent as if he had no case against him, builds up from day to day a wall of protection for such opponent, which will probably defeat any future attack upon him."

The position of a landlord where conditions in a lease have been ignored for a long time and consequent refusal of a Court to enforce forfeiture, is outlined in *Lombardo* v. *Clifford Bros. Co.* (1921), 114 Atl. 849 at pp. 850-51, as follows:

MACDONALD, J.

1923

April 10.

ORPHEUM THEATRICAL CO. v. ROSTEIN

"The conduct of the defendant in her long course of dealing with the plaintiff was, we think, sufficient to have led the plaintiff to believe that prompt payment would not be insisted upon, and that it was not her intention to enforce a forefeiture because of the alleged breach of said condition of the lease, and therefore the defendant should not be permitted, without notice of her intention to do so, to enforce a forfeiture for a breach of said condition of the lease. 16 R.C.L. 652."

Would it not, after the manner in which the plaintiff has acted, with respect to the lease, be most unfair and inequitable for the defendant Rostein, not only to have his rights under the lease forfeited but, upon being dispossessed, to be still liable to his co-defendant and also subject to actions at the suit of his sub-tenants? It was suggested during the argument, that those sub-tenants, who had lengthy leases might be dealt with in a satisfactory manner by the plaintiff, should it obtain possession but, in that event, they would be dependent upon the good-will or condescension of the plaintiff. Suitable terms might or might not be arranged and the liability of the defendant Rostein, to protect his sub-tenants would remain. Plaintiff would have had no right to pursue a claim for possession against a portion of the leased premises and waive it as to the rest. See *Ocean Grove Land Ass'n* v. *Berthall* (1898), 40 Atl. 779.

Judgment

The length to which the principle of estoppel by conduct, even as against a corporation, may be applied, so as to destroy a right to forfeiture and the manner, in which it may be held to have received notice and been bound, through knowledge imparted to its officials, was discussed in *Toronto* v. *Toronto Electric Light Co.* (1905), 10 O.L.R. 621. The following extracts from the judgment of the Court of Appeal in that case at pp. 625-7, are in point:

"The burden of proof was upon the defendants to establish knowledge by the plaintiffs of the essential facts upon which the right to claim the forfeiture rested, but it was not, I think, necessary to prove what is called actual notice to the plaintiffs of the agreement itself between the defendants, but was sufficient to shew such a state of affairs as reasonably indicated that the covenant in question had been broken . . . . Notice or knowledge can only be brought home to a corporation through those who act for and represent it . . . . Then having such knowledge the plaintiffs [City of Toronto] were, I think, bound to act with reasonable promptness in claiming the forfeiture. Instead they permitted years to elapse during which as the plaintiffs must have known heavy expenditure

by the Toronto Electric Light Co. was going on, and expenditure that would have been impossible but for the consent from time to time of the plaintiffs to the necessary openings being made in the city streets. There was thus in the plaintiffs' conduct much more than a mere passive acquiescence, something indeed under the circumstances I have mentioned amounting to an active encouragement to the defendants to think and believe that they the plaintiffs did not intend to claim the benefit of the forfeiture."

Plaintiff, however, contends that it should not be bound by any knowledge which either said Pilling or his successor acquired, as to the manner in which covenants in the lease were being broken by the defendant Rostein and that they, as representatives of the plaintiff, could not bind it in the matter. While this contention might have considerable weight under some circumstances, I do not think, under the facts here presented, that it should prevail, unless it were shewn that, after the letter of the 30th of October, the defendant Rostein committed some new breach of any covenant in the lease. He did not so act but sought, by paying rent in advance, to comply strictly with its terms and, as soon as he could legally do so, compelling the Orpheum Club to leave the premises.

I am of the opinion that, under the circumstances, the principle of estoppel operated in favour of defendants and that plaintiff is not entitled through its conduct to destroy the lease and obtain possession of the premises.

Judgment

"While waiver is not in the proper sense of the term a species of estoppel, yet where a party to a transaction induces another to act upon the reasonable belief that he has waived or will waive certain rights, remedies, or objections which he is entitled to assert, he will be estopped to insist upon such rights, remedies, or objections to the prejudice of the one misled":

See 21 C.J., pp. 1240-41.

In the event of it being held that plaintiff was entitled to forfeiture of the lease, then defendants invoked the provisions of subsection (14) of section 2 of the Laws Declaratory Act, R.S.B.C. 1911, Cap. 133, and claimed relief thereunder. It was submitted, by the plaintiff, that, upon the facts, subsection (14) should not be applied and, further, that forfeiture had already been waived out of Court and consequently subsection (17) of the same section deprived the Court of the power to so relieve. In view of the opinion already expressed, as to

MACDONALD, J.

1923

April 10.

ORPHEUM THEATRICAL CO. v. ROSTEIN

plaintiff's right of action, it is not necessary for me to come to a conclusion on these points. In this connection, however, it is worthy of mention that the power, coupled with the duty, of the Court to grant relief is unrestricted in proper cases. It applies to "all penalties and forfeitures": See *Huntting* v. *MacAdam* (1908), 13 B.C. 426. Then in *Balagno* v. *Le Roy* (1913), 18 B.C. 127, GREGORY, J. discusses the essentials of a waiver out of Court.

As to costs, the equitable ground upon which the defendants sought relief and upon which they have succeeded, was only properly raised and pleaded at the trial. So I think that up to the time when the amendment was allowed, enabling them to avail themselves of such defence, the plaintiff should be entitled to its costs, while all subsequent costs should be borne and paid by the plaintiff. In other words for "good cause," I think defendants should be not only deprived of but required to bear the costs up to the time of such amendment. Order accordingly dismissing action.

Judgment

Action dismissed.

NOTE.—Subsequently argument was allowed upon the question of costs and judgment in this respect varied.

HERALD PRINTING CO. *ET AL.* v. RYALL *ET AL.*

MURPHY, J. (At Chambers)

1923

May 2.

HERALD PRINTING CO. v. RYALL

Libel—Pleading—Fair comment—Particulars—As to what are facts and what are comments.

When in an action of newspaper libel the defendant sets up a plea of fair comment the plaintiff is entitled to particulars of what part of the alleged libel are relied upon as facts and what are relied upon as comment. Further specific instances of the truth of the allegations should be given when necessary.

APPLICATION by the plaintiff demanding particulars on the defendants' plea of fair comment in an action for damages for libel. Heard by MURPHY, J. at Chambers in Vancouver on the 30th of April, 1923.

Statement

Mayers, for plaintiffs.
Symes, for defendants.

2nd May, 1923.

MURPHY, J.: The plea of which particulars are asked is a plea of fair comment and not of justification as I at first thought.

"Fair comment must in its nature be based upon facts. Unless it is shewn that the statements of fact on which the comment is based are not misstatements, the comment is not fair, and the defence of fair comment fails":

Digby v. *Financial News, Lim.* (1906), 76 L.J., K.B. 321 at pp. 327-8.

Judgment

If the statement of facts is made by plaintiff, it is sufficient to shew that it was so made, *ib.* But if it is not or if facts are asserted, in addition to those stated by plaintiff, it follows, from the principle cited, the question whether they are in truth facts or not must arise on the plea of fair comment. In the alleged libel, there are or, at any rate, may be statements of fact other than those made by plaintiff. The plaintiff is entitled to have particulars of the issues he has to meet. He is, therefore, I think clearly entitled to have defendants deliver particulars setting out specifically what facts they rely upon as a basis for fair comment.

MURPHY, J. (At Chambers)

1923

May 2.

HERALD PRINTING CO. v. RYALL

Judgment

Once the facts are established the further question of fair or unfair comment arises. The plaintiff is, therefore, entitled to particulars setting out what part of the alleged libel defendants class as comment. I have read the alleged libel and I am unable to say what part of it is fact and what comment. The words of Lord Ellenborough, C.J. in *Stiles* v. *Nokes* (1806), 7 East 493 seem to me applicable:

> "The Court cannot decompose this mass: but the party who requires the separation to be made for his own defence ought to have taken upon himself the burden of doing it, in order that the Court might see with certainty what parts he meant to justify."

True this decision refers to a plea of justification but *Digby* v. *Financial News, Lim., supra,* shews, I think, there are two things to be made out to establish the plea of fair comment: First, the truth of the facts unless they are furnished by plaintiff when all that is required is to shew he did furnish them as facts whether they are so or not and second, the fairness or unfairness of the comment. If this is so, clear particulars of what in the alleged libel is relied upon as facts and what as comments are as necessary under this plea as under a plea of justification. Further, I think specific instances of the truth of the allegations should be given where necessary. For instance, there is an allegation in the alleged libel:

> "What the ministerial association is concerned about is the fact that flagrant defiance of the law as it is being interpreted in other Provinces is taking place in Nanaimo."

In my opinion, the plaintiff is entitled to specific instances of the alleged interpretation of the law in other Provinces. I think particulars, as asked under paragraphs 3 and 4 of the summons, should be given so that no question may arise at the trial as to the exact meaning of the paragraph of the defence therein referred to. Costs in the cause.

Application granted.

DAVEY v. DAVEY.

MACDONALD, J.

1923

April 23.

DAVEY v. DAVEY

Divorce—Practice—Alternative remedy of judicial separation—Costs.

Upon the petition of a wife for a decree of divorce being refused, she then sought as an alternative remedy a decree of judicial separation.

Held, that on the ground of cruelty, proved, it should be granted even though not asked for in the petition.

Where a wife is unsuccessful in obtaining a divorce but is granted judicial separation she is entitled to costs if upon the facts submitted to her solicitor, and upon which he proceeded to trial he had reasonable grounds to warrant him in instituting proceedings for divorce.

ACTION by a wife for divorce or in the alternative (though not asked for in the petition) for a decree of judicial separation. The facts are set out in the reasons for judgment. Tried by MACDONALD, J. at Vancouver on the 2nd of September, and 6th and 30th of November, 1922. Statement

Martin, K.C., and *N. R. Fisher*, for petitioner.
Mayers, and *Robert Smith*, for respondent.

23rd April, 1923.

MACDONALD, J.: Mrs. Davey seeks a divorce from her husband, on the ground of adultery, coupled with cruelty. I was satisfied, during the trial, that cruelty, on the part of the husband, had been established, but reserved judgment on the question of adultery.

The petitioner contends that, what may be termed the circumstantial evidence is sufficient to support the charge of adultery, even in the face of flat contradictions on the part of the respondent and co-respondent. Such evidence is not, however, in my opinion, at all conclusive and should not prevail as against the positive evidence of the parties charged, so decree for divorce is refused. Judgment

In the event of my coming to such a conclusion, petitioner then sought, as an alternative remedy, a decree of judicial separation, even though it was not asked for in her petition. I think, on the ground of cruelty, that this request should be

MACDONALD, J.

1923

April 23.

DAVEY v. DAVEY

granted even at this stage of the proceedings. See, on this point, *Parsons* v. *Parsons* (1907), P. 331, where this course was pursued, even after a decree *nisi* for divorce had been given. Compare *Rutherford* v. *Richardson* (1922), 92 L.J., P. 1, where a decree for judicial separation, on the ground of cruelty, was allowed after an appeal, from a judgment for a dissolution of marriage was dismissed.

The petitioner, though unsuccessful in obtaining divorce, and only being granted judicial separation—after the trial—is still I think entitled to her costs. Upon the facts submitted to the solicitor for the petitioner, and, upon which he proceeded to trial, I think he had reasonable grounds upon which he was warranted to institute proceedings for divorce. The question of a wife instituting proceedings for divorce, and being unsuccessful, and still being allowed her costs, was dealt with by me, in *Vernon* v. *Vernon* (1914), 6 W.W.R. 1047. I quote from the judgment therein as follows (p. 1048):

Judgment

"In *Flower* v. *Flower* (1873), L.R. 3 P. & D. 132; 42 L.J., P. & M. 45, the Court refers to the fact that it is not absolutely bound to give the wife her costs where unsuccessful, 'but it would only be justified in refusing them in cases where it appeared that the attorney had done something wrong, or that he had instituted proceedings without reasonable ground, that is, where he had the means of seeing before instituting the suit that it was one that ought not to be instituted. When such a case arises I will disallow the wife's costs, and thus cause the punishment to fall on the attorney.'"

Being thus satisfied, that the solicitor did nothing wrong in instituting the proceedings for divorce, the decision, as to costs, that I have indicated, should follow. There will be judgment granting the petitioner judicial separation with costs.

Judgment for petitioner for judicial separation with costs.

VANCOUVER MILLING & GRAIN CO., LTD., v. UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION.

MCDONALD, J.

1923

April 13.

VANCOUVER MILLING & GRAIN CO. v. UNITED STATES SHIPPING BOARD

Contract—Bill of lading—Transportation by sea—Clause as to ships—Clause allowing transhipment—Transhipment to vessel other than provided for—Damage—Liability—Pleading—Form of denial in defence—Sufficiency of.

In paragraph 3 of the statement of claim the plaintiff alleged that "by a bill of lading the defendant acknowledged receipt and shipment on board (a ship) of 2,000 cases of fresh eggs in apparent good order and condition." The defendant in his defence denied "each and every allegation of fact contained in paragraph 3 of the statement of claim." On the contention that this was merely a denial of the acknowledgment of receipt and shipment and not a denial that the eggs were in apparent good order and condition when shipped:—

Held, that there was a denial of all allegations in paragraph 3 which included the allegation that the eggs were fresh and in apparent good order and condition.

By bill of lading the defendant undertook to carry a cargo of eggs from Shanghai to Vancouver by a ship named or by any other vessel operated by or on account of the defendant. The ship named sailed to Seattle and the cargo was transhipped to Vancouver by a vessel not operated by or on account of the defendant. The eggs were damaged by improper stowage on the second vessel.

Held, that there was breach on the part of the defendant in transhipping the cargo on the second vessel and in the circumstances a general clause in the bill of lading authorizing the defendant to tranship at any intermediate port "by any other vessel, steam, motor or sail" did not warrant the defendant in departing from the special clause of the contract relative to the using of the vessel named or another vessel operated by or on account of the defendant.

Held, further, that under the American law applicable, if the defendant transhipped without the right to do so, it cannot rely upon the special terms contained in the bill of lading exempting it from liability in the various cases therein mentioned and the defendant was liable as a common carrier.

ACTION for damages for injury to goods in course of transit by steamship from Seattle to Vancouver and resultant depreciation in value. The facts are set out in the reasons for judgment. Tried by MCDONALD, J. at Vancouver on the 21st and 22nd of December, 1922, and the 1st, 2nd and 3rd of March, 1923.

Statement

MCDONALD, J.

1923

April 13.

Craig, K.C., and *Tysoe*, for plaintiff.

Davis, K.C., and *Hossie*, for defendant.

13th April, 1923.

VANCOUVER MILLING & GRAIN CO. v. UNITED STATES SHIPPING BOARD

McDONALD, J.: By paragraph 3 of its statement of claim, the plaintiff alleges that, by a bill of lading, dated at Shanghai on the 12th of December, 1921, issued by the defendant to The Far East Trading Co. Incorporated, the defendant acknowledged receipt and shipment on board the ship "Keystone State" of 2,000 cases of fresh eggs in apparent good order and condition and that the defendant agreed with The Far East Trading Co. Incorporated, to transport the said eggs by the said ship "Keystone State" or any other vessel operated by or on account of the defendant or the United States Shipping Board from Shanghai to Vancouver and there deliver the same in like apparent good order and condition unto the Bank of Nova Scotia or its assigns.

By paragraph 1 of the statement of defence, the defendant denies "each and every allegation of fact contained in paragraph 3 of the statement of claim."

The plaintiff contends that this is merely a denial of the acknowledgment of receipt and shipment and is not a denial that the eggs in question were in apparent good order and condition when shipped. This contention I think cannot prevail. It seems to me that paragraph 1 of the statement of defence constitutes a denial of every allegation contained in par. 3 of the statement of claim, one of which allegations is, that the eggs in question were fresh eggs in apparent good order and condition.

Judgment

Prior to the issuing of the bill of lading, the Pacific Steamship Co., who were operating and managing the defendant Company's ships, issued what is called a shipper's permit to the chief officer of the "Keystone State" authorizing him to receive on board the eggs in question for "Vancouver *via* Seattle," and the mate of the vessel issued the usual mate's receipt acknowledging receipt of 2,000 cases of fresh eggs "in good order" for "Vancouver *via* Seattle." The ship sailed from Shanghai on the 13th of December, 1921, for Seattle and reached that port on the 30th of December, 1921. She pro-

ceeded no further than Seattle and the cargo in question was unloaded there and placed in a shed and afterwards, on the 6th of January, 1922, was loaded on board the steamship "Eastholm," a vessel owned and operated by Frank Waterhouse & Co. The latter vessel arrived in Vancouver on the 7th of January, 1922, and the eggs were unloaded and placed in the Canadian Pacific Railway Company's shed on the 8th of January. The plaintiff, who had purchased the eggs in question from The Far East Trading Co., and to whom the bill of lading in question had been transferred, gave a receipt for the eggs in question commonly called the expense bill and placed a notation thereon in the following words:

"All cases more or less stained—condition of contents unknown."

Evidence was given by the officers of the "Keystone State" to the effect that when the eggs were taken on board at Shanghai they were in apparent good order, and none of the officers, whose duty it was to check the delivery on board, noticed any stains on the cases or anything else to indicate that the eggs were not in good order and condition. Further evidence was given by these officers to the effect that the eggs were properly stowed on the "Keystone State" and could not possibly have come in contact with salt water. Witnesses from the dock at Seattle were called by the plaintiff, who swore that the cases came off the "Keystone State" in apparent good order with the exception of 22 cases which required re-coopering, and none of the persons who handled the eggs in Seattle, on their removal from the "Keystone State" to dock, and from the dock to the "Eastholm," save as hereinafter mentioned, noticed anything to indicate that the eggs were not, at that time, in good order and condition. When the eggs arrived in Vancouver, there is overwhelming evidence that they were in very bad condition. Many of the cases were wet and tests shewed that this wetness had been caused by salt water. Many of the cases, in addition to being stained by water, were stained by broken eggs and mould had set in to such an extent that I find, as a fact, that the shipment, as a whole, was not marketable nor were the eggs fit for human consumption. They were disposed of at 10 cents a dozen whereas, if they had been in good condition, they would

Judgment

MCDONALD, J.

1923

April 13.

VANCOUVER MILLING & GRAIN CO. v. UNITED STATES SHIPPING BOARD

have been worth on the market in Vancouver, at the time in question, 35 cents per dozen.

The officers of the S.S. "Eastholm" were called by the defendant and they gave evidence to the effect that, when the eggs came aboard, they noticed a bad smell but they made no complaint as to this, nor did they draw the attention of any other person thereto, and I am of opinion that they are mistaken. They said that the eggs were properly stowed between decks but that for lack of space it was necessary to pile approximately 100 cases above the coamings of the hatches, and that, while the hatch cover was not put on, the opening was carefully and completely covered with three tarpaulins which would protect the cargo from salt water. They stated further that, in any event, no seas came over and the eggs were not exposed to salt water at any time during the trip from Seattle to Vancouver. On the whole of the evidence, I feel satisfied, and I find, that the eggs were in good order and condition when they were taken aboard the S.S. "Eastholm" and that, on the trip from Seattle to Vancouver, they were exposed to salt water which caused the damage in question.

Judgment

It is true that the defendant contends that the mould in question could not have developed in so short a time and, pending an adjournment of the trial, tests were made with a view to ascertaining within what time an exposure to water would cause mould to form upon eggs. I was not impressed with the result of these tests for the reason that the conditions under which the tests were carried out were not similar to the conditions surrounding the eggs while they were aboard the "Eastholm," and for the further reason that the plaintiff offered evidence of several men engaged for years in this trade in Vancouver, who stated positively (and I see no reason for not accepting their evidence), that mould would and does form within two or three days after eggs are exposed to water.

The defendant relies on various special terms contained in its bill of lading as exempting it from liability under the various circumstances mentioned.

The plaintiff contends that the defendant has lost the benefit of all these special terms by reason of its failure to carry out

its contract, as contained in the bill of lading, such failure consisting in the facts that the "Keystone State" sailed to Seattle instead of Vancouver, that the goods in question were transhipped upon a vessel which was not operated by or on account of the defendant or the United States Shipping Board and that the eggs in question were improperly stowed upon the "Eastholm." If I am right in holding that the eggs stowed as they were on the "Eastholm" became exposed to salt water, it would seem to follow that such exposure was the result of improper stowage and I so find. In my opinion, further, the defendant committed a breach of its contract in transhipping the eggs in question on board the "Eastholm." The defendant contends that it had a right to so tranship by virtue of clause 6 of the special terms contained in the bill of lading. That clause provides that if on account of weather . . . . riot, war, etc., it should be considered impracticable or unsafe in the opinion of the master to land the goods at the port to which they are destined, the master is to have the option of landing the goods at any other port or retaining same on board until the vessel's return trip or of transferring the same to another vessel, steam, motor or sail; the same clause further provides: that the master or the carrier shall have the right under any and all circumstances, at his option, and without notice, to tranship the goods at carrier's expense but at shipper's risk at the port of shipment or at any intermediate port by any other vessel, steam, motor or sail. Having in mind that the defendant's contract was to carry the goods in question upon the "Keystone State," or any other vessel operated by or on account of the United States Shipping Board Emergency Fleet Corporation, or the United States Shipping Board, with leave "to tranship to any other vessel operated by said Corporation or said Board or for its account," it seems to me that clause 6, except at least in the case of what may be called misadventure, gave the defendant no right to tranship by the "Eastholm" under the circumstances of this case. It is common ground or at least it is clearly established by evidence as to the American law applicable that, if the defendant did tranship on board the "Eastholm," without the right to do so,

Judgment

MCDONALD, J.

1923

April 13.

VANCOUVER MILLING & GRAIN CO. v. UNITED STATES SHIPPING BOARD

then the defendant cannot rely upon the special terms contained in the bill of lading, and is liable as a common carrier.

In view of the above findings, it is not necessary to deal with the question of whether or not the "Keystone State" in going to Seattle, deviated from the voyage agreed upon.

As to the damages, the plaintiff is entitled to recover the difference between 35 cents per dozen, being the market value of the goods in question, had they arrived in good condition, and 10 cents per dozen being the value of the eggs in question in the condition in which they did arrive. The plaintiff has sued for $12,023.29, which is a lesser sum than would be arrived at on the above computation, and there will be judgment for the plaintiff in the said sum of $12,023.29.

Judgment

Judgment for plaintiff.

COURT OF APPEAL

1923

March 21.

ALLEN v. ALLEN

ALLEN v. ALLEN

Divorce—Judgment—Execution—Order for sale of respondent's lands—Appeal—Jurisdiction—R.S.B.C. 1911, Cap. 79, Sec. 28—Marginal rule 1040g.

The Court of Appeal has jurisdiction to hear an appeal from an order of a judge under section 28 of the Execution Act for the sale of the respondent's lands or to realize the amount payable under a judgment in a divorce action.

Laird v. *Laird* (1920), 28 B.C. 255 followed.

That a decree of alimony is one which is within the purview of the Execution Act and capable of being registered so as to be a charge against land is covered by marginal rule 1040g.

Statement

APPEAL by respondent from the order of MCDONALD, J., of the 26th of January, 1923, granting an application under section 28 of the Execution Act, that the interest of the respondent (judgment debtor) in any lands in the Vancouver Land Registry District be sold to realize the amount payable under the

COURT OF APPEAL

1923

March 21.

ALLEN v. ALLEN

judgment herein and for a reference to the registrar to ascertain what lands are liable to be sold under said judgment.

The appeal was argued at Vancouver on the 21st of March, 1923, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Molson, for appellant.

Raines, for respondent, raised the preliminary objection as to the jurisdiction to hear the appeal and referred to *Francis* v. *Wilkerson* (1918), 2 W.W.R. 956; *Laird* v. *Laird* (1920), 28 B.C. 255; *Brown* v. *Brown* (1909), 14 B.C. 142.

Molson: The learned judge below was sitting in divorce and matrimonial causes and had no jurisdiction to make an order under the Execution Act. He cannot take upon himself to act in both capacities. This is not a judgment within the meaning of section 28 of the Execution Act: see *S.* v. *S.* (1877), 1 B.C. (Part I.) 25; *Watts and Attorney-General for British Columbia* v. *Watts* (1908), A.C. 573. Section 28 aforesaid cannot apply to an order for alimony: see *Bailey* v. *Bailey* (1884), 13 Q.B.D. 855. The last point is that if the respondent is given an opportunity to carry on he may realize sufficient to pay all obligations: see *McLeod* v. *McLeod* (1918), 25 B.C. 430.

Argument

Raines: The order was properly made, the law being settled by the case of *Laird* v. *Laird* (1920), 28 B.C. 255.

MACDONALD, C.J.A.: I think the appeal must be dismissed. The legal point involved, namely, that the action was brought before a divorce judge and in the Divorce Court I think practically is disposed of in this Court by the decision in *Laird* v. *Laird* (1920), 28 B.C. 255.

The second point raised was that the learned judge had omitted to insert the words "In the matter of the Execution Act," but those words are superfluous. The order should have been styled "In the Supreme Court" without reference to the Execution Act. There is, therefore, nothing in that ground of appeal.

MACDONALD, C.J.A.

The question of whether a decree of alimony is one which is within the purview of the Execution Act and is capable of

COURT OF APPEAL

1923

March 21.

ALLEN v. ALLEN

being registered so as to charge the land has also been argued. As pointed out by Mr. *Raines* a few moments ago the Act in that respect has been amended; but apart from that there is a rule which has the force of a statute, that is to say, rule 1040g, which seems to cover this case completely. So that there is really nothing in that point.

The last point argued by Mr. *Molson* was founded upon the affidavit which has been put in as supplementary material. This being an interlocutory motion he had the right to file the affidavit without leave. The respondent in the divorce proceedings sets out in the affidavit that he owns an interest in the property in question subject to a mortgage, that he has been keeping his head above water for seven or eight years or ever since the divorce proceedings terminated in the expectation that eventually he should be able to pay the arrears of alimony and save the property.

MACDONALD, C.J.A.

That is an appeal to the indulgence of the Court, and I do not think such an appeal can be entertained. I think the Court has no discretion. If a proper case be made out, there is no discretion to refuse the relief sought. I can understand that if the mortgage was so much in excess of the value of the property that no sale above its value could be hoped for, the Court would not do an idle act by ordering a sale; but that is not the case here. It is admitted in the affidavit that there may be realized $1,000 over and above the mortgage. It is suggested, of course, that some of that will be eaten up by costs, but, on the evidence of the respondent himself, there will be a substantial amount coming to the wife; so that on the whole I cannot see that we can accede to any of the grounds of appeal that have been urged. The appeal is dismissed. The costs of the preliminary motion go to the appellant.

MARTIN, J.A.

MARTIN, J.A.: Following up the observations I made in *Laird* v. *Laird* (1920), 28 B.C. 255 at p. 259, where the principle which governs this case is discussed, I regard this application (which is one under the Execution Act) as simply being made to the Court in its ordinary jurisdiction; and the fact that there have been improperly inserted in the style of cause

(whether *ex abundanti cautela* or simply because of carelessness, I do not know) references to the Execution Act or to the divorce and matrimonial jurisdiction has no effect at all, and is mere surplusage. It should have been made just like applications have been made to the Court, and can be made now, to extend the time for taking certain proceedings under the Mineral Act. There never was any necessity, nor was it thought necessary, to recite the Mineral Acts in those proceedings, which were made to the Court in its ordinary jurisdiction, many examples of which may be found in my collection of Mining Cases; therefore this application is simply, as I say, one in the ordinary jurisdiction of the Court, and if that is so it is an end of the matter.

MARTIN, J.A.

As to the other point, we have no discretion, I think, to stop this sale under section 28. On the facts before us there is, clearly, no jurisdiction to arrest the realization of this judgment. And there is clearly no jurisdiction conferred upon us to prevent the registration thereof; a reference to the Supreme Court rule, 1040g, which my brother MCPHILLIPS drew our attention to, answers that question.

GALLIHER, J.A.: I agree.

GALLIHER, J.A.

MCPHILLIPS, J.A.: The appeal, in my opinion, must fail. I think a good way of illustrating how it is that the Supreme Court of British Columbia exercises divorce jurisdiction would be to take the Supreme Court Act which constitutes the Supreme Court and indicates and defines its powers, and read into that Act the Imperial legislation at the time in England, when by the terms of the Union this Province came into Confederation. One is the Provincial hand and the other is the Imperial hand—the Sovereign Parliament. That is the way the Supreme Court gains that jurisdiction. If it had been written by the Provincial hand it would not have been valid, but having been written by the Imperial hand, the Sovereign Parliament, it is supremely potent; and thus it is only from that source that the Supreme Court can exercise its jurisdiction; in the absence of that this Province would be in the same position as Quebec and Ontario, that is, there would be no power in regard to divorce. That

MCPHILLIPS, J.A.

COURT OF APPEAL

1923

March 21.

ALLEN v. ALLEN

power is being exercised in the Senate and the House of Commons of Canada in respect of cases arising in Provinces of Canada where divorce powers are non-existent. Therefore, it is jurisdictional, and being jurisdictional the powers are exercisable in the Supreme Court of British Columbia. The statement upon the face of the proceedings, "In Divorce and Matrimonial Causes" is really perhaps of little value but in any case innocuous. It indicates to the practitioner the special jurisdiction being exercised.

Then, with regard to the alimony order which is the substantive matter of this appeal, that is an order which has the force of a judgment, as provided in the Land Registry Act, and as provided in rule 1040g, it is registerable, and being registered it has exactly the same force as if it were a deed in the sense that the judgment debtor had signed a document under his hand and seal charging his lands with the amount set forth in the judgment. Whether the payments are payable *in futuro* or not, makes no difference whatever, the analogy is quite complete with the case of a mortgage where instalments and interest may be payable at some future time or times the instalments and interest as they fall due may be enforced. In the present case, as the amounts provided in the alimony order fall due payment may be enforced.

MCPHILLIPS, J.A.

I have to commend the learned counsel in support of the appeal. I think he quite ably presented the different points, but I think with deference they have no substantial force or merit when the whole matter is carefully studied. I do not say, though, that the points did not merit consideration, and as a matter of practice it is well that they have received consideration so that all doubts may be removed.

EBERTS, J.A.

EBERTS, J.A.: I have nothing further to add. I would dismiss the appeal.

Appeal dismissed.

Solicitors for appellant: *Walsh, McKim & Housser.*
Solicitors for respondent: *F. N. Raines & Company.*

REX v. DEAL.

COURT OF APPEAL

1923

Jan. 17.

REX v. DEAL

Criminal law—Murder—Charge to jury—Failure to present evidence as given in defence—New trial—Criminal Code, Sec. 1019.

On a trial for the murder of a police officer who was shot, evidence was submitted by the defence that accused did not intend to shoot his gun. The judge charged the jury and accused's counsel then objected to its sufficiency and asked the judge to tell the jury that "If the jury believes his (the accused's) evidence that he did not point his gun at McBeath or did not point it at Quirk and he had no intent—no intention of shooting anybody and in the scuffle the gun was discharged and McBeath was unfortunately killed, then he (the accused) is not guilty of the crime with which he is charged." The judge refused to so charge. On appeal by way of case stated:—

Held, reversing the decision of MACDONALD, J. (MACDONALD, C.J.A. and GALLIHER, J.A. dissenting), that the charge did not present the defence fully to the jury as the facts deposed to on behalf of the accused were, if believed, open to the inference that the shots had been fired in the scuffle by misadventure in some unexplained way by one of the participants therein, and such being the case the whole aspect of the occurrence constituting, if true, a good defence to the charge of murder, should have been presented to the jury and there should therefore be a new trial.

Per MACDONALD, C.J.A. and GALLIHER, J.A.: That in view of the law of homicide, the onus of proof and the statement of facts on which the question of law was submitted, the direction desired by counsel for accused would have been misdirection, and even if the jury had believed the facts as stated by counsel for accused, they could not properly acquit of the charge of murder; they would have to go further and ascertain the character of the scuffle, which was left unascertained by the statement of facts; and further the instruction asked for was only partially supported by accused's evidence.

APPEAL by way of case stated by MACDONALD, J., of the 18th of December, 1922, from the conviction of the accused on a charge of murder. The case stated was as follows:

"On the 8th of November, 1922, accused Fred Deal was brought up for trial before this Court charged with murder.

Statement

"The trial lasted two days and on the 9th of November, 1922, the accused was found guilty and sentenced to be hanged on the 26th of January, 1923.

"After I had charged the jury and the jury had retired counsel for the defence took several exceptions to the charge and requested me to recall the jury, and the jury were accordingly recalled.

"A transcript of my charge to the jury and counsel's exceptions thereto, including the manner in which the objection hereafter referred to was dealt with are attached hereto.

COURT OF APPEAL

1923

Jan. 17.

REX v. DEAL

"As appears by such transcript, I agreed to recall, and did recall the jury, and charged them on certain points raised by counsel for the prisoner.

"I refused to accede to the request of counsel for the accused to charge the jury:

"'If the jury believes his (the accused's) evidence that he did not point this gun at McBeath or did not point it at Quirk and he had no intent—no intention of shooting anybody and in the scuffle the gun was discharged and McBeath was unfortunately killed, then he (the accused) is not guilty of the crime with which he is charged.'

"A transcript of the evidence of the defence relied upon by counsel for the prisoner, outlining the evidence in support of his said objection, is attached hereto.

Statement

"The questions reserved for the consideration of the Court of Appeal are:

"1. Was I right in refusing to instruct the jury as so requested by counsel for the prisoner?

"2. Is the prisoner entitled to a new trial?"

The appeal was argued at Victoria on the 9th and 10th of January, 1923, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Arnold, for accused: The trial judge refused to put the defence to the jury which amounted to non-direction and misdirection. The defence is that there was no intent but the gun went off inadvertently in the scuffle. On the failure to submit to the jury a substantial ground of defence see *Reg.* v. *Theriault* (1894), 2 Can. Cr. Cas. 444; *Rex* v. *Daley* (1909), 16 Can. Cr. Cas. 168; *Rex* v. *Blythe* (1909), 15 Can. Cr. Cas. 224; *Rex* v. *Wong On and Wong Gow* (1904), 10 B.C. 555; 8 Can. Cr. Cas. 423; *Rex* v. *Scherf* (1907), 13 Can. Cr. Cas. 382; *Rex* v. *Walker and Chinley* (1910), 15 B.C. 100; 16 Can. Cr. Cas. 77; *Rex* v. *Jaget Singh* (1915), 21 B.C. 545. Where there is non-direction a new trial will be ordered: see *Rex* v. *Letain* (1918), 1 W.W.R. 505; *Rex* v. *Kleparczuk, ib.,* 695; *Allen* v. *Regem* (1911), 44 S.C.R. 331. The English cases are *William Warner* (1908), 1 Cr. App. R. 227; *Arthur James Burton* (1922), 17 Cr. App. R. 5. Under section 1019 of the Code we are entitled to a new trial.

Argument

Robert Smith, for the Crown: The judge could not charge the jury as requested because there was no such evidence and there was no evidence that the gun went off in a scuffle. The probabilities are a very important matter. The cases on the

question of miscarriage are *Rex* v. *Gorges* (1915), 25 Cox, C.C. 218; *Joseph Stafford* (1920), 15 Cr. App. R. 7-8; *Nina Vassileva* (1911), 6 Cr. App. R. 228.

Arnold, in reply, referred to *Hyman Kurasch* (1917), 13 Cr. App. R. 13; *Thomas Finch* (1916), 12 Cr. App. R. 77; *Rex* v. *Murray and Mahoney* (1916), 27 Can. Cr. Cas. 247; *John Bacon* (1917), 13 Cr. App. R. 36 at p. 37.

Cur. adv. vult.

17th January, 1923.

MACDONALD, C.J.A.: When in a murder trial the Crown proves that the accused caused the death of the deceased, it has made out a *prima facie* case. Upon such proof a presumption arises that the accused intended to kill. But the presumption is a rebuttable one. The accused may shew that the deed was done in self-defence and therefore not criminal at all, or that it was done under such provocation as for the moment to deprive him of self control, in which case it will be reduced to the crime of intentional manslaughter, or that it was done without intention to kill, in which it will be either unintentional manslaughter or murder, according to the circumstance in which it was done. If the accused at the time of the shooting was engaged in a criminal enterprise, for instance, if his intention was to escape by violence, and he without intending to kill, does so, he is guilty of murder, because when he embarked on his criminal enterprise he would know that his conduct might bring about death, that is to say, death would be not an unexpected consequence of his act, though he did not intend to kill. Therefore, if death result from such criminal enterprise of the accused, the crime, even in the absence of intention to kill, would be murder. A good illustration of this is the recent case of *Rex* v. *Robinson* (1921), 30 B.C. 369, in which one of two men intending to hold up another, shot him. The other had no direct connection with the firing of the shot, but because they were jointly engaged in a criminal enterprise, namely, to hold up their victim at the point of a revolver, each was guilty of the crime of murder.

MACDONALD, C.J.A.

But when a person engaged in an act which is not criminal,

COURT OF APPEAL

1923

Jan. 17.

REX v. DEAL

by accident and without negligence, kills another, he is guilty of no crime. If on the other hand he is engaged in an act which though criminal is not likely to result in the death of anyone, but nevertheless death occurs through accident, his crime is that of manslaughter only. This is called unintentional manslaughter.

In a murder trial there is no appeal to this Court except on a question of law. The trial judge may state facts, which we must accept as the true facts and the only facts, whether they are so or not, and upon these facts, give the answer in law.

After the trial the prisoner's counsel applied to the judge to state a case for appeal, which was acceded to and the judge has done so and in it has told us that after he had delivered his charge to the jury, the prisoner's counsel took objection to its sufficiency and requested him to tell the jury that,

"If the jury believes his (the accused's) evidence that he did not point this gun at McBeath or did not point it at Quirk, and he had no intent—no intention of shooting anybody and in the scuffle the gun was discharged and McBeath was unfortunately killed, then he (the accused) is not guilty of the crime with which he is charged."

The learned judge refused to do so, and the question we have to answer and the only question we can answer on the facts is:

"Was [he] right in refusing to instruct the jury as so requested by counsel for the prisoner?"

There is another question:

MACDONALD, C.J.A.

"Is the prisoner entitled to a new trial?"

But that is superfluous, since the Court has power by statute to order a new trial should the first question be answered in the negative.

Now, I have no hesitation in saying that such a direction would have been misdirection. The character of the scuffle is not stated. Even if the jury believed the facts as stated they could not properly acquit of the charge of murder. They would have to go further and ascertain the character of the scuffle, which is left unascertained by the above statement of facts.

The transcript can only be looked at for the purpose of ascertaining whether there was in fact such evidence as was alleged in counsel's request, because if there were no basis for the statement which the judge was requested to make, clearly he would not be wrong in his refusal. The instruction asked

for is only partially supported by the accused's evidence and this is a further reason why the judge should have refused to give it.

It may be that the judge's charge was open to objection in other respects, but I have no right to say so, all that this Court has power to do is to answer the question submitted and no other.

I would answer the first question in the affirmative, which makes it unnecessary to answer the second.

MARTIN, J.A.: This is an appeal, on a case stated, from the conviction of the appellant at the Vancouver Assizes on the 9th of November last, before MACDONALD, J., for the murder of police constable McBeath, and a new trial is asked for upon the ground that the principal defence of the accused was not presented to the jury by the learned trial judge, and consequently he did not have that fair trial which is his right in this and all other countries which are civilized.

It is conceded, as it must be, that he is entitled to have his defence in all its distinct branches fully and completely submitted to the jury, see, *e.g., Reg.* v. *Theriault* (1894), 2 Can. Cr. Cas. 444; *Rex* v. *Blythe* (1909), 15 Can. Cr. Cas. 224.

So mindful, indeed, is our system of jurisprudence of the necessity to take every precaution before a fellow creature is deprived of his life by legal process that the Courts of Canada will not accept a plea of "guilty" in a capital case, but will direct a plea of "not guilty" to be entered upon the record and (if necessary) assign counsel to the accused in order that he may not, because of poverty, ignorance, despair, insanity or otherwise, fail to have his defence, if any, brought forward after the Crown has made out a *prima facie* case against him.

MARTIN, J.A.

This essential obligation upon the presiding judge to see that the case of the accused is fully and fairly presented to the jury was recognized by the learned judge below, because in his charge to the jury he says, referring to the defence that the killing was in self defence, that "it was not pressed to any extent by the accused, but it is my duty to refer to all possible defences, especially in a murder trial." But it is objected that

COURT OF APPEAL

1923

Jan. 17.

REX v. DEAL

though the learned judge charged the jury upon that defence (which he says upon the same page was not even argued, confirming counsel's statement to us to that effect) and also at length upon the second defence of provocation, yet he entirely omitted to give any direction upon the third and principal and (pending verification) most plausible defence, *viz.*, that the killing was the result of an accident owing to the accused's revolver having been inadvertently discharged during a scuffle between the accused and constables Quirk and McBeath; in other words, homicide *per infortunium,* as the older cases have it, or by misadventure, in more modern language.

To satisfy myself upon this vital point I have since the argument re-examined the whole charge with great care and can only come to the conclusion that there is nothing therein which can be attributed to such third defence, and the brief, not to say casual, reference to the "intention" with which the accused fired the revolver (or "gun" as the witnesses termed it) or his refusal to admit that he fired it at all, are either connected with the two defences that were dealt with, or so detached from any defence at all as to convey no intimation to the jury that a third defence was being set up and relied upon. Because of this grave omission the prisoner's counsel, at the conclusion of the learned judge's charge, asked him to charge the jury thus:

MARTIN, J.A.

"If the jury believes his (the accused's) evidence that he did not point this gun at McBeath or did not point it at Quirk and he had no intent—no intention of shooting anybody and in the scuffle the gun was discharged and McBeath was unfortunately killed, then he (the accused) is not guilty of the crime with which he is charged."

But the learned judge refused to do so, giving no reason for that crucial refusal except this general statement:

"Well, that point I would rather leave as it is, I think I was sufficiently fair to the accused."

It is, however, quite clear, to me at least, that, speaking with all possible respect, the learned judge had failed to realize the effect of the evidence of the accused (supplemented by that of Johnson) which, if the jury chose to believe it (in the exercise of their exclusive jurisdiction to pass upon its verity) in preference to the very different account given by Constable Quirk,

shewed that at the worst he could only be found guilty of manslaughter. His account of the matter, was, in brief, that after he was arrested and pulled out of his motor-car on Granville Street, on the accusation of being drunk, and taken by the two constables to the police telephone-box at the corner of Granville and Davie Streets, he was left there with constable McBeath, the other officer, Quirk, having crossed Davie Street to go back to the car; that recalling to mind the fact that he had a revolver hidden upon his person he ran away from McBeath so as to secretly get rid of it and in so doing crossed Davie Street, having pulled the weapon out from under his belt and holding it in his hand as he ran to the car to secret it therein; that just as he had crossed Davie Street he was stopped by Quirk who seized his hand and the gun in it and hit him on the head with a black-jack; that McBeath then came up and both officers seized and choked him and both of them struck him so severely that he was "knocked out" and lost consciousness; that he had never pointed or fired the gun at anyone before he was seized and struck or afterwards that he could remember, though he "had some recollection of hearing a shot . . . . some noise like a shot" in the scuffle, but did not know how many shots; and that the next thing he did remember was being put into the patrol wagon. The witness Johnson testified to six or seven shots in all having been fired in the course of that scuffle between the three men, at the end of which they "fell right over in a heap, over to the edge of the sidewalk," and it is common ground that several shots were fired out of that revolver some time at least during the whole affair, which was of short duration. It is therefore apparent that the facts deposed to on behalf of the accused (in other words, his evidence) were, if believed, unquestionably open to the inference that the shots had been fired in the scuffle by misadventure in some unexplained way by one of the participants therein, and such being the case that whole aspect of the ocurrence constituting, if true, a good defence to the charge of murder, should have been presented to the jury, who could, if they chose to believe it as aforesaid, have returned the lesser verdict of manslaughter thereupon.

MARTIN, J.A.

COURT OF APPEAL

1923

Jan. 17.

REX v. DEAL

It is really unnecessary, now, to go into the authorities upon excusable homicide and so I shall only cite the following for reference and guidance later: *Reg.* v. *Archer* (1858), 1 F. & F. 351; *Reg.* v. *Wesley* (1859), *ib.* 528; *Stanley* v. *Powell* (1891), 1 Q.B. 86; *Reg.* v. *Gorges* (1915), 25 Cox, C.C. 218; Roscoe's Criminal Evidence, 14th Ed., 814, 833; Archbold's Criminal Pleading, 26th Ed., 870, 885, 896; Russell on Crimes, 7th Ed., 780, 783(n), 808.

I have no doubt that there should be a new trial on the ground that the principal defence was excluded from the jury, and so I have discussed the evidence as little as possible for obvious reasons, but it has been necessary to do so to a certain extent in view of the submission pressed by the Crown counsel that there was no evidence of the discharge of the revolver in the scuffle, which submission is, in my opinion, quite untenable.

MARTIN, J.A.

The case of *Rex* v. *Gorges, supra,* does not assist the Crown, because there the conviction was not for murder, as here, but manslaughter only, and it was supported because such a verdict was the most favourable that the accused could possibly have obtained upon his own evidence.

The result is that the first question, *viz.*:

"Was I right in refusing to instruct the jury as so requested by counsel for the prisoner?"

should be answered in the negative, and therefore there must be a new trial.

GALLIHER, J.A.

GALLIHER, J.A.: I agree with the reasons of the Chief Justice in this appeal.

McPHILLIPS, J.A.: The following case stated was reserved and stated under section 1014 of the Criminal Code, by MACDONALD, J. [Already set out in statement.]

MCPHILLIPS, J.A.

I would unhesitatingly answer both questions in this way: To the first, I would answer, no, to the second, yes.

I cannot see that there is necessity to refer to authorities in the matter as the prisoner had the constitutional inalienable right to have his defence placed before the jury notwithstanding that it may have even bristled with improbabilities. I make no comment upon the facts as in my opinion there should

be a new trial and it would not comport with judicial precedent to in such case canvass the facts. (The facts are to be weighed and decided by the jury, *Allen* v. *Regem* (1911), 44 S.C.R. 331).

Here we have a capital case with the verdict of murder and the prisoner sentenced to be hanged, being the statutory penalty. Now, what was the position in law at the trial? In Denman's Digest relating to Indictable Offences, 2nd Ed., we find it stated at pp. 346-7:

"*Homicide.*—The law presumes every homicide to be murder until the contrary appears. 'In every charge of murder, the fact of killing being first proved, all the circumstances of accident, necessity, or infirmity are to be satisfactorily proved by the prisoner unless they arise out of the evidence produced against him, for the law presumeth the fact to have been founded in malice until the contrary appeareth' (Foster, Cr. L. 255; *Cf. R.* v. *Noon* [(1852)], 6 Cox, C.C. 137, Cresswell, J.). Therefore the prosecutor is not bound to prove malice, or any facts or circumstances beside the homicide, from which the jury may presume it; and it is for the defendant to give in evidence such facts and circumstances as may prove the homicide to be justifiable or excusable (see under these heads) or that at most it amounted to manslaughter (*id.; R.* v. *Greenacre* [(1837)], 8 Car. & P. 35). Archb. 832."

The case stated exactly sets forth the evidence the prisoner gave upon which the defence was founded, tending to prove the homicide to be "justifiable or excusable or that at most it amounted to manslaughter" and if believed by the jury the prisoner would not be "guilty of the crime with which he was charged," *i.e.*, not be guilty of murder.

MCPHILLIPS, J.A.

Search and analyze the charge as you will, I cannot find that the learned trial judge put the defence of the prisoner to the jury, nor does the learned judge state that he did in the form stated in the case or to a like effect. On the contrary, the learned judge states unequivocally that he "refused to accede to the request of counsel for the accused to charge the jury in the stated terms." What does that mean? It must mean that the learned judge did not present the defence of the prisoner to the jury otherwise he would have stated that he had done so or had presented the defence in which he considered a sufficient form, and would have cited the form in which he did so present it. The fact that we have a case stated before us is indicative of doubt upon the part of the learned judge (if not

COURT OF APPEAL

1923

Jan. 17.

REX v. DEAL

more) and with the greatest respect to the learned trial judge, in a capital case above all other cases, there must be no room for doubt. This Court acting under sections 1018 and 1019 may direct a new trial, a power the Court of Criminal Appeal in England is not clothed with (*Charles Ellsom* (1911), 7 Cr. App. R. 4).

Then we have the case of *Allen* v. *Regem* (1911), 44 S.C.R. 331, where a new trial was granted upon the ground that that which had been improperly done may have influenced the jury and that was a case of murder, and upon a new trial the verdict was one of manslaughter. In *William Smallman* (1914), 10 Cr. App. R. 1 at p. 4, Lord Reading said:

"Once it comes to the conclusion that a wrong decision has been given during the course of the case, the Court should never allow the conviction to stand unless it comes to the conclusion that the jury would certainly have convicted even if such wrong decision had never been given."

In *Rex* v. *Kleparczuk,* 13 Alta. L.R. 212 (1918), 1 W.W.R. 695, it was held that where a trial judge errs in his statement of the evidence to the jury, and refuses to correct it although exception is taken by counsel for the accused, it cannot be said that no substantial wrong was done and consequently the conviction was set aside and a new trial ordered, and this case affords an exact parallel. In my opinion, there was clear non-direction here upon a material point; in truth it was the sole defence of the prisoner, and it was not even put to the jury. Is it possible to conjure up a case of clearer import demonstrating that "substantial wrong and miscarriage" (section 1019) occurred at the trial through the failure of the learned judge to present to the jury the evidence given by the accused on his own behalf? In my opinion there can only be one answer, and that answer is as previously stated with the resultant effect that the prisoner is entitled to a new trial.

MCPHILLIPS, J.A.

I wish to say that I am in entire agreement with the reasons for judgment of my brother MARTIN, and associate myself with all my learned brother has said in determining that the case is one for the direction that the conviction should be quashed and a new trial directed.

EBERTS, J.A.

EBERTS, J.A.: This is a case stated under 1014 of the

Criminal Code by MACDONALD, J., arising out of the conviction of one Fred Deal, on the 9th of November, 1922, for the murder of police officer McBeath. The case stated is as follows: [Already set out in statement].

Undoubtedly from all the authorities prisoner was entitled to have his defence presented to the jury by the learned trial judge, and the question is, was this done?

After the jury retired, counsel for the prisoner requested the learned trial judge to recall the jury and charge them as set out above in the case, and the learned judge refused.

It is clear that if the jury believed the prisoner's statement they could not have found him guilty of the crime of murder with which he was charged. The counsel for the Crown submitted that the learned trial judge had sufficiently presented the defence of the prisoner in his charge to the jury.

EBERTS, J.A.

I have carefully considered the charge and I am of opinion that such is not the case. Under the circumstances I would answer the above questions as follows: 1, no; 2, yes.

New trial ordered,
Macdonald, C.J.A., and Galliher, J.A., dissenting.

REX v. FITZPATRICK.

Criminal law—Receiving stolen goods—Evidence—Proof of theft and of knowledge that goods sold were those stolen—Admissibility of—Evidence of accomplice—Corroboration—Criminal Code, Sec. 400.

The accused was convicted of having received stolen goods knowing them to have been stolen. Evidence of two men was submitted that they had on separate occasions received sable and fox skins from longshoremen at the dock where the ship "Alabama Maru" was moored and through a third party had sold them to the accused. The evidence of the officers of the ship was that at Vancouver they discovered that two boxes of furs had been broken open and the contents stolen. The shipping order given the officers when the boxes of furs were shipped at Yokohama was accepted as evidence of the contents of the boxes. On appeal by way of case stated:—

COURT OF APPEAL

1923

May 3.

REX v. FITZPATRICK

Held, reversing the decision of CAYLEY, Co. J. (MARTIN and GALLIHER, JJ.A. dissenting), that it is incumbent upon the Crown to prove that the goods received by the accused were in fact stolen, and in the absence of such proof the conviction is bad even where the accused actually believed that he was receiving goods which had been stolen.

Held, further, that although shipping orders are admissible in evidence as between a person shipping goods and the owners of the vessel to prove the contents of the boxes in which the goods were alleged to have been placed, such orders are not admissible for that purpose in criminal proceedings for receiving stolen goods, and where with this evidence excluded there is no evidence of theft a conviction in such proceedings is bad.

Held, further, that the Crown must prove that the cases contained the goods which it is alleged they contained and that these goods were of the same description as those found in possession of the accused. That the cases were found open and empty does not prove that they ever contained the goods, or, if they did, that they were those stolen.

APPEAL by way of case stated from the decision of CAYLEY, Co. J. of the 13th of March, 1923, convicting the accused of receiving stolen goods knowing them to have been stolen, *i.e.*, a number of sable and fox furs, the property of the O.S.K. Steamship Company. Apart from the Japanese officers of the Alabama Maru (from which vessel the furs were alleged to have been stolen) the evidence submitted was that of two longshoremen, named Smith and Lewis. Smith's evidence was that he and one Gould went to the Great Northern dock in the first week of August, 1922, where they met a longshoreman. Next day he and Gould and the accused met at a hotel where Gould and accused had a conversation. Later in the day he and Gould went back to the dock where a longshoreman gave them 105 sable furs and 8 fox skins. On the following day the furs were sold in two lots to the accused. Witness asked accused if he knew where the furs came from and accused said he had seen it in the paper. The other witness Lewis said he met accused in August, 1922 (the theft having taken place some days before), Gould having taken him into a fur store where the accused was working in the office. Gould tried to sell furs to the accused and on a sale being arranged witness supplied the furs which he had received from a longshoreman working on the "Alabama Maru." All he knew as to the longshoreman's connection with the "Alabama Maru" was what the longshoreman told him. The evidence of the officers of the "Alabama

Statement

Maru" was that six boxes of fox skins and raw furs were shipped from Yokohama on board the "Alabama Maru" as shewn in shipping orders. While in Vancouver the officers discovered that two of the boxes had been broken open and the contents stolen. It was found by the magistrate on this evidence that the furs purchased by accused were the furs stolen from the "Alabama Maru" the property of the O.S.K. Company. The following questions were submitted by the magistrate:

"1. Was I right in admitting the shipping orders as evidence?

"2. Was there evidence on which I could find that each parcel of the furs received by the accused were portions of the identical furs contained in the two cases found in Vancouver to be broken and empty?

"3. Was there evidence on which I could find that the furs received by accused had been stolen from the 'Alabama Maru'?

"4. Was there any evidence on which I could convict the accused?

"5. Was there any evidence on which I could find that the furs received by the accused were stolen in Vancouver?

"6. If not, was it necessary under the charge as drawn, for the Crown to prove that the theft took place in Canada?

"7. Was I right in overruling the objection as to the form of charge?"

Statement

The appeal was argued at Vancouver on the 19th and 20th of March, 1923, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

A. H. MacNeill, K.C. (*Fleishman,* with him), for appellant: It is necessary to prove (1) that the furs were put on board the steamer "Alabama Maru"; (2) that the goods sold were the same as those stolen; and (3) that he knew they were stolen. The shipping orders should not be received as evidence of the contents of the boxes: see Phipson on Evidence, 6th Ed., p. 248; *Arthur Sidney Barker and William Henry Page* (1915), 11 Cr. App. R. 191. The *corpus delicti* is not shewn. It must be shewn the goods sold were those stolen. Evidence is wanting as to this: see *Rex* v. *Scheer* (1921), 34 Can. Cr. Cas. 231 at p. 238; *Rex* v. *Carswell* (1916), 29 D.L.R. 589. You must prove the goods were stolen. On corroboration the evidence of one accomplice does not corroborate that of another: see *Rex* v. *Baskerville* (1916), 2 K.B. 658; *Regina* v. *Pratt* (1865), 4 F. & F. 315; Russell on Crimes, 7th Ed., Vol. 3, p. 2291, note (*h*).

Argument

Wood, for the Crown: Under section 898 of the Code

COURT OF APPEAL

1923

May 3.

REX v. FITZPATRICK

objections to defects in the indictment should be taken at the opening of the case. The two witnesses were not accomplices; they acted independently of each other.

The circumstances in which the goods were received is sufficient proof of theft and that the accused knew: see *Rex* v. *Sbarra* (1918), 87 L.J., K.B. 1003; *Nathan Gordon* (1909), 2 Cr. App. R. 52; *Rex* v. *Ward* (1914), 24 Can. Cr. Cas. 75; *Rex* v. *Frank* (1910), 16 Can. Cr. Cas. 237. As to evidence of an accomplice not being accepted it is not a question of law but of practice. The evidence should be scrutinized with great care: see *Regina* v. *Beckwith* (1859), 8 U.C.C.P. 274 at p. 277; *Rex* v. *Dumont* (1921), 49 O.L.R. 222 at p. 230; *Rex* v. *Ratz* (1913), 21 Can. Cr. Cas. 343; *Rex* v. *Tate* (1908), 77 L.J., K.B. 1043. In any event there was some measure of corroboration: see *Reg.* v. *Cramp* (1880), 14 Cox, C.C. 390; Russell on Crimes, 7th Ed., Vol. 3, p. 2290.

Argument

MacNeill, in reply, referred to *Rex* v. *Hayes* (1923), 1 W.W.R. 209.

Cur. adv. vult.

3rd May, 1923.

MACDONALD, C.J.A.: The prisoner was convicted of receiving stolen goods, namely, furs.

In my opinion it is only necessary to answer the third question propounded in the case stated, which is as follows:

"Was there evidence on which I could find that the furs received by accused had been stolen from the 'Alabama Maru'?"

and the answer should be, No.

The evidence leaves not the slightest doubt in my mind as to the true character of the transaction into which the prisoner entered with Gould, Smith and Lewis. The prisoner thought he was buying stolen furs. All the actions of himself and the others concerned set out in the evidence makes that perfectly clear. But before a person can be convicted of the crime of receiving stolen goods knowing them to have been stolen, it is incumbent upon the Crown to shew that the goods received were, in fact, stolen, and this is where, in my opinion, the Crown has failed.

MACDONALD, C.J.A.

The evidence shews that six sealed cases were delivered by

shippers in Hong Kong to the vessel owners, for carriage to Tacoma and from there were routed to New York. Shipping orders describing the contents of these cases were delivered to the proper officer of the ship. When the ship was at her dock in Vancouver, it was discovered that two of the cases had been broken and were empty. Upon search some four or five skins were found concealed in the hold of the vessel. The Crown sought to prove the contents of the boxes by production of the shipping orders. In my opinion those documents were not admissible for that purpose. As between the shipper and the owners of the vessel, the shipping orders might be perfectly good evidence, but as against a third person they were inadmissible. It was, therefore, error to admit them, and with these excluded there is no evidence of theft. The fact that two of the cases were found open and empty does not prove that the boxes ever contained furs, or that if they did, the contents had been stolen. In my opinion, it was incumbent upon the Crown to prove the contents of the two cases in which the alleged stolen furs were supposed to have been, that is to say, whether the two cases contained furs of the description of those found on the prisoner. There is not a tittle of evidence of that kind. *Rex* v. *Sbarra* (1918), 87 L.J., K.B. 1003, is relied on as shewing that there was sufficient evidence of theft here, but if the true meaning of that judgment is that mere conjecture is sufficient, then I do not agree with it. I think, however, that the Court there must have attached some importance to the fact that the three persons indicted with the prisoner had pleaded guilty of the theft, and therefore the failure to prove the theft formally did no substantial wrong to the prisoner. The conviction should therefore be set aside and a new trial ordered.

MACDONALD, C.J.A.

MARTIN, J.A.: I agree with my brother GALLIHER that this appeal should be dismissed, and only add to his reasons the observation that I agree with the dissenting judges in *Rex* v. *Dumont* (1921), 37 Can. Cr. Cas. 166, that the question of corroboration of accomplices is one of law, and, therefore, can be reserved.

MARTIN, J.A.

I have had much difficulty in arriving at a satisfactory con-

COURT OF APPEAL

1923

May 3.

REX v. FITZPATRICK

MARTIN, J.A.

clusion, owing (I am impelled to state with all due respect) to the very unsatisfactory way in which the case has been stated, because it has not been limited, as it ought to be, to a plain statement of the facts found by the learned judge below, but has been interspersed with argumentative, hypothetical and irrelevant matter very embarrassing and entirely out of place and contrary to the expressions and warnings that this Court has repeatedly given upon this important point, which I trust will not be overlooked in future, and so avoid the expense and delay of again sending back cases for restatement, which at one time I felt strongly disposed to do herein, see *e.g., Rex* v. *Walker and Chinley* (1910), 15 B.C. 100 at pp. 103, 122-31; *Rex* v. *Davis* (1914), 19 B.C. 50 at p. 61; *Rex* v. *De Mesquito* (1915), 21 B.C. 524 at p. 526; *Rex* v. *Angelo* (1914), 19 B.C. 261 at p. 269; and *Rex* v. *Fong Soon* (1919), 26 B.C. 450 at p. 455.

GALLIHER, J.A.: This matter comes before us by way of a case stated by CAYLEY, Co. J., who found the accused Fitzpatrick guilty of receiving stolen goods, knowing them to have been stolen. Seven questions were submitted to us as follow: [already set out in statement].

To questions 1, 2, 3, 4, 5 and 7, I would answer, yes. The answer to 5 renders it unnecessary to answer 6.

As to number 1, the learned judge admitted the shipping orders as evidence only that six specially defined boxes were received by the officers of the "Alabama Maru," and stored on their ship and conveyed to Vancouver, and not as evidence that the boxes actually contained furs.

GALLIHER, J.A.

The same condition could not arise as in the case of *Arthur Sidney Barker and William Henry Page* (1915), 11 Cr. App. R. 191, where invoices were admitted as evidence of the contents of a box said to contain watches. It is quite clear, as Reading, L.C.J., says, that these invoices were clearly not admissible as evidence of the contents. In that case there was a jury, but here the trial was before a judge without a jury, and his Honour clearly instructed himself that they were not such evidence.

As to number 2: The evidence that certain of these particular boxes were broken open and furs answering the description of

some of those said to have been shipped found loose among lumber which was being loaded into the vessel at Vancouver, and the further evidence that some of the furs received by the accused answered to the same description, together with the manner in which the goods sold to the accused were obtained, and the place from which they were obtained, and the circumstances as shewn in which the accused received the goods, all point strongly to the conclusion the learned judge arrived at, and justify question No. 2 being answered in the affirmative.

In the case of *Rex* v. *Sbarra* (1918), 87 L.J., K.B. 1003 at p. 1004, Darling, J. says:

"We desire to express the law in the following terms: The circumstances in which a defendant receives goods may of themselves prove that the goods were stolen, and, further, may prove that he knew it at the time when he received them. It is not a rule of law that there must be other evidence of the theft."

GALLIHER, J.A.

The point most strongly pressed by counsel for the accused was that there was no proof that the goods were stolen, in fact, there was no attempt to argue that the defendant did not know they were stolen.

With regard to the remaining questions, except No. 4, I do not think that they call for elaboration.

As to No. 4: I doubt if that is sufficiently stated so as to raise the question of corroboration of alleged accomplices, but if it is, the trial judge below must be taken to know the law or the rule of practice by which a judge should instruct a jury that it would be unsafe to convict on the unsupported testimony of an accomplice, and to have so instructed himself.

Moreover, this evidence is not unsupported, and I find other evidence in conjunction therewith material to the issue tried.

I would uphold the conviction.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I concur in the proposed disposition of this appeal, that is, that a new trial be directed.

EBERTS, J.A.

EBERTS, J.A.: I agree that there should be a new trial.

New trial ordered,
Martin and Galliher, JJ.A. dissenting.

Solicitor for appellant: *A. H. Fleishman.*
Solicitor for respondent: *H. S. Wood.*

GREGORY, J.

1923

May 3.

LI DIN v. CHOW TOY DONG *ET AL.*

Sheriff—Execution—Costs—Man in possession—When justified — Proper charge—Storing of goods.

LI DIN v. CHOW TOY DONG

Where a sheriff makes a seizure under execution he is not entitled to incur the costs of placing a man in possession (1) where there is no danger of the property being removed as in the case of a building or land or (2) where the property can be conveniently secured by storing it.

A sheriff is not entitled to make profit out of possession money, when not personally in possession of the goods seized. In a proper case for putting a man in possession, possession money can only be charged when he is in actual possession and only for the period in which he is in actual possession. The amount charged shall not exceed the sum paid out by the sheriff in that connection and he must produce vouchers for the sums so paid out by him.

Statement

APPEAL by certain creditors from the registrar's certificate of taxation of the sheriff's costs with reference to the seizure of certain lands and goods under execution. Argued before GREGORY, J. at Chambers in Vancouver on the 2nd of May, 1923.

W. J. Baird, for the appeal.
Tobin, contra.

3rd May, 1923.

Judgment

GREGORY, J.: The fees allowed by the registrar for possession money cannot be sustained. There is nothing in the Act which justifies the sheriff when not personally in possession of goods seized making a profit on possession fees. He can only charge such possession money as he has actually paid and vouchers should be produced for such payment.

The affidavits of the deputy and under-deputy sheriff, as to their possession are most unsatisfactory, and, in view of their cross-examination, I am satisfied that neither of them was in actual possession of the goods excepting temporarily and it is also quite clear that neither of them ever expected to be paid a stipulated sum *per diem*—together covering the whole period now claimed for. The business they were engaged upon was their usual daily work and not that of keeping possession of the

goods seized. It would be a scandal in the administration of justice if the sheriff were allowed to charge the large sum of money he claims (much more than the value of the goods) as possession money. There was no danger of the building or land running away and the chattels should have been stored. See section 142 of County Courts Act, Cap. 53, R.S.B.C. 1911. It cannot be truthfully said in the present case that the chattels were "in the custody" of either of the officers named, either actual or constructive—they were far from the premises where the goods were and there was no one on the premises to represent them. The cross-examination shews beyond question that the statements of these gentlemen as to the building being locked all the time was quite untrue. Speaking generally of their affidavits they have used language from which no intelligent person could come to any other conclusion than that they were actually personally present on the premises in which the goods were stored (between them) continuously from the date of seizure to the date for which possession money is claimed. This was not the fact and they knew it and the language used cannot be justified by their interpretation of the legal meaning of the word "possession" as applied to sheriffs' proceedings.

Judgment

The possession money allowed by the registrar must be disallowed, and if the parties cannot agree as to the amount to be allowed they can apply to me again upon proper evidence to have the same fixed, or it can be referred back to the registrar if they agree.

The sheriff must pay the costs of this appeal.

COURT OF APPEAL

1923

May 3.

REX v. MILLER

REX v. MILLER.

Criminal law—Conviction—Defence of alibi—Evidence of accused—Direction to jury—That defence of alibi should be "supported by independent evidence"—Misdirection—Charge viewed as a whole—Criminal Code, Secs. 445, 446 (c), 1015 and 1019.

The defendant, with two others, was convicted of holding up the employees and robbing a bank premises during banking hours of $2,091. While the other two men entered the bank the defendant was presumed to have been holding his automobile in waiting. There was very slim evidence as to the identity of the defendant or of the car and on the trial he endeavoured to prove an *alibi* on his own evidence. On appeal objection was taken to the judge's charge that on the defence of an *alibi* the accused's evidence must be supported by independent evidence.

Held, affirming the decision of MACDONALD, J. (MCPHILLIPS, J.A. dissenting), that on the question of misdirection the Court must look at the charge to the jury as a whole and with regard to the circumstances under consideration, and where a trial judge has made use of expressions which it might be supposed would, if taken alone, lead the jury to believe that the evidence of the accused himself is not sufficient to prove an *alibi* unless it is corroborated, but a perusal of the whole charge shews that the alleged error is at the worst merely technical, and that no substantial wrong has been done to the accused, a new trial should be refused.

Per MACDONALD, C.J.A.: If the Court of Appeal is satisfied from a perusal of the evidence that the accused is guilty, a new trial should not be ordered because of alleged errors in the trial judge's charge to the jury, if such errors do not seriously prejudice the accused. The Court has a duty to society as well as to the accused, and it should not shrink from exercising the powers given by section 1019 of the Criminal Code but sustain the conviction.

Per MACDONALD, C.J.A.: Evidence given by an accused purporting to shew that he has an *alibi* is merely evidence of innocence. It is a misnomer to call it evidence of an *alibi*. A true *alibi* is proved by evidence of other persons as to accused's whereabouts at the time of the crime or by circumstances tending in the same direction.

Per MARTIN, J.A.: There may be circumstances where the evidence of an accused person alone should satisfy a jury as to the truth of his *alibi*, because there is no reason why that defence should not be established in the same way as any other now that an accused may testify on his own behalf.

Per GALLIHER, J.A.: A jury may believe the evidence of the accused himself and refuse to convict even if there is no corroborative evidence of the *alibi* but in such a case the term *alibi* is not a proper one to apply.

Statement APPEAL from the refusal of MACDONALD, J., to reserve ques-

tions of law and state a case for the opinion of the Court of Appeal and from the verdict pronounced against Clarence Miller on the 24th of October, 1922, whereby he was sentenced to five years' imprisonment for an offence against sections 445 and 446 (*c*) of the Criminal Code. The charge is in connection with the holding up and stealing of $2,091 from a branch of the Royal Bank of Canada at the corner of Commercial Drive and Napier Street, in Vancouver, at about 10:45 on the morning of the 15th of May, 1922. Harry Blackburn, Eddie Thomas and Clarence Miller were convicted. It was found that Blackburn and Thomas entered the bank and held up the staff, a third party (presumed to have been Miller) waited in an automobile outside but there was no definite evidence as to it being Miller. He gave evidence on his own behalf admitting he was with Blackburn and Thomas on that day, that on the previous evening he had motored out in his own car from the St. Regis Hotel to a house on 19th Street with Thomas; that he played cards there and became intoxicated, Blackburn also being present; that on the morning of the 15th he was awakened by Blackburn. He dressed intending to go with the others to town but when they got to the corner of Fraser and Kingsway they went to the "Bungalo," getting there about five minutes after 12 o'clock, when they indulged in more drinking until a taxi came for them, when they went back to the St. Regis Hotel. When Miller was arrested some of the money stolen from the bank was found in his clothes. The main ground of appeal was that the learned judge in his charge stated that in order to prove an *alibi* the accused's evidence must be supported by independent evidence.

Statement

The appeal was argued at Vancouver on the 2nd and 4th of April, 1923, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Ross, K.C., for appellant: There was very slender evidence to shew he was one of the three who committed the robbery. The judge must bring out all facts for and against accused on the defence of an *alibi*: see *Millichamp* (1921), 16 Cr. App. R. 83; *Thomas Finch* (1916), 12 Cr. App. R. 77; *Bundy*

Argument

COURT OF APPEAL

1923

May 3.

REX v. MILLER

(1910), 5 Cr. App. R. 270. There was substantially no evidence identifying the car: see *Chadwick* (1917), 12 Cr. App. R. 247. Nondirection may be misdirection: see *Stoddart* (1909), 2 Cr. App. R. 217 at p. 246. Assuming he was present as a driver he may have been perfectly innocent: see *Ashdown* (1916), 12 Cr. App. R. 34. Where the defence is an *alibi* the jury cannot convict unless they wholly reject the evidence: see *Rex* v. *Paris* (1922), 38 Can. Cr. Cas. 126; *Rufino* (1911), 7 Cr. App. R. 47. There was misdirection that may have confused the jury: see *Rex* v. *Smith* (1916), 23 B.C. 197. He failed to instruct the jury that each prisoner should be dealt with separately: see *Higgins* (1919), 14 Cr. App. R. 28; *Pritchard* (1913), 9 Cr. App. R. 210; *Taylor* (1921), 16 Cr. App. R. 4. He did not say what section of the Act applied to Miller: see *Rex* v. *Wong On and Wong Gow* (1904), 10 B.C. 555; *Rex* v. *Blythe* (1909), 15 Can. Cr. Cas. 224. As to dealing with criminals separately see *Rex* v. *Murray and Mahoney* (1916), 27 Can. Cr. Cas. 247; (1917), 28 Can. Cr. Cas. 247. Inference is not knowledge: see *Lund* (1921), 16 Cr. App. R. 31; *Reg.* v. *Curgenwen* (1865), 10 Cox, C.C. 152; *Peake* (1922), 17 Cr. App. R. 22. The evidence amounts to merely a suspicion: see *Reg.* v. *Winslow* (1899), 3 Can. Cr. Cas. 215; *James Bennett* (1912), 8 Cr. App. R. 10; *Rex* v. *Jagat Singh* (1915), 21 B.C. 545; 25 Can. Cr. Cas. 281 at p. 290; *Burton* (1922), 17 Cr. App. R. 5. Evidence of previous conviction was allowed to go to the jury: see *Rex* v. *Mulvihill* (1914), 19 B.C. 197; *Rex* v. *Baugh* (1916), 27 Can. Cr. Cas. 373. This should only be allowed to test the veracity of a witness. On question of suspicion again see *Rex* v. *Atlas* (1910), 16 Can. Cr. Cas. 36; *Rex* v. *Long* (1902), 5 Can. Cr. Cas. 493; *Redd* (1922), 17 Cr. App. R. 36; *Regina* v. *Gadbury* (1838), 8 Car. & P. 676. A substantial wrong has been done the prisoner: see *Allen* v. *Regem* (1911), 44 S.C.R. 331 at p. 335; *Rex* v. *Drummond* (1905), 10 Can. Cr. Cas. 340; *Reg.* v. *Theriault* (1894), 2 Can. Cr. Cas. 444; *Rex* v. *Law* (1909), 15 Can. Cr. Cas. 382.

Argument

Robert Smith, for the Crown: Lawson, who was at the "Bungalo," gave evidence in support of the *alibi.* There was

the substantial evidence that Miller had some of the bank's money on him that was lost. The jury were told that they might find one guilty and another innocent.

Ross, in reply.

Cur. adv. vult.

3rd May, 1923.

MACDONALD, C.J.A.: A perusal of the evidence convinces me that the prisoner was guilty of the crime of which he was convicted, and therefore, if the alleged errors in the judge's charge are not of such a nature as to seriously prejudice the prisoner, that is to say, if they do not amount to substantial wrong or miscarriage, there ought not to be a new trial.

The prisoner gave evidence in his own behalf and besides denying his guilt, swore that he was not at the place at which the robbery had been committed at the time of its commission, but was at another place. This is referred to by his counsel as evidence of an *alibi.*

The learned judge in his charge makes use of some expressions which, it was submitted by the prisoner's counsel, amount to a direction that the evidence of the prisoner himself tending to prove an *alibi* must be corroborated. While the language complained of was capable of being understood as a direction in the law, yet I am not sure that it was more than a caution to the jury, or a reference to the evidence of Lawson. But if treated as a direction in law, I am not prepared to say that it was error except, perhaps, in a technical sense. The evidence given by the prisoner himself in support of what was called an *alibi,* is no more than an evidence of innocence, it is a misnomer to call it evidence of *alibi.* A true *alibi* is proved by evidence of others as to the whereabouts of the prisoner at the time the crime was committed, or by circumstances tending in the same direction.

MACDONALD, C.J.A.

But even if it be conceded to be error, it will, I think, be found on a perusal of the whole charge that no substantial wrong was done to the prisoner, since the evidence together with the corroborative evidence of Lawson was called to the attention of the jury. But even apart from this, no substantial wrong could be done, having regard to the character of the

COURT OF APPEAL

1923

May 3.

REX v. MILLER

MACDONALD, C.J.A.

evidence, which was nothing more than a further denial of guilt, which uncorroborated could add nothing to previous denials.

Section 1019 of the Criminal Code is applicable where the errors are of such a nature as to not seriously prejudice the prisoner's defence. Appellate Courts should not shrink from exercising the power given by that section. The Courts have the duty of protecting not only the prisoner, but society as well, and if looking at the case as a whole no substantial wrong has been done, it is the Court's duty to up-hold the conviction.

The appeal should be dismissed.

MARTIN, J.A.: This is a motion under section 1015 of the Criminal Code, for leave to appeal from a conviction, upon an indictment for robbery with violence, at the Vancouver Assizes last October, the presiding judge having refused to state a case.

A number of grounds were argued, but I am of opinion that the only one of substance is that which relates to alleged misdirection upon the defence of an *alibi,* as to which the learned judge instructed the jury in part as follows:

"Now an *alibi* as a means of defence, if properly proved, is a full and complete defence. It means that the parties charged with a crime shew by evidence to the satisfaction of a jury that it was physically impossible for them to have committed the crime; and whose *alibi* is supported by independent evidence. For example, a party accused of a crime on a certain evening shews that on that evening he was in some other house, and the parties who were with him, who are not concerned at all or charged come and give evidence to that effect; and if the jury is satisfied it operates of course as evidence of innocence, and the result is no conviction. Here, however, that is not the case. It is only incidentally that the defence may be termed an *alibi.* It follows from the accused Thomas and Miller in giving their evidence reciting circumstances in which they say not only did they not rob this bank, were not there at that place, but were at some other place at that time. They would be bound in giving their evidence to account for their presence at the time of the alleged robbery. It is quite evident it would be a ridiculous proposition for them to come forward simply and say 'we did not rob the bank, we were not at that point on the morning of the 15th of May,' and stop there. So then you have to consider their actions as outlined by themselves. . . . ."

MARTIN, J.A.

What is particularly objected to is the statement that the *alibi* should be "supported by independent evidence." The observations of the learned judge must be viewed in the light

of the charge as a whole and with regard to the circumstances under consideration, which were that the *alibi* was a matter necessitating very precise definition, because the place where the accused said he was at the time of the crime (about 11:30 a.m. on the 15th of May, 1922) was a short distance from the scene of the crime in Vancouver and from the Bungalow road-house where he arrived in a motor-car with two other men, shortly before twelve o'clock, and telephoned to Vancouver for another motor-car which came out in about 15 minutes and took them and the witness Wetherstone into the centre of the City of Vancouver calling at 19th Avenue on the way in, where one of the men (not the appellant) got out, carrying a bag which he left there, and then rejoined the others in the car. In these circumstances of short times and distances the *alibi* would have to be exactly established, and such being the case I do not think that the observation that the *alibi* should be supported by independent evidence is substantially objectionable, bearing in mind the additional remark that it would evidently be ridiculous for the three accused to simply baldly say they were not at the scene of the crime at the time. What the whole direction on the point (despite certain unhappy and loose expressions) comes to is that in the circumstances the jury should, in the learned judge's opinion, require some evidence other than a bald statement. That there may be circumstances where the evidence of the accused alone should satisfy the jury as to an *alibi* I do not doubt, because I see no reason why this defence should not be established in the same way as any other, now that an accused may testify in support of any and all defences he may set up. And "independent evidence" would include, *e.g.*, evidence by record in the way suggested in that valuable work, Bouvier's Law Dictionary, 1897, *sub. tit. Alibi,* Vol. 1, p. 128, where it is said:

MARTIN, J.A.

"When a person, charged with a crime, proves (*se eadem die fuisse alibi*) that he was, at the time alleged, in a different place from that in which it was committed, he is said to prove an *alibi*, the effect of which is to lay a foundation for the necessary inference that he could not have committed it. See Bracton 140. This proof is usually made out by the testimony of witnesses, but it is presumed it might be made out by writings; as if the party could prove by a record, properly authenicated, that on the day or at the time in question he was in another place."

COURT OF APPEAL

1923

May 3.

REX v. MILLER

In Wills on Circumstantial Evidence, 5th Ed., pp. 230-1, that high authority observes:

"Of all kinds of exculpatory defence, that of an *alibi*, if clearly established by unsuspected testimony, is the most satisfactory and conclusive. While the foregoing considerations are more or less of an argumentative and inconclusive character, this defence, if the element of time be definitely and conclusively fixed, and the accused be shewn to have been at some other place at the time, is absolutely incompatible with, and exclusive of, the possibility of the truth of the charge. 'It must be admitted,' says Sir Michael Foster, 'that mere *alibi* evidence lieth under a great and general prejudice, and ought to be heard with uncommon caution; but if it appeareth to be founded in truth, it is the best negative evidence that can be offered: it is really positive evidence, which in the nature of things necessarily implieth a negative; and in many cases it is the only evidence an innocent man can offer.'

"It is obviously essential to the proof of an *alibi* that it should cover and account for the whole of the time of the transaction in question, or at least for so much of it as to render it impossible that the prisoner could have committed the imputed act; it is not enough that it renders his guilt improbable merely, and if the time is not exactly fixed, and the place at which the accused is alleged by the defence to have been is not far off, the question then becomes one of opposing probabilities."

Where this defence is raised, as it is under the general plea of "not guilty," the prosecution may call evidence in rebuttal: *Reg.* v. *Briggs* (1839), 2 M. & Rob. 199.

Here there was in fact some independent evidence of one Lawson upon the whereabouts of the accused that morning, though the learned judge expressed the opinion that he thought

MARTIN, J.A.

the jury would agree with him that "on the real point" it "was not material" (by which I understand him to mean not definite) *i.e.*, as to whether the three men were in the house at 19th Avenue when he, Lawson, left them there. And after perusing Lawson's evidence I am satisfied no jury could rely on it. These expressions of opinion by the learned judge (which as a matter of strict law he was entitled to make, whatever may be said as to the advisability of such a course) must be construed in the light of the fact that he had already instructed the jury that:

"You are not in any way to be governed by an opinion which you may form from any of my remarks, whether directly indicating my opinion or indirectly doing so. You are the judges of the facts, and the duty—the onerous duty, I might add, is upon your shoulders to determine, irrespective of any opinion you may form as to the trial judge's ideas of the matter or what he may say."

And he concluded the charge by saying that:

"You have been very careful in giving your attention to the evidence. From time to time you have formed conclusions as to the witnesses, and you have a right to judge as to their credibility—not only as to their credibility but as to the probability of their evidence. That is all within your purview. Let me only add in conclusion, that in any essential feature of the case, where a reasonable doubt comes into your mind you give the benefit of that doubt to any and all the accused."

As to the necessity of reviewing the judge's charge as a whole and in the light of the facts, and the onus of proof in criminal trials I refer to the recent decision of the Supreme Court of Canada in *Rex* v. *Picariello and Lassandro* (1923), 1 W.W.R. 1489 at pp. 1491, 1495, 1502, 1506.

MARTIN, J.A.

It follows that viewing the charge as a whole and applying it to the circumstances, as is our duty, I am unable to say that there has been a misdirection, and therefore, the appeal should be dismissed.

GALLIHER, J.A.: The prisoner, Miller, was convicted at the Fall Assizes in Vancouver in 1922, of robbing the Royal Bank of Canada (in company with others also convicted) of the sum of $2,091. The case was tried by MACDONALD, J., with a jury.

Counsel for Miller made application to the trial judge to reserve a case on points of law for the opinion of this Court which was refused, and counsel is now applying to us by way of appeal to direct the judge to state a case on the grounds of misdirection and non-direction in his charge to the jury.

Mr. *Ross,* counsel for the prisoner, in a clear and forcible argument presented several grounds why a case stated should be ordered, but after consideration I think there is only one of them which possesses any merit, and that is the manner in which the learned trial judge dealt with the question of *alibi* in his charge to the jury.

GALLIHER, J.A.

An *alibi* is defined in 1 Bishop's New Criminal Procedure, 4th Ed., Vol. 1, p. 669, as follows:

"An *alibi* is, in criminal evidence, the defendant's shewing, under his plea of not guilty and without special averment, that when the criminal thing was done he was at some place where he could not be the doer."

It will thus be seen that *alibi* is not an extrinsic defence but a traverse of the material averments of the indictment that the

COURT OF APPEAL

1923

May 3.

REX v. MILLER

accused did then and there the particular act charged. In our Courts and in the English Courts as well, prior to the time when the accused was permitted to give evidence on his own behalf, an *alibi* must necessarily, when set up, be proved by evidence other than that of the accused. I have been unable to find any cases, either in the English Courts or our own, or in decisions of the United States Courts, since prisoners were allowed to testify on their own behalf, by which an *alibi* was attempted to be proved or established, except by evidence corroborating the prisoner's statement as to his whereabouts at the time the crime was committed, yet, owing to the language used by the learned trial judge in addressing the jury on the question of *alibi,* it becomes necessary for us to consider whether the prisoner's own testimony (when he swears in his defence that he was at the time the crime was committed at a place where if his evidence is true he could not be at the place where and when the offence was committed) if believed by the jury is sufficient to establish an *alibi,* if in fact, such can be termed an *alibi.* The language I refer to is as follows:

"And then you come to a consideration of the other accused person, namely, Miller. It is suggested by the Crown that the defence is setting up what is termed an *alibi.* Now an *alibi* as a means of defence, if properly proved, is a full and complete defence. It means that the parties charged with a crime shew by evidence to the satisfaction of a jury that it was physically impossible for them to have committed the crime; and whose *alibi* is supported by independent evidence. For example, a party accused of a crime on a certain evening shews that on that evening he was in some other house, and the parties who were there with him, who are not concerned at all or charged come and give evidence to that effect; and if the jury is satisfied it operates of course as evidence of innocence, and the result is no conviction. Here, however, that is not the case. It is only incidentally that the defence may be termed an *alibi.* It follows from the accused Thomas and Miller in giving their evidence reciting circumstances in which they say not only did they not rob this bank, were not there at that place, but were at some other place at that time. They would be bound in giving their evidence to account for their presence at the time of the alleged robbery. It is quite evident it would be a ridiculous proposition for them to come forward simply and say 'we did not rob the bank, we were not at that point on the morning of the 15th of May,' and stop there."

GALLIHER, J.A.

Without critically analyzing this language, I think the jury might very reasonably conclude that the learned judge was instructing them that there must be independent evidence to

support an *alibi*. He then refers to the evidence of Lawson, in these words:

"There is some evidence of Lawson as to being there that morning, but for the real point—and I think you will agree with me—his evidence was not material upon the question as to whether the three men at the time when he left on the morning of the 15th were then in the house or not."

This evidence of Lawson, not originally in the appeal book was by our request furnished to the Court, and made a part of the appeal. His evidence as to Miller's whereabouts at the time the crime was committed is too indefinite and I think the learned trial judge was right in expressing his view to the jury, in effect, that that evidence was negligible. But from all this arises this situation: the jury are told the accused is attempting to prove an *alibi*, that his statement must be corroborated by independent evidence, that if they find Lawson's evidence does not corroborate, the *alibi* fails. If the jury believed the accused that he was at 19th Avenue, at the time the crime was committed instead of at the bank, they would not of course, convict, even if there was no independent evidence to corroborate his story, but in such a case the term *alibi* seems to me not the proper one to apply. The learned trial judge, instructed the jury in these words:

"I instruct you, gentlemen, that although these accused were entitled to set up what I have thus termed an *alibi* that that does not remove the burden from the Crown of satisfying you that the accused were guilty of the crime, namely, of robbery of the bank."

GALLIHER, J.A.

That was a proper instruction.

The accused starts out with the presumption of innocence in his favour and the onus is on the Crown to rebut that presumption, and prove his guilt. That onus never changes throughout no matter what defence is put up, even if it fails, and the Crown has to make out its case on the whole evidence and the accused is entitled to have the jury pass upon the whole evidence, and on the question of reasonable doubt, to consider whether the evidence adduced by the defence is such as creates in their minds a reasonable doubt as to the sufficiency of the Crown evidence, or, to put it shortly, the defence evidence must be taken in conjunction with the Crown evidence in determining whether the Crown has made out a case beyond a reasonable doubt.

COURT OF APPEAL

1923

May 3.

REX v. MILLER

The learned trial judge continues in his charge as follows:

"Shall I make that somewhat clearer? Supposing you come to the conclusion that these men were not at, say, half past 11 or a quarter to 12, at 19th Avenue, then you must direct your attention as to whether the evidence satisfies you, irrespective of that contention for the defence, that the accused were guilty of the robbery, and it comes back on your part to a consideration of where I commenced."

Considerable stress was laid upon this language by counsel for the prisoner, and particularly on the words "irrespective of that contention for the defence." After most careful consideration I have come to the conclusion that there is not error. I think the language means simply this: if you disbelieve the evidence of the defence as to their whereabouts at the time, still, your duty is not ended and you must, irrespective of that, determine whether the Crown has made out its case. If I might say so, with every respect, the explanation does not seem to me to make the principle clearer, but I am satisfied the jury would be in no way misled by it.

GALLIHER, J.A.

The further direction,—

"Let me only add in conclusion, that in any essential feature of the case, where a reasonable doubt comes into your mind you give the benefit of that doubt to any and all of the accused,"

puts the question of reasonable doubt fairly before the jury. So that on the charge as a whole, I find no error and would dismiss the appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I am of the opinion that the ends of justice require the quashing of the conviction as against the prisoner Miller, but there should be a new trial. The evidence as to the identification of the prisoner Miller is indeed scant, and this observation is even more justifiable with respect to the motor-car used at the time of the committing of the offence; in truth, there is no sufficient evidence in law of identification of the prisoner as one of the culprits that it was his motor-car or that he was seated in the motor-car when the robbery was committed and drove off with Blackburn and Thomas after the perpetration of the robbery. However, I do not proceed upon this point in arriving at my conclusion that there should be a new trial. With great respect to the learned trial judge there was error in law in the charge to the jury having relation to the defence of *alibi* advanced by the

prisoner Miller. The error consisted in instructing the jury that evidence of that character required other independent evidence to support it. I so read the charge, and I cannot, upon the reading of the whole charge, come to any other conclusion. (*Blue & Deschamps* v. *Red Mountain Railway* (1909), 78 L.J., P.C. 107).

The following is an excerpt from the charge of the learned judge to the jury:

"And then you come to a consideration of the other accused, namely, Miller. It is suggested by the Crown that the defence is setting up what is termed an *alibi*. Now an *alibi* as a means of defence if properly proved, is a full and complete defence. It means that the parties charged with a crime shew by evidence to the satisfaction of a jury that it was physically impossible for them to have committed the crime; and whose *alibi* is supported by independent evidence."

The above, in my opinion, is misdirection and substantial misdirection. In *Allen* v. *Regem* (1911), 44 S.C.R. 331, Sir Charles Fitzpatrick, C.J., at p. 337, said:

"Despite all the changes made in recent years in the procedure in criminal and *quasi*-criminal cases, the classic saying of Lord Hardwicke still holds that 'it is the greatest consequence to the law of England and to the subject that these powers of the judge and jury are kept distinct, that the judge determines the law, and the jury the fact; and if ever they come to be confounded it will prove the confusion and destruction of the law of England.'"

The jury, having been directed as they were, would unquestionably look for and require independent evidence upon the *alibi* defence and without it would find, as they did find, against the prisoner; and there was in the present case exactly that which is covered by section 1019 of the Canada Criminal Code: " . . . . something not according to law was done at the trial or some misdirection given." It is true the section provides that no conviction shall be set aside or a new trial directed—"unless in the opinion of the Court of Appeal some substantial wrong or miscarriage was thereby occasioned at the trial." There was that substantial wrong and miscarriage in the present case in my opinion. The learned Chief Justice of Canada in the *Allen* case, at p. 335, said (he is dealing with illegal evidence, in the present case the charge was, in effect, that unless there was independent evidence, other evidence than that of the prisoner, it was evidence that could not be considered, *i.e.*, illegal evidence):

COURT OF APPEAL

1923

May 3.

REX v. MILLER

"My difficulty is to say to what extent the jury, or any one of them, may have been influenced by the questions put to the prisoner on cross-examination by the Crown prosecutor. There are many reported cases in which convictions have been quashed on the ground that illegal evidence was admitted—often reluctantly, in view of the clear guilt of the accused. The law on this express point was laid down quite recently in England by the Court of Criminal Appeal in *Rex* v. *Fisher* (1910), 1 K.B. 149. Speaking for the Court, Channell, J. said: 'In the circumstances of this case we cannot come to any other conclusion but that the jury may have been influenced by the evidence of the other cases, and, therefore, although there was sufficient evidence to convict the prisoner without the evidence as to the other cases, in accordance with the rule laid down in this Court, the conviction cannot stand.'

"This case was subsequently formally approved in *Rex* v. *Ellis* (1910), 2 K.B. 746 at page 760."

Then at p. 337 the learned Chief Justice said:

"And what greater wrong can be done a prisoner than to deprive him of the benefit of a trial by a jury of his peers on a question of fact so directly relevant to the issue as the one in question here—the existence of previous threats—and to substitute therefor the decision of judges who have not heard the evidence and who have never seen the prisoner? It may well be that in our opinion sitting here in an atmosphere very different from that in which the case was tried the evidence was quite sufficient, taken in its entirety, to support the verdict, but can we say that the admittedly improper questions put by the Crown prosecutor and the answers which the prisoner apparently very reluctantly gave did not influence the jury in the conclusion they reached? We must not overlook the fact that it is the free unbiased verdict of the jury that the accused was entitled to have."

MCPHILLIPS, J.A.

And at p. 339:

"It was argued that the section of our Code, upon which the Chief Justice in the Court of Appeal relied, specially provides that the appeal shall be dismissed even where illegal evidence has been admitted, if there is otherwise sufficient legal evidence of guilt. I cannot agree that the effect of the section is to do more than, as I said before, give the judges on an appeal a discretion which they may be trusted to exercise only where the illegal evidence or other irregularities are so trivial that it may safely be assumed that the jury was not influenced by it. If there is any doubt as to this the prisoner must get the benefit of that doubt *propter favorem vitæ*."

And at p. 341:

"On the whole I am of opinion that the appeal must be allowed, the conviction quashed and a new trial directed, on the ground that important evidence, which, in the circumstances, was inadmissible, was put in by the Crown and this evidence may have influenced the verdict of the jury and caused the accused substantial wrong, and that is the opinion of the majority."

Here, in effect, the jury was told that there being no inde-

COURT OF APPEAL

1923

May 3.

REX v. MILLER

pendent evidence supporting the defence of *alibi* it would not be competent for the jury to consider that defence.

My conclusion, therefore, is as stated at the outset, that the conviction as against the prisoner Miller, should be set aside, and a new trial directed as in my opinion, substantial wrong and miscarriage took place at the trial, and it is impossible to say that the misdirection of the learned trial judge may not "have influenced the verdict of the jury and caused the accused substantial wrong": *Allen* v. *Regem, supra,* at p. 341.

EBERTS, J.A.

EBERTS, J.A. would dismiss the appeal.

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitors for appellant: *Ross & Ross.*
Solicitor for respondent: *Robert Smith.*

REX v. FUNG FANG YUK.

COURT OF APPEAL

1923

May 3.

REX v. FUNG FANG YUK

Criminal law—Unlawful possession of preparation containing opium—Evidence—Provision as to offence not applying in certain cases—Onus on accused—Can. Stats. 1911, Cap. 17; 1920, Cap. 31, Sec. 5A.

Where a charge has been laid against a person under section 5A, subsection (2)(*e*), of The Opium and Narcotic Drug Act, he having been found to be in unlawful possession of a preparation containing opium, the onus is upon him to prove that he is within the protection of the proviso in subsection (4)(*a*) of section 5A and that the preparation in question not only contains no more than two grains of opium to one ounce of the preparation but also that it contains other active medicinal drugs other than narcotic drugs.

Per MARTIN, J.A.: As the analyst deposed that the drug seized was "opium prepared for smoking" subsection (4) of section 5A of the Act relating to the necessity of the presence of a certain percentage of opium in "preparations and remedies" does not apply and the conviction should be sustained.

Statement

APPEAL by way of case stated from the decision of CAYLEY, Co. J. convicting the accused upon a charge of having opium

COURT OF APPEAL

1923

May 3.

REX v. FUNG FANG YUK

in his possession contrary to The Opium and Narcotic Drug Act. The accused, who arrived at Vancouver from China on the 28th of August, 1922, had been a resident of British Columbia and was a returning Chinaman. On the luggage being taken ashore the accused claimed his trunk for which he produced a key and on being examined by the proper officer was found to have false sides containing 21 tins of opium. When asked why he did this he tapped his head and said "no brains." When the officer was about to break the trunk, accused pointed out the screws which attached the outer frame of the trunk to the inner frame. An analyst testified that on examination of a sample of the drug he found it to contain opium and it was opium prepared for smoking. There was no evidence that accused had any licence from the minister presiding over the department of health to have the drug in his possession. The accused claimed that what was found was a preparation prepared by a Chinese doctor to cure him of the opium-smoking habit and he produced a letter written in Chinese by said Chinese doctor stating the preparation was given him for curing the desire for opium. The analyst's evidence did not disclose whether there were two grains of opium per ounce in the preparation but the magistrate held the burden was on the accused to shew it did not. The following questions were submitted for the opinion of the Court:

Statement

"(1) Was I right in refusing to dismiss the case on the ground that the charge did not disclose any offence against The Opium and Narcotic Drug Act?

"(2) Was I right in admitting the evidence of Mr. DeGraves as to the statements made to him by the accused?

"(3) Was I entitled on Mr. Dawson's evidence hereto appended to find that the tin, the contents of which were examined by him, contained opium prepared for smoking?

"(4) Was I right in holding that a Chinese doctor not registered under the Medical Act of one of the Provinces of Canada, is not a duly-authorized and practising physician within the meaning of The Opium and Narcotic Drug Act?

"(5) Was I right in holding that the onus was upon the accused to shew that the preparation in question did not contain more than two grains of opium per ounce?

"(6) Was I right in holding that the accused was guilty of having the tins said to contain opium prepared for smoking, in his possession?"

The appeal was argued at Vancouver on the 19th of March,

1923, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

COURT OF APPEAL

1923

May 3.

REX v. FUNG FANG YUK

Maitland, for appellant: Accused came back after two years in China. Under section 5A of the Act (1920), there are the offences (a) of having opium in one's possession; (b) doing certain things without a licence. There is no section giving the minister power to give a licence for having opium in one's possession. The charge is not properly made: see *Rex* v. *Shaw* (1921), 36 Can. Cr. Cas. 162. The rule is a confession must be free and voluntary: see *Rex* v. *De Mesquito* (1915), 21 B.C. 524. We are charged under subsection (2) (*e*) and (*f*), the words "prepared for smoking" appear in the interpretation clause and nowhere else. The accused's evidence as to the Chinese doctor should be accepted: see *Rex* v. *Covert* (1916), 10 Alta. L.R. 349. That the onus was on the accused as to the quantity of opium in the preparation he followed *Regina* v. *Strauss* (1897), 5 B.C. 486; see also *Regina* v. *Boscowitz* (1895), 4 B.C. 132. If we are guilty of anything it is importing.

Argument

Wood, for the Crown: Opium "prepared for smoking" could hardly be had for medicinal purposes. There was no evidence to prove whether there were more than two grains per ounce: *Rex* v. *Young* (1917), 24 B.C. 482. As to the question asked the accused by the officer see *Rex* v. *Rodney* (1918), 42 O.L.R. 645; *Ibrahim* v. *Regem* (1914), A.C. 599. If it is a voluntary statement it is sufficient.

Maitland, in reply.

Cur. adv. vult.

3rd May, 1923.

MACDONALD, C.J.A.: This was a prosecution under The Opium and Narcotic Drug Act. The accused was charged with having opium in his possession contrary to the Act. He had arrived from China and on his trunk being examined by the customs officers, several tins, which the Crown alleged contained opium, were found in the lining of his trunk. He was therefore prosecuted and convicted and the learned judge has stated a case for the opinion of this Court.

MACDONALD, C.J.A.

COURT OF APPEAL

1923

May 3.

REX v. FUNG FANG YUK

The questions are:

"(1) Was I right in refusing to dismiss the case on the ground that the charge did not disclose any offence against The Opium and Narcotic Drug Act?"

I would answer that question in the affirmative.

"(2) Was I right in admitting the evidence of Mr. DeGraves, as to the statements made to him by the accused?"

As these statements were made before the accused was put under restraint, I think they are rightly admitted in evidence, but it really does not matter since the statements are immaterial to the case.

"(3) Was I entitled on Mr. Dawson's evidence, hereto appended, to find that the tin the contents of which were examined by him, contained opium prepared for smoking?"

I would answer that question in this way: The evidence of Mr. Dawson proves that the tin contained opium but in what proportion to the other contents is not clearly shewn. The finding of the learned judge himself on that evidence is that the tin contained opium prepared for smoking, and while the words "prepared for smoking" had been dropped from the Act, yet the fact remains as found by the learned trial judge, on sufficient evidence, that the tin contained opium.

"(4) Was I right in holding that a Chinese doctor, not registered under the Medical Act of one of the Provinces of Canada, is not a duly-authorized and practising physician within the meaning of The Opium and Narcotic Drug Act?"

MACDONALD, C.J.A.

In my view of the case, this finding was immaterial, but if it were material, I think it was right.

"(5) Was I right in holding that the onus was upon the accused to shew that the preparation in question did not contain more than two grains of opium per ounce?"

This, to my mind, is the crucial question in the case. The prosecution was conducted under section 5A of the Act, subsection (2) clause (*e*) which reads as follows:

"Any person who has in his possession without lawful authority or manufactures, sells, gives away or distributes any drug without first obtaining a licence from the minister, shall be guilty of a criminal offence, and shall be liable upon indictment to imprisonment for a term not exceeding seven years."

The accused had in his possession a mixture which undoubtedly contained opium, though the number of grains of opium per ounce of the contents of the tin has not been clearly defined. He would therefore be liable to the penalty above mentioned

unless he had shewn himself to be within the protection of subsection (4) (*a*) of the said section 5A, which reads as follows:

"The provisions of section 5 and of paragraph (*e*) . . . . of this section shall not apply to the possession, sale, or distribution of preparations and remedies which do not contain more than two grains of opium . . . . in one avoirdupois ounce . . . . but every such remedy or preparation as mentioned in this section, must contain active medicinal drugs other than narcotic in sufficient proportion to confer upon the preparation or remedy valuable medicinal qualities, other than those possessed by the narcotic drugs alone."

I have not quoted the subsection in full, but only what I deem to be the material part thereof.

The question is, upon whom rested the onus of proof of this proviso or exception. The learned judge held that it rested upon the accused, and I think he was right.

The rule in cases of this kind was laid down in *Thibault* v. *Gibson* (1843), 12 M. & W. 88. The statute there under construction provided:

"That no bill of exchange, &c. nor any contract for the loan or forbearance of money above £10, shall be affected by reason of any statute or law in force for the prevention of usury; provided that nothing therein contained shall extend to the loan or forbearance of money upon security of any lands, tenements, or hereditaments."

It will be perceived that the exception or proviso was of the same character as the one in question here. The rule there adopted was that (p. 95):

"'Wherever a statute inflicts a penalty for an offence created by it, upon conviction before one or more justices of the peace, but there is an exception in the enacting clause of persons under particular circumstances, it is necessary to state in the information, that the defendant is not within any of the exceptions. And it seems immaterial whether the exception be in the same section or in a preceding Act of Parliament referred to by the enacting clause. But where the exemption is contained in a proviso in a subsequent section or Act of Parliament, it is matter of defence; and therefore it is not necessary to state in the conviction that the defendant is not within such proviso.'"

MACDONALD, C.J.A.

Now, I think that in the present case the exception is one by way of proviso, and while not in a separate section of the Act, it is in a separate subsection. Parke, B., goes on to say that—

"In all cases of exception, where it comes by way of proviso in a subsequent section, the exemption must be noticed by the party who relies on it; and I have some doubt whether the same rule does not also hold, even where the exception comes by way of proviso in the same section, although it will not be necessary to decide that point at present."

Where the section is divided into subsections, I think the

APPEAL COURT OF

1923

May 3.

REX v. FUNG FANG YUK

rule is applicable. In *Simpson* v. *Ready* (1844), 12 M. & W. 736 at p. 740, Parke, B., goes further than he did in *Thibault* v. *Gibson, supra,* and says that when the proviso occurs in a subsequent part of the same section even, it must be raised by the defence if relied on. That the exception is one by way of proviso, I think is shewn by a comparison of it with the proviso in the above case. The mere fact that a clause of this nature is called a proviso or an exception does not change its real character.

It was therefore incumbent upon the accused, if he desired to take advantage of subsection (4) to prove, not only that the preparation which he says was given to him by a Chinese doctor for the purpose of breaking him of opium smoking, contained not more than two grains of opium to the ounce of the mixture, but that it contained other active medicinal drugs other than narcotic, and this he has not done.

MACDONALD, C.J.A.

"(6) Was I right in holding that the accused was guilty of having the tins said to contain opium prepared for smoking in his possession?"

I would answer this question in the affirmative. The trunk containing the tins was unquestionably in the possession of the accused at the time of the examination of it by the customs officers, when the tins were discovered.

The conviction should be sustained.

MARTIN, J.A.: This is an appeal upon a case stated and in my opinion the conviction should be affirmed. The questions are so inartistically framed (I say so with every respect) that I refrain from attempting to answer them categorically and shall content myself by saying generally, that upon the facts as stated the offence has been established, the most substantial point is that since the analyst deposed that the drug seized was "opium prepared for smoking," then subsection (4) of section 5A of The Opium and Narcotic Drug Act, relating to the necessity of the presence of a certain percentage of opium in "preparations and remedies," does not apply to such a state of affairs.

MARTIN, J.A.

There was ample evidence to justify the finding that the opium was not "imported . . . . or had in possession . . . . for medicinal purposes" under section 10 of said Act, quite

COURT OF APPEAL

1923

May 3.

REX v. FUNG FANG YUK

apart from any admissions made to the customs officer, DeGraves, which are unnecessary to rely upon, and therefore immaterial. The expression "possession without lawful authority" in subsection (2) (*e*) means possession in any way other than that authorized by the Act, *e.g.*, by a physician giving or selling drugs under section 5 (2), or a dentist or veterinary surgeon as therein permitted.

GALLIHER, J.A.

GALLIHER, J.A.: I agree with the Chief Justice. It seems to me the crucial question is, on whom does the onus lie to prove that the mixture in the possession of the accused contained not more than two grains of opium to the ounce? The authorities cited by the Chief Justice seem to cover the point and I think the onus as found by the learned trial judge lies on the accused and was not discharged.

MCPHILLIPS, J.A.

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

EBERTS, J.A.

EBERTS, J.A.: I agree.

Appeal dismissed.

Solicitors for appellant: *Maitland & Maitland.*

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

BURGESS v. PACIFIC PROPERTIES LIMITED.

HUNTER, C.J.B.C.

1923

May 23.

BURGESS v. PACIFIC PROPERTIES LTD.

Sale of land—Agreement for—Misrepresentation—Rescission—Refund of moneys paid.

The plaintiff, who lived in the State of Ohio, on seeing the defendant's advertisement in a journal as to sale of lots at the Canadian Northern Railway's Pacific terminus known as "Port Mann," wrote the defendant asking for literature and suggestions as to what lots he should buy. The defendant answered enclosing a price list. They did not repudiate the advertisement or say anything as to "Port Mann" being a terminus. The price list contained a statement that "Port Mann" was to be a terminus and seaport of Canada's second transcontinental railway. The plaintiff entered into an agreement to purchase two lots for $14,000 which contained a clause that he relied entirely on his own knowledge of the property and not on the representations

HUNTER, C.J.B.C.

1923

May 23.

BURGESS v. PACIFIC PROPERTIES LTD.

made by the defendant or its representatives, and that the defendant was not bound by the acts of its sales solicitors or correspondents.

Held, that the statement that "Port Mann" was to be a terminus of a transcontinental railway was the chief representation that led to the contract and was false to the knowledge of the defendant, and there should be rescission of the contract and repayment of the money paid thereon.

Held, further, that the vendor's attempt to trap the purchaser into an agreement that he cannot rely on any representations made by the vendor, when he knows that he is relying on his representations, had the ear-mark of a swindle.

Statement

ACTION for rescission of an agreement for sale of land and for a refund of the moneys paid thereon on the ground of fraudulent misrepresentation. The facts are set out in the reasons for judgment. Tried by HUNTER, C.J.B.C. at Vancouver on the 23rd of May, 1923.

A. H. MacNeill, K.C., for plaintiff.
J. S. MacKay, for defendant.

Judgment

HUNTER, C.J.B.C.: This appears to me to be an undefended case. It is one of the numerous actions which have arisen in the last few years in connection with investments made by people in paper townsites which for some period of time before the war sprang up like mushrooms all over the Province.

The contract in question was brought about by correspondence, the first letter being dated May 6th, 1912, written by the plaintiff, who lives in East Liverpool, Ohio, and who had no knowledge of local conditions, and had only indefinite information as to where Port Mann was, I will not say, is. On the 6th of May he wrote a letter in which he stated he had read the advertisement of the Company in the May number of a journal entitled the "Sunset" and "The Pacific Monthly Magazine," relative to the Canadian Northern Railway's Pacific terminus known as "Port Mann." He stated he had some intention of investing but wished some literature sent and some suggestion as to what lots he should buy, and wound up by saying that if he approved of the selection he would remit one-fourth cash payment by return mail.

That letter was replied to on May 16th, which was an

acknowledgment of the letter of the 6th and the statement that the contents were noted. There is no repudiation whatever by the Pacific Properties Company of the advertisement being authorized by them or sanctioned by them, which was published in the "Sunset." One would have thought if they had not intended to recognize this they would have called Mr. Burgess's attention to the fact, that they were not endorsing it, instead of encouraging the idea that Port Mann was the terminus. I have no doubt the plaintiff did receive one of these price lists as stated by him, which has been put in as an exhibit, in accordance with the contents of this letter; the letter would be absolutely meaningless to the plaintiff unless it contained one of these price lists. It would convey no information to the plaintiff whatever as to the desirability or otherwise of purchasing these lots unless the price list was enclosed. I have therefore no doubt the price list was enclosed in the letter.

Now, I see no reason to believe that the plaintiff, living in East Liverpool, Ohio, from which Port Mann doubtless appeared to be of lunar remoteness, had nothing else to judge by except what appeared in this letter and on the price list. Of course, the chief statement in that price list, and on which a foreigner might reasonably rely, was the statement made that this place was to be the terminus and seaport of Canada's second transcontinental railway. No man in his senses would invest $14,000 in two lots in a bush townsite unless it was to be the terminus of a transcontinental railway, and the statement that it was to be the terminus was no doubt the chief representation that led to this contract. It was false, as the Company must have known, for the reason that the charter itself, as set forth in a public statute, stated that there would be two termini, one at English Bluff and one at Vancouver. I think it is cause for comment that the transaction should be followed up by the request for the plaintiff's signature to the yellow document, Exhibit 9, which is an agreement of purchase and among other things contains the following clause:

"I rely entirely upon my own knowledge of the property and not upon any representation made to me by your Company or any of your representatives, and I agree that neither your Company nor the owner is bound by the acts of its sales solicitors or correspondents, and in receiving money

HUNTER, C.J.B.C.

1923

May 23.

BURGESS v. PACIFIC PROPERTIES LTD.

under this agreement they are acting as my agents and not the agents of your Company."

It is only necessary to say that when a vendor attempts to trap the purchaser into an agreement that the purchaser can not rely on any representation made by the vendor who knows that he is relying on his representations it is the ear-mark of an audacious swindle.

With regard to the question as to the relief, it is well settled that equity does not give relief by way of rescission unless the plaintiff has shewn by his conduct that he is both prompt and eager, but the plaintiff has all along insisted on his rights and has done nothing to waive them, and he is eager to get the assistance of the Court. There has been some delay in the proceedings but it has been satisfactorily explained. It was not a case of a man waiting to see how the cat jumps because in the early period anxious enquiries were made by the plaintiff as to rumours that came through newspaper publications and otherwise, that the whole thing was not in accordance with the prospectus, that is to say, that there was no intentional delay on his part, what he wanted was to have all doubts as to these matters removed. But, far from being told the real truth, he is put off by correspondence assuring him that this was to be the terminus. In the letter of November 25th they state:

Judgment

"We have definite assurance from the officials of the road that the Company will carry out to the letter all that they have promised for Port Mann townsite."

Every explanation the defendant made was made for the purpose of assuring the plaintiff and throwing him off his guard.

There will be a decree for rescission and for the repayment of the money with interest and costs.

Judgment for plaintiff.

PIONEER LUMBER COMPANY v. ALBERTA LUMBER COMPANY.

COURT OF APPEAL

1923

April 4.

PIONEER LUMBER CO. v. ALBERTA LUMBER CO.

Practice—Court of Appeal—Motion to extend time to set down appeal—Right of counsel to read his own affidavit—Two judges refuse to sit on motion—Order subsequently made in Chambers—Appeal.

A motion by the appellant had previously been made to the Court of Appeal, when four judges were sitting, to extend the time for delivery of appeal books and for leave to set down the appeal for the then sittings of the Court. Upon objection being taken to counsel for respondent reading his own affidavit in opposition to the motion, the Court divided equally as to whether he should be allowed to do so and MARTIN and MCPHILLIPS, JJ.A. declined to take part in the hearing of the motion until other counsel appeared for the respondent. Later the Chief Justice of the Court of Appeal made an order in Chambers granting an extension of time for delivery of appeal books and for leave to set down the appeal for the sittings aforesaid. An application to the Court (five judges sitting) to set aside the order of the Chief Justice was dismissed, MARTIN and MCPHILLIPS, JJ.A. dissenting on the ground that there was no jurisdiction to make the order.

MOTION by plaintiff (respondent) to the Court of Appeal to set aside an order of MACDONALD, C.J.A. made in Chambers extending the time for delivery of the appeal books herein to the Registrar of the Court of Appeal and granting leave to set down the appeal in this case for the sittings of the Court commencing on the 6th of March, 1923. Statement

Heard at Vancouver by MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A. on the 4th of April, 1923.

Mayers, for the motion.
A. H. MacNeill, K.C., contra.

MACDONALD, C.J.A.: This is a motion to set aside a Chamber order giving leave to set down an appeal.

The question of jurisdiction of a judge in Chambers to make the order has been raised. That, I think, is fully met by section 10 of the Court of Appeal Act, which so far as is pertinent reads: MACDONALD, C.J.A.

COURT OF APPEAL

1923

April 4.

PIONEER LUMBER CO. v. ALBERTA LUMBER CO.

"In any cause or matter pending before the Court of Appeal, any direction incidental thereto not involving a decision of the appeal may be given by a single judge of the Court of Appeal in Chambers."

Until now that jurisdiction has never been questioned.

Something has been said as to the propriety of counsel appearing when his own affidavit is before the Court. It has always been recognized that on trials and appeals on the merits, it is contrary to good ethics for counsel to do this. *Wilson* v. *McLennan* (1919), 27 B.C. 262 was such a case, but on Chamber or other interlocutory motions, that notion has never prevailed, as all practicing lawyers know. The practice in this Court has been to require motions of this sort to be made to the Court if the Court be sitting, otherwise in Chambers. But this practice, which is not founded on any rule of Court, is not a stereotyped one and it may be departed from when circumstances require it. Whether the application be made in Chambers or in Court, its character is the same. The jurisdiction given to a judge in Chambers is absolute and cannot be taken away by a rule of convenience adopted by the Court. There was, therefore, no objection to counsel reading his own affidavit. The cases to which we are referred were all appeals or trials, not interlocutory motions. But even if the Court were so hypercritical as to think that the solicitor should have retained other counsel, possibly at considerable expense, yet, one would not be justified in refusing to hear him. The rule of ethics mentioned is founded on practical convenience, particularly in jury cases, when there might be fear that a jury should confuse the evidence of counsel with his argument, but there is no such danger in interlocutory motions, since judges, it is to be hoped, are too intelligent to be so confused.

MACDONALD, C.J.A.

Then it was contended that the previous motion which was made to the Court was still pending. True, two of the members of the Court professed not to be sitting while actually sitting.

But if by some fiction it be assumed that two members of the Court were absent, counsel for the applicant had, nevertheless, the right to abandon his application when he found there was no quorum to hear it, which right he exercised. He then served a new notice returnable in Chambers, which in the unhappy circumstances was the obvious course open to him.

MARTIN, J.A.: This is a motion to this Court by the respondent (plaintiff) to set aside an order made in Chambers by the Chief Justice on the 26th of March last, giving leave to the appellant (defendant) to set this appeal down for hearing at the sittings of this Court now in progress (since the 6th of March) and as the situation is without precedent in the history of appellate jurisdiction in this Province, it is essential that it should be exactly understood, and it is as follows: On the 8th of March last a motion was made to this Court by the appellant for (to quote the notice)

"an order extending the time for delivery of the appeal books to the registrar of this Honourable Court and giving leave to set down the appeal herein for the sittings of this Honourable Court beginning on Tuesday the 6th day of March . . . ."

This motion came on to be heard before the Court, then constituted by four out of the five justices thereof, and Mr. *A. H. MacNeill, K.C.,* on behalf of the appellant, submitted his argument and supported the motion by the affidavits of *John Robertson,* the appellant's solicitor, and *Francis D. Pratt,* also a solicitor. In answer to the motion Mr. *John S. Jamieson* appeared as counsel for the respondent and informed the Court that he would shew by uncontradicted statements in his own affidavit of the 6th of March that the appellant's motion should be refused, and he proceeded to read and discuss at length his said long affidavit (of six pages) and those of Messrs. *Robertson* and *Pratt,* but as he proceeded it became apparent that there was a direct and serious conflict of testimony on material points between the statements of Mr. *Jamieson* on the one hand and those of Messrs. *Robertson* and *Pratt* on the other, he, Mr. *Jamieson,* for example, twice alleging in paragraph 9 of his affidavit that what Mr. *Robertson* had sworn to was "not true" upon two separate occasions. When this stage of acute conflict of testimony was thus plainly reached, I stated that it was contrary to the long-established practice of this Court that counsel should appear before us in the dual capacity of counsel and witness, and such a course also violated the recent canon of legal ethics of the Canadian Bar Association (speaking for all Canada) upon the subject of the "duties of a barrister" in such circumstances, *viz.,* canon 3 (11):

MARTIN, J.A.

COURT OF APPEAL

1923

April 4.

"He should not appear as witness for his own client except as to merely formal matters, such as the attestation or custody of an instrument, or the like, or when it is essential to the ends of justice. If he is a necessary witness with respect to other matters, the conducting of the case should be entrusted to other counsel."

PIONEER LUMBER CO. v. ALBERTA LUMBER CO.

This canon was adopted at the annual meeting at Ottawa on the 2nd of September, 1920 (57 C.L.J. at p. 51) and was also approved for this Province by the Benchers of our Law Society on the 3rd of January, 1921. The latest decision of this Court on the matter occurred in *Wilson* v. *McLennan,* an appeal before the full bench sitting here (Vancouver) on the 15th of April, 1919, when Mr. *George E. Martin* of New Westminster, counsel for the respondent, was unanimously not allowed to address the Court because it appeared that he had been a witness below, whereupon he properly applied for an adjournment so as to instruct other counsel and the adjournment was granted, and on the 17th of April Mr. *Whiteside, K.C.,* appeared in his stead and the argument proceeded, as reported in 27 B.C. 262. Since that last enforcement of our long-established rule, no one has ventured to break it until now, and no good reason can exist for enforcing the rule against a counsel from New Westminster and relaxing it in favour of a counsel from Vancouver where we are sitting: it is, indeed, much more inconvenient to outside counsel to enforce it against them, for obivous reasons. It is both improper and offensive to forensic decorum, as well as most embarrassing to bench and bar and a violation of their solemnly adopted canons, that counsel should read his own affidavit to us and ask that it should be accepted as true as against that of the opposing solicitor whom he charges with falsehood, and I objected to the argument being continued under such repugnant and unprofessional conditions. My brother MCPHILLIPS asked Mr. *Jamieson* why he had not retained counsel as the opposing solicitor, Mr. *Robertson,* had done (in the person of Mr. *MacNeill, K.C.*) and so avoided such a regrettable situation? But no explanation was forthcoming, and as I could not be a party to lowering the standard of forensic propriety that I have been for many years instrumental in maintaining on the bench (and also adopted as a member of the Canadian Bar Association), I stated that if Mr. *Jamieson*

MARTIN, J.A.

persisted in his argument I would decline to hear him and would not take part in the hearing of the motion till another counsel should appear for the respondent. I can see no distinction whatever between the case of a counsel who is a witness because he signs and swears to an affidavit which he presents to a Court and that of the same witness who does not sign an affidavit but takes his oath and gives his evidence *viva voce* to the Court; in both cases the testimony is the same, be it written or spoken. Indeed, in perhaps the highest of our Courts (in its principles of equity) the Court of Chancery, until recently all the witnesses gave their evidence by affidavit and it is stated in Best on Evidence, 12th Ed., 102, that despite the change made by the Judicature Act, "agreement for affidavit evidence is in practice so frequently made that *viva voce* evidence is still the exception and not the rule" in that Court.

Nevertheless, a division of opinion arose upon this bench and two of my brothers, the Chief Justice and Mr. Justice GALLIHER, thought that Mr. *Jamieson* was entitled to be heard, and Mr. *Jamieson* continued his argument to them alone, despite our objections, because since my brother MCPHILLIPS and I felt that we could not possibly abandon the principle to which we were committed on this very serious question of public policy, we therefore stated that we would not take any further part in the hearing of the motion until other counsel appeared in the place of Mr. *Jamieson*. The result of this was, as we pointed out, that there was no quorum of the Court to hear the motion further, because under section 11 of the Court of Appeal Act three judges at least are necessary to "consitute a quorum," and of that quorum a majority only can give a decision, this Court being constituted upon the principle of a judicial democracy because historical experience has demonstrated that it is fully as essential to safeguard the public interest in judicial affairs from autocracy as in political ones. In the face, therefore, of an equal division of opinion as to the continued hearing of the motion, no order or direction was or could legally be made by two individual judges only of the Court; the only direction that can legally be given in the absence of a quorum is that which the Court of Appeal in England gave in *Miller* v. *Pilling*

MARTIN, J.A.

COURT OF APPEAL

1923

April 4.

(1882), 9 Q.B.D. 736, upon its constitution being objected to by counsel, *viz.*:

"*Per Curiam*: The case must stand over until three judges are present, when final judgment must be entered."

PIONEER LUMBER CO. *v.* ALBERTA LUMBER CO.

This case is even stronger because the objection to the quorum was taken by one half of the Court itself. The argument before us, therefore, perforce stood in that unfinished state till the judicial deadlock could be removed by the arrival of the fifth justice of appeal, my brother EBERTS, who had been unavoidably detained in Victoria by illness, but who did take his seat upon the bench on the 12th of March and has been in constant attendance since, but notwithstanding his presence no steps (much to my surprise) have yet been taken to resume and complete the hearing of the motion thus pending before us.

But while the motion was so pending, part heard, before this Court a notice of motion was, by leave of the Chief Justice, given *ex mero motu,* filed in the registry on the 19th of March last by the appellant's solicitor, stating that:

"An application will be made to the Chief Justice of this Honourable Court in Chambers at the Court House, Vancouver, B.C., on Wednesday, the 21st day of March, A.D. 1923, at the hour of 10.30 o'clock in the forenoon or so soon thereafter as counsel may be heard on behalf of the above-named appellants for an order extending the time for delivery of the appeal books herein to the registrar of this Honourable Court and giving leave to set down the appeal herein for the sittings of this Honourable Court beginning on Tuesday, the 6th day of March, A.D. 1923."

MARTIN, J.A.

This motion to one member of the Court in his Chambers is (it will be seen upon collation with the first quotation herein) exactly the same motion as that which was made to the Court on the 8th of March and is still pending for further argument, so there were in fact two motions of exactly the same kind to obtain one and the same object pending at the same time before this open Court and also in the Chambers of one of its members! Legally this is manifestly an impossible situation because no Court of even a higher jurisdiction could interfere with us in the exercise of our jurisdiction, much less one of our own members sitting in Chambers, *i.e.,* below us. Not even the Supreme Court of Canada or the Privy Council, who are our only judicial superiors (see *Pacific Lumber Agency* v. *Imperial Timber & Trading Co.* (1916), 23 B.C. 378) could usurp our

jurisdiction to complete our hearing of a pending motion, according to unquestionable legal principles which I discussed at length in *The Leonor* (1916), 3 P. Cas. 91; (1917), 1 W.W.R. 861, to which I refer. If we make a wrong order or wrongly refuse to make any order, our action may in general be reviewed by a higher Court, but while a matter before us is still *sub judice* no person except Parliament can lawfully interfere with us. This is so elementary that it ought to be unnecessary even to be required to state it. The well-known illustration of the illegality and impropriety of a judge in Chambers, even of the Supreme Court of Canada, seeking to interfere with a judgment of a superior Court is in *re Robert Evan Sproule* (1886), 12 S.C.R. 140, wherein Mr. Justice Henry undertook in Chambers, at Ottawa, to review, by way of *habeas corpus* the judgment of the old Full Court of this Province affirming a conviction for murder. The Chief Justice of Canada said (pp. 201-2) that to permit such a thing to be done would be to allow the administration of criminal justice to be "paralyzed" by a judge in Chambers, and that if such a thing were premitted there was no reason why a single judge "should not go behind the record, and by extrinsic evidence, pronounce the proceedings without jurisdiction." Mr. Justice Strong (p. 204) referred to the "anomalous character of such an interference with the due course of justice," whereby "the judgment of a Court of competent jurisdiction" was "intercepted" and "reduced to a dead letter"; and Mr. Justice Taschereau (p. 242) concurred and said that the proceeding of their brother in Chambers was a "complete nullity" and pointed out (p. 248):

MARTIN, J.A.

> "[The] serious consequences [that] would follow the exercise of the power, if it existed, by a single judge sitting in chambers to assume the functions of a Court of error and review the decisions of the superior Courts of the country even on a question of jurisdiction."

In the result the order of Mr. Justice Henry was quashed.

What has been done in the present case by our brother in Chambers is even more serious than what was done in *Sproule's* case, because he has ventured to interfere with our proceedings before we have completed the hearing of the matter before us. With all possible respect such a usurpation of our jurisdiction

COURT OF APPEAL

1923

April 4.

PIONEER LUMBER CO. v. ALBERTA LUMBER CO.

can neither be justified nor sanctioned. It would obviously be a dangerous thing if in a case one of the members of this bench was unable to obtain the necessary majority of his brothers upon this bench to support his view of what order should be made, that nevertheless he could enforce his view by making himself alone, in his own Chambers, off the bench, that order that he wished unsuccessfully to have the Court pronounce. I conceive it to be my clear and bounden duty to firmly oppose in the public interest any such unwarranted proceeding "behind the record" which would "paralyze" the administration of justice by this Court, to apply the Chief Justice of Canada's expression above cited, and I must respectfully decline to be in any way a party to surrendering any of the principles which should guide us or the powers which have been conferred by Parliament upon this Court as a whole, and not upon any one of its members, in order to safeguard the rights and interests of its litigants and the public at large and those safeguards would be destroyed if its deliberations or decisions were to be usurped or controlled by any one of its members. It would be, in truth, a calamity if the independence of this Court could be sapped by such proceedings, and it was to prevent such consequences that this Court was democratically constituted by Parliament with five members and a quorum as aforesaid, and a majority of its members alone can decide upon the action to be taken in any and every case. It follows, therefore, that upon this ground of total lack of jurisdiction, the order of the Chief Justice complained of must be quashed as a complete nullity which should have been ignored by this Court (if we had not been moved to set it aside) as being merely a "thing of naught which could not be disobeyed"—*McLeod* v. *Noble* (1897), 28 Ont. 528; 24 A.R. 459.

MARTIN, J.A.

And the said order should also be quashed on another ground, *viz.*, that while this Court is sitting it alone has control over its own list and no one of its members has the power to direct that an appeal should be entered and added to. This view of the law has been repeatedly laid down by the Court and in so doing it has followed the practice of the old Full Court as to which I can speak from nearly 25 years' judicial experience. To

attempt now to overturn such an unbroken course of decisions and practice is to attempt a revolution in the procedure of this Court, and I feel it my duty to protest against it to the utmost extent consistent with respect because no authority whatever can be cited in defence of it.

By way of precaution I add that I do not wish it to be understood that I think any member of this Court has the power at any time to give leave to enter appeals to this Court, because I have always been of opinion that only this Court could or should deal with so grave a matter, and I have never known such an order to be made except by this Court. So far from there being any recent relaxation of the Court over its own list, the contrary is the case, as is shewn by the fact that on the 30th of June last, at Victoria, we, in open Court, unanimously announced the rule that in future appeals in criminal cases would not be allowed to be added to the list without the leave of the Court, changing our practice in that respect to meet the increasing number of appeals of that description, which theretofore had been entered at any time without leave.

The order being null and void on these two grounds, it can have no legal effect upon the original motion which has been pending before us since the 8th of March last and is still standing for further argument, and no obstacle has existed for several weeks to prevent the hearing of that motion being completed before us, and I note that the order complained of recites that Mr. *Mayers* appeared, on the 26th of March, before the Chief Justice in his Chambers, for the respondent in the place of Mr. *Jamieson* (as he did before us on the present motion) and so as forensic proprieties were then at last observed all obstacles respecting counsel then likewise disappeared and quite apart from any question of jurisdiction it became apparent to our brother in Chambers that our objections to the completion of the hearing in Court had disappeared, and so, with all respect, he should, in any event, have refrained from further interfering with this Court's jurisdiction which gave it exclusive cognizance of the unfinished motion. The case of *Koosen* v. *Rose* (1897), 76 L.T. 145, is much in point, and in it the Court of Appeal decided that a judge of the High Court sitting as the Court had

MARTIN, J.A.

COURT OF APPEAL

1923

April 4.

PIONEER LUMBER CO. v. ALBERTA LUMBER CO.

no power to interfere with an order made by a judge of the same Court sitting in Chambers, Lord Esher, the Master of the Rolls, saying (p. 146):

"Now, one judge cannot interfere with an order of another judge of co-ordinate jurisdiction, unless that power has been given by some statute."

And still less can one judge in Chambers interfere with five judges sitting in Court, as has been regrettably attempted here, in the absence of any statute conferring such power.

MARTIN, J.A.

The result of the whole matter is, in my opinion, that the motion to set aside the order complained of is allowed with costs and the hearing of the original motion should be resumed and completed in this Court in the usual way and without further unnecessary delay.

GALLIHER, J.A.

GALLIHER, J.A.: At the close of the hearing of this motion, I stated that I would dismiss same and hand down written reasons later, but have so far omitted to do so. However, owing to some references in the reasons for judgment of my brother MARTIN handed in, I feel that I ought to advance some reasons why I took the course I did on the application before us.

The matter, as I view it, was a very simple one: A motion was made to the Court composed of the Chief Justice, Justices MARTIN, MCPHILLIPS and myself, for an order to extend the time for setting down the appeal, and the argument had not proceeded very far when it became apparent that there was a difference of opinion between the solicitors for the respective parties, as to who was responsible for the delay in settling the appeal book. There was no question of the *bona fides* of the intention to appeal, and the notice of appeal had been given within the proper time.

Mr. *Jamieson,* who appeared as counsel for one of the parties, and who was, I think, the solicitor on the record, proceeded to read his own affidavit, which was in contradiction of some assertions made by the other side, when my brothers MARTIN and MCPHILLIPS intimated that he should procure other counsel to argue the motion. Mr. *Jamieson* did not accede to this suggestion, and it became necessary for the Court to express some opinion on the matter. The Chief Justice and

myself intimated that we would hear Mr. *Jamieson,* my brothers MARTIN and MCPHILLIPS stating that they would take no further part in the argument and moved their seats back out of alignment.

My reasons for not refusing to hear Mr. *Jamieson* were that even if he was offending against the rule of ethics, which I did not think should apply in the application before us, which in no way determined the rights of the parties which were being litigated, or the merits in the cause such as in cases at trial or in appeal, I doubted my right to refuse to hear him if he persisted. While in cases at trial or in appeal where the merits and rights of the parties are being considered, I am in absolute sympathy and accord with the resolution of the Canadian Bar Association in respect to this rule, and in such a case it would seem to me that it would only be necessary to mention it to have counsel accede to it, as was done in the hearing of the appeal in *Wilson* v. *McLennan* (1919), 27 B.C. 262, referred to by my brother MARTIN, but to carry it into all applications in Chambers or motions of the nature of the one made to us, which, as I before stated, did not touch the merits in the action, is, in my humble opinion, going too far and imposing on the already overburdened litigant a further burden.

From that point of view, I did not consider, and I do not now consider, that I was in any way lowering the standard of forensic propriety that should be maintained on the bench, in consenting to hear Mr. *Jamieson.*

GALLIHER, J.A.

With regard to the power of the Chief Justice to hear such an application, I think there can be no doubt; that is given by the rules.

It is quite true that this Court has requested counsel to bring applications of this kind before them while sitting, and with that I am in complete accord, and have adjourned applications made to me into Court on more than one occasion. There are times, however, when (and I regret to say this was one of them) it would seem wise to relax the rule of practice the Court may have adopted. That influenced me strongly in supporting the course the Chief Justice adopted.

As I understand the matter, Mr. *MacNeill* abandoned his

COURT OF APPEAL

1923

April 4.

motion to the Court and made a fresh application to the Chief Justice, as suggested by him. In the circumstances of this case I think it is entirely a misnomer to designate the act of the Chief Justice as a usurpation of the powers of the Court.

PIONEER LUMBER CO. *v.* ALBERTA LUMBER CO.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: With great respect to all contrary opinion, I am of the same opinion as my brother MARTIN, and I may say that there are two grounds, insuperable in their nature, preventing this order being made, one being that this Court promulgated a rule that no application should be made to other than the Court itself, once the Court assembled, and was seized with the list of appeals. I, as a member of this Court could not ignore that rule. The only way that rule could be abrogated would be by its being abrogated by the Court and that has not been done, therefore, all I can do is to carry out the rule. That is one of the insuperable obstacles.

Secondly, when Mr. *Jamieson* persisted in proceeding to argue the matter, he then was proceeding in defiance of a decision not only given once, but given several times by this Court, and enforced, that no counsel could be heard in an argument in any appeal or motion before the Court where he had been a witness or had made statements under oath which were being used.

I remember distinctly a case in which Mr. *Martin* of New Westminster was counsel in an appeal before this Court, the point was taken, and Mr. *Martin* withdrew, the appeal standing for other counsel to be instructed and other counsel appearing the obstacle was removed—the appeal was then only proceeded with.

Now these are the two insuperable obstacles to anything being done other than that the motion should, if proceeded with at all, be proceeded with before this Court, and it has been pointed out by my brother MARTIN that the opportunity to do that has existed for some three weeks as other counsel was briefed and the situation cured. It can only be that, through inadvertence, a situation of *per incuriam* has arisen as the order made, with great respect, is a nullity.

As far as this motion is concerned, I would accede to it with-

out prejudice to the motion for leave to appeal and set down the same being renewed and continued in this Court. As being made to this Court, and properly so, it was incompetent to proceed in Chambers and the order there made is nugatory.

Let me say, in the most pronounced terms that, holding as I do that the matter is one which can only be dealt with by the Court of Appeal itself, it in no way retards the wheels of justice; the interests of justice are conserved by compliance with the rules. It would appear that when the application made in Chambers was opened, other counsel had been briefed and attended on behalf of the respondents, therefore, the obstacle that had arisen in the Court of Appeal was swept away and nothing prevented the motion being proceeded with before the Court of Appeal. With great respect, the proper and plain course to have been adopted was the continuance of the pending motion before the Court of Appeal, the only possible course in any case.

EBERTS, J.A. (oral): The Chief Justice in Chambers after adjournment made an order granting leave to the appellant to set down his appeal for this Court. His order is now before the Court by way of a motion to discharge same. I am of opinion the order should stand and am guided by the case of *Gold* v. *Evans* (1920), 29 B.C. 81, that as no substantial wrong would be done, relief as asked for should be granted. I would dismiss the motion.

Motion dismissed,
Martin and McPhillips, JJ.A. dissenting.

COURT OF APPEAL

1923

May 3.

REX v. LIDDINGTON.

Criminal law—Abduction—Girl voluntarily leaves her home against her father's will—Evidence—Inducement—Criminal Code, Sec. 315.

REX *v.* LIDDINGTON

Where a girl under sixteen years of age leaves her father's house against his will, but leaves only for a temporary purpose intending to return home again and during such absence she is induced by an accused to change her mind and go away with him, he may be guilty of abduction within the meaning of section 315 of the Criminal Code.

Statement

APPEAL by way of case stated from the conviction of the accused by CAYLEY, Co. J. on the 20th of February, 1923, on a charge of abduction under section 315 of the Criminal Code. The facts as found by the trial judge were that the girl in question, who was 14 years old, and lived with her father in North Vancouver, wanted to go to a party at the Liddingtons' house on Sunday evening, the 7th of January, 1923. Her father refused her leave to go as it was Sunday. After her father was in bed she went across the road to a Mrs. Hildur (a sister of accused) and told her she could not go to the party. She then went home but could not get in as the door was locked in her absence. She tried to get in through a window which resulted in her breaking a glass and one of her sisters then told her she would get into trouble with her father, so she then went back to Mrs. Hildur's but not finding her at home went to the Liddingtons' house where Mrs. Hildur had gone. It was then about 9 p.m. After spending the evening there she went back to Mrs. Hildur's house with Mrs. Hildur and the accused. Up to this time there was no suggestion that accused had taken any part in the girl's movements. Being afraid to go home she told Mrs. Hildur she was going to Mrs. Griffin's where she was working, to spend the night. She left Mrs. Hildur at about one o'clock intending to go to Mrs. Griffin's and the accused accompanied her. They went to Mrs. Griffin's house but she did not go in. From this point the only evidence is that of the accused and the girl, and their stories differ except that they walked about until 6 o'clock in the morning when they

took the ferry for Vancouver. The girl said accused persuaded her to take the ferry and took her to his three-roomed flat on Main Street, Vancouver, where they were alone, but she said there was no improper conduct on the part of the accused. On the following evening they went to New Westminster where they went to The Savoy rooming-house. He registered as "Mr. Gale and S. Gale." The evidence of the girl was that he first got one room but on her objecting to this he got two. The rooms were adjoining. They spent the night there but he did not molest her in any way. On Tuesday accused went back to North Vancouver where he found the girl's father and the police were looking for her, but he did not give them any information. Accused said he accompanied the girl merely to protect her. The following question was reserved for the Court of Appeal:

Statement

"Was I right on the above facts in finding accused guilty of abduction under section 315 of the Criminal Code?"

The appeal was argued at Vancouver on the 19th and 20th of March, 1923, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Arnold, for accused: On the evidence there is no abduction. If she is once away from home and then is induced to go away the section does not apply. Imperial statute (24 & 25 Vict.), Cap. 100, Sec. 55, is the same as 315 (1) of our Act. The evidence is there was no improper conduct and it was so found: see *Reg.* v. *Christian Olifier* (1866), 10 Cox, C.C. 402; *Reg.* v. *Miller* (1876), 13 Cox, C.C. 179; *Reg.* v. *Henkers* (1886), 16 Cox, C.C. 257. It must be shewn he took some active step to induce her to leave home: see *Rex* v. *James Jarvis* (1903), 20 Cox, C.C. 249. The girl on her own volition left her home to go to a party against her father's will: see *Rex* v. *Kauffman* (1904), 68 J.P. 189; *Rex* v. *Alexander* (1912), 23 Cox, C.C. 138; *Rex* v. *Weinstein* (1916), 26 Can. Cr. Cas. 50. The only point found against the accused was that he induced her not to go to Mrs. Griffin's. If her going away was voluntary there is no offence: see *Regina* v. *Handley* (1859), 1 F. & F. 648.

Argument

Wood, for the Crown: Subsection (2) of section 315 is not in the English Act so that the cases referred to do not apply.

COURT OF APPEAL

1923

May 3.

REX v. LIDDINGTON

Argument

If she intended to return home she is still in the custody of her father: see *Reg.* v. *Mycock* (1871), 12 Cox, C.C. 28; *The Queen* v. *Manktelow* (1853), 22 L.J., M.C. 114. Even if at the girl's suggestion it comes within the section see *Rex* v. *Meyers* (1915), 24 Can. Cr. Cas. 120; *Reg.* v. *Robert Miller* (1850), 4 Cox, C.C. 166. The section applies where the girl is not living with the father: see *Rex* v. *Holmes* (1909), 14 O.W.R. 419; *The Queen* v. *Mondelet* (1877), 21 L.C.J. 154; see also *Rex* v. *Yorkema* (1910), 21 O.L.R. 193; *Regina* v. *Robb* (1864), 4 F. & F. 59: The cases cited are all considered in *Regina* v. *Blythe* (1895), 4 B.C. 276.

Arnold, in reply: The distinction here is that the girl left her father's house against his will.

Cur. adv. vult.

3rd May, 1923.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I concur in the conclusion and agree with the reasons of Mr. Justice GALLIHER.

MARTIN, J.A.

MARTIN, J.A.: This is a case stated by the learned senior County Court judge of Vancouver upon a conviction of the appellant for the abduction of a girl under sixteen "out of the possession and against the will of her father" contrary to section 315 of the Criminal Code.

By the facts stated, it appears that the parties concerned lived in North Vancouver and the girl had asked her father's leave to go to a party at the house of the appellant's parents and he had refused, and that after he had gone to bed about 9 o'clock she went across the road to tell the appellant's sister, Mrs. Hildur, that she could not go to the party and then returned to her own home but found the door locked, and after trying to get in by the window, and breaking the glass in the attempt, she desisted out of fear of getting into trouble with her father and went to the Liddingtons' house to the party, after which, between 12 and 1 a.m. she went to Mrs. Hildur's and then started to go, accompanied by the appellant, to Mrs. Griffin's house where she had been working, in order to stay the night there and return to her father's in the morning. But owing to the persuasion of the appellant she changed her intention and

did not go to the Griffin house but stayed out with him all night walking about and took the 6 a.m. ferry to Vancouver and that same (Monday) evening went with him to New Westminster and stayed there till the police came on Wednesday when she returned to her father. It is due to the appellant to say that they occupied separate rooms and no charge of improper conduct is made against him. He was in North Vancouver on Tuesday and knew that her father and the police were looking for her but did not tell them where she was. It is not so found, nor do I gather from the facts stated that it was the intention of her father to lock his daughter out that night, if he had done so, that might well have put a different aspect on the matter. I have considered the authorities that were cited to us and many others. The leading case is unquestionably *Reg.* v. *Christian Olifier* (1866), 10 Cox, C.C. 402, which has been often followed in England and elsewhere, *e.g.,* by the Ontario Court of Appeal in *Rex* v. *Yorkema* (1910), 21 O.L.R. 193, and by the Full Court of Victoria (Australia) in *Rex* v. *Mackney* (1903), 29 V.L.R. 22. It was said by the Court of Appeal in *Reg.* v. *William Hilbert* (1869), 11 Cox, C.C. 246, that "the essence of the offence was the taking the girl out of the possession of her father." In *Olifier's* case, Baron Bramwell said (p. 404):

"I am of opinion that if a young woman leaves her father's house without any persuasion, inducement, or blandishment held out to her by a man, so that she has got fairly away from home, and then goes to him, although it may be his moral duty to return her to her parents' custody, yet his not doing so is no infringement of this Act of Parliament, for the Act does not say he shall restore her, but only that he shall not take her away. It is, however, equally clear that, if the girl, acting under his persuasion, leaves her father's house, although he is not present at the moment, yet, if he avails himself of that leaving which took place at his persuasion, that would be taking her out of the father's possession, because the persuasion would be the motive cause of her leaving. Again, although she may not leave at the appointed time, and although he may not wish that she should have left at that particular time, yet if, finding she has left, he avails himself of that to induce her to continue away from her father's custody, in my judgment, he is also guilty, if his persuasion operated on her mind so as to induce her to leave."

MARTIN, J.A.

On the facts before us it is impossible, I think, to say that the girl "got fairly away from home and then [went] to" the accused. She had no intention of leaving her home; on the

COURT OF APPEAL

1923

May 3.

REX v. LIDDINGTON

contrary, she wished to return to it in the morning; indeed she would have doubtless returned after the party had the door not been locked. In such case I think the observation of Willes, J., in *Reg.* v. *Mycock* (1871), 12 Cox, C.C. 28 at p. 30 is in point, thus:

> "The girl was, also, just as much in the possession of her father when she was walking in the street, unless she had given up the intention of returning home, as if she had actually been in her father's house when taken off."

In that case, I find upon careful examination, the only inference to be drawn from the facts is that though the girl met, the accused by appointment, it was only to walk with him as usual and that he persuaded her to enter a railway station and go with him to Manchester where they stayed two days and then she returned to her father's house. I think that in general, the reasons given by Magee, J.A. in *Rex* v. *Yorkema, supra,* are applicable to this case and I adopt them.

MARTIN, J.A.

The question reserved should, I think, despite the able presentation of the appellant's case by Mr. *Arnold,* be answered in the affirmative and the appeal dismissed.

GALLIHER, J.A.: In my opinion, on the facts found here, there can be no doubt that the learned trial judge came to the right conclusion, and I would answer the question submitted to us in the affirmative. The cases cited by Mr. *Arnold,* counsel for the accused, are clearly distinguishable. The facts as found in the case stated are shortly these:

On the 7th of January, 1923, the girl asked leave of her father with whom she was living, to spend the evening at the Liddington house, where the accused was staying. Her father refused leave to go to the party as it was Sunday. After the father retired the girl went over to a Mrs. Hildur (a sister of the accused) who lives across the road from the girl, Gladys Lander, to tell her she could not go to the party, and returned home to find the door locked. She then, after trying to get in, went back to Mrs. Hildur's but finding her not at home, went on to the Liddingtons and spent the evening there, returning to Mrs. Hildur's with Mrs. Hildur and the accused.

GALLIHER, J.A.

She told them she was afraid to go home and that she was going to a Mrs. Griffin's, where she worked during the day, to spend the night. This was between 12 and 1 o'clock at night. She left, and the accused went with her.

The learned judge also refers in the case stated to the fact that a boy named Ferguson, Mrs. Hildur and the accused all swore that the girl left to spend the night with Mrs. Griffin, and finds that when she left Mrs. Hildur's house she was not running away from home, but left the house for a mere temporary purpose, intending to return home again. In such finding he was amply justified. He further finds that the story told by the girl about their subsequent movements, is true. It is shortly to this effect: That they went to Mrs. Griffin's house but did not go in; that the accused persuaded her to take the West Vancouver ferry for Vancouver, after walking about all night until 6 o'clock in the morning. On reaching Vancouver, they went to a flat the accused had on Main Street. The same evening the accused took her to a rooming-house in New Westminster, called "The Savoy," where he hired one room, but on her objecting to this arrangement, he hired another room communicating. They spent the night there but the girl says he did not molest her at any time. The accused admits he registered at The Savoy as Mr. Gale and S. Gale. The accused left New Westminster the next morning and went to North Vancouver, where all parties lived, and though he knew the police and father were looking for the girl, he did not inform them of her whereabouts. The New Westminster police found her on Wednesday and returned her to her father. The girl also swore that he wanted her to go to Seattle.

The learned judge finds that when they left Mrs. Hildur's door together, it was the intention of the girl to go to Mrs. Griffin's, and that the accused changed her intention and upon the case as stated, I am in entire accord with that view.

It seems to me beyond question that when the girl left for Mrs. Griffin's she intended only to remain for the night and return home next day and that the blandishments of the accused caused her to change her mind. Under the circumstances, in the legal sense, she was never out of the possession of her father

COURT OF APPEAL

1923

May 3.

REX v. LIDDINGTON

and she was taken out of such possession against his will, he then having lawful charge of her.

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

EBERTS, J.A. would dismiss the appeal.

Appeal dismissed.

YOUNG, CO.J.

1923

April 23.

REX v. BOWLES

REX *EX REL.* CARR v. BOWLES.

Criminal law—Complaint under Game Act — Dismissed — Appeal — Notice served after expiration of statutory period—Evidence of defendant's knowledge of appeal and evasion of service—B.C. Stats. 1918, Cap. 87, Sec. 3; 1914, Cap. 33.

Where an appeal has been taken from the dismissal of a complaint under the Game Act and service of the notice of appeal was one day late, if the evidence discloses that every endeavour had been made to serve the accused in time, the failure to do so having arisen through his deliberate and successful efforts to evade service, he will be held to have dispensed with a strict compliance with provisions as to service in the Summary Convictions Act.

Statement

APPEAL by the informant from the dismissal by G. B. Robb, J.P. at Burns Lake, B.C., on the 17th of February, 1923, of a charge under the Game Act of buying the skins of beaver caught during close season. At the close of the hearing the Court intimated that the appeal would be allowed subject to a reservation on the question of service of the notice of appeal it appearing that the notice was not served on the defendant until the day following the expiration of ten days from the decision appealed from within which time notice of appeal must be served under section 3 of the Summary Convictions Act Amendment Act, 1918. The defendant was not represented and did not appear on the hearing of the appeal.

L. S. McGill, for appellant: The evidence shews respondent had knowledge that an appeal had been taken and there was deliberate action on his part to evade service. The cases shew that in such circumstances service on the following day should be held as sufficient: see *Rex* v. *Reader, Rex* v. *Thompson* (1922), 31 B.C. 417; *Wills & Sons* v. *McSherry* (1913), 1 K.B. 20; *Rex* v. *Trottier* (1913), 22 Can. Cr. Cas. 102; *Rex* v. *McKay* (1913), 21 Can. Cr. Cas. 211; *Rex* v. *Kamak* (1920), 34 Can. Cr. Cas. 126; *Kowalenko* v. *Lewis and Lepine* (1921), 35 Can. Cr. Cas. 224; *Lamson* v. *District Court Judge* (1921), 36 Can. Cr. Cas. 326.

Argument

23rd April, 1923.

YOUNG, Co. J.: On the 17th of February, 1923, G. B. Robb, a justice of the peace at Burns Lake, B.C., dismissed the charge brought on the complaint of police constable Percival Carr, appellant, against John A. Bowles, respondent, for having dealt in beaver skins contrary to the Game Act. This is an appeal against such dismissal.

The appeal was argued at Smithers on the 19th and 20th of April, 1923, in pursuance of the notice of appeal. The appellant was not present nor was he represented. Section 76 (*b*) of the Summary Convictions Act, B.C. Stats. 1915, Cap. 59, as amended by B.C. Stats. 1918, Cap. 87, Sec. 3, requires notice of appeal to be served on the respondent "within ten days after the conviction."

Judgment

In this case the order of dismissal of the charge was made by the justice hearing the case on February 17th. The time for serving the above notice of appeal would expire on February 27th, but the notice was not served on the respondent until the 28th of February. All other requirements under the statute governing such appeals were complied with. The question to be determined is: Is such service on the respondent sufficient?

The evidence relating to the attempts to serve the respondent with the notice of appeal, follows. [The learned judge set out the evidence and continued.]

After the appeal was once launched everything possible was done to serve the respondent with the notice of appeal but it

YOUNG, CO.J.

1923

April 23.

REX
v.
BOWLES

was impossible to do so, because, I am satisfied, that he intentionally and deliberately evaded such service and apparently thought that he had been successful, as evidenced by his sudden appearance before the constable at Burns Lake on the 28th of February, the date he was served, informing him that he had received advice that the notice of appeal must be served on him by midnight the 27th of February.

The facts in this case, in my opinion, clearly distinguish it from the cases of *Rex* v. *Reader* [(1922), 31 B.C. 417]; 38 Can. Cr. Cas. 202, and unless it was intended by that case to decide that a strict compliance with a rule or statute in reference to the service of the notice of appeal is necessary under any and all circumstances, and I take it that such was not the intent, then the respondent, by his conduct, has, in my opinion, dispensed with such strict compliance. The appeal is allowed.

Judgment

On the evidence submitted to me I find the said John A. Bowles, respondent, guilty of the offence as charged and I condemn him to a fine of $50 and costs to be paid forthwith to the clerk of the peace or the registrar of the Court at Smithers, B.C., and in default of payment to two months' imprisonment at Okalla Prison Farm, with hard labour.

Appeal allowed.

HALL v. LANE. (No. 2).

COURT OF APPEAL

1923

May 3.

HALL v. LANE

Costs—Appeal from judgment of County Court—Leave granted by judge below under section 119 of County Courts Act—Supreme Court scale —R.S.B.C. 1911, Cap. 53, Secs. 116, 117, 119 and 122.

Where the County Court judge grants leave to appeal in pursuance of section 119 of the County Courts Act, the appeal is outside sections 116 and 117, it being expressed to be "an appeal in any cause or matter in which an appeal is not now allowed." It does not therefore come within subsections (1) or (2) of section 122 (GALLIHER, J.A. dissenting).

The costs of such an appeal under section 119 are governed by section 122 exclusive of subsections (1) and (2) thereof; they follow the event, are taxed upon the Supreme Court scale and the successful party is entitled to the costs on that scale (GALLIHER, J.A. dissenting).

MOTION by defendant to review the taxation by the registrar of the appellant's costs of appeal in this action (see 31 B.C. 507). The appeal was taken under special leave of the learned judge below under section 119 of the County Courts Act, the amount involved being $44 in an interpleader issue. Statement

The motion was heard at Vancouver on the 21st of March, 1923, by MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

A. Leighton, for the motion: Leave to appeal is granted under section 119 but I submit it should be read with 117, and comes within the restrictions of subsection (1) of section 122. The amount involved was only $44. It is only by resorting to section 119 that the greater costs can be recovered, and even then it would not exceed $100.

Mayers, contra: The action was clearly on the question of law and fact (see judgments (1923), 31 B.C. 507). An important point had to be settled. Leave to appeal is not an order: see *Lane* v. *Esdaile* (1891), A.C. 210. There is no limit by section 122 upon section 119, and this is clearly within section 119 and not 117. Argument

Cur. adv. vult.

COURT OF APPEAL

1923

May 3.

HALL v. LANE

3rd May, 1923.

MACDONALD, C.J.A.: Section 116 of the County Courts Act gives an appeal as of right in the several matters therein enumerated, and section 122, subsection (2) provides how the costs are to be taxed. This case does not fall within section 116, nor within section 117, although the proceedings are interpleader proceedings, because the appeal is not upon a point of law, or upon the omission or rejection of evidence.

The appeal in this case was upon mixed questions of law and fact. We, therefore, have to look to section 119 for the right of appeal, and I think the costs of an appeal under that section are governed by section 122, exclusive of the subsections thereof, which provides that the costs shall follow the event and be taxed upon the Supreme Court scale. The appeal given by section 119 is expressed to be an appeal in a matter in which an appeal is not now allowed; that is to say, outside sections 116 and 117, and therefore cannot come within the subsections of section 122. To my mind there is nothing anomalous about this. It was intended to give an appeal only when the facts or law apart from the sum involved were of such a special nature as to call for review by the higher Court. Such an appeal can only be taken by leave of the judge or the Court of Appeal. The Legislature evidently depended on the good sense of the Court or judge to see that leave should not be granted unless the circumstances justified it; that is to say, when questions involved were of such importance as to justify an appeal with its attendant risk of the full costs.

MACDONALD, C.J.A.

The successful party in the appeal is, therefore, entitled to costs on that scale.

MARTIN, J.A.: In the County Court below a final judgment was given in favour of the plaintiff (respondent) for $44, but upon appeal we reversed that judgment in favour of the defendant (appellant), which appeal involved the determination by us, as it did below, of questions of both law and fact, as appears by our judgment reported in (1923), [31 B.C. 507]; 1 W.W. R. 545.

MARTIN, J.A.

In such circumstances, the amount claimed being below $100

(see section 116 of the County Courts Act) the appeal lay only because the learned judge below gave leave under section 119, since under section 117 (in cases of less than $100) an appeal lies "in point of law" only; and, therefore, section 117 has no application to the question of costs now before us. Section 122 is invoked by the respondent to set aside the taxation herein, but in my opinion it, as applied to special appeals under section 119, simply declares the usual rule that costs shall follow the event and be taxed on the Supreme Court scale, etc., and its first and second subsections are restricted in application to the general classes of appeals therein specified. The result may be that a larger sum can be taxed in special appeals under section 119 than in general appeals under sections 116-7, but I see no injustice in that because the whole object of section 119 is that appeals of a specially important nature involving, as here, *e.g.*, large amounts as a consequence of their adjudication (a species of test case in fact) should for that reason receive special consideration, and so why should they not carry a special obligation for the costs necessarily incurred thereby? I find myself unable to give effect to the submission of the respondent's counsel that these special provisions of section 119 should be interwoven with general rules in other sections, and therefore the motion should be dismissed.

MARTIN, J.A.

GALLIHER, J.A.: This is an application to review the taxation of the registrar of the appellant's costs of appeal in the above action. The appeal was from the judgment of the County Court judge at Nanaimo, in an interpleader action, the amount involved being $44, and was allowed by this Court. The registrar taxed the costs according to the scale in force in the Supreme Court under section 122 of the County Courts Act, which reads as follows:

GALLIHER, J.A.

"122. The costs of and consequent upon such appeals shall follow the event of the appeal, and shall, subject to the provisions contained in subsections (1), (2), and (3) hereof, be charged and taxed according to the scale in force from time to time in the Supreme Court; and in all cases in which no provision is made in the said scale for work done the same shall be charged for in accordance with similar work in the said scale:

"(1) In appeals under section 117, or in appeals from interlocutory judgments, orders, or decrees, the costs of such appeal shall not be allowed upon taxation at a greater sum than fifty dollars:

COURT OF APPEAL

1923

May 3.

HALL v. LANE

"(2) In appeals under section 116, where the plaintiff shall claim a sum of, or a counterclaim shall be set up of, one hundred dollars or over, but not exceeding two hundred and fifty dollars, or the value of the subject-matter shall equal or exceed one hundred dollars, but shall not exceed two hundred and fifty dollars, the costs of such appeal shall not be allowed upon taxation at a greater sum than one hundred dollars:

"(3) The taxing officer, in adjusting the costs of an appeal, may, at the instance of any party, and without any request, inquire into any prolixity, and order the costs occasioned by such prolixity to be borne by the party chargeable with the same."

The application was first made to me in Chambers, but I thought the matter of sufficient importance to adjourn it into Court in order that the judges who had heard the appeal and who were then sitting, might deal with it.

Sections 116, 117, 119 and 122 of the County Courts Act have to be considered. Section 122 I have set out above. Section 116, as far as is necessary, is as follows:

"An appeal shall lie to the Court of Appeal from all judgments, orders, or decrees, whether final or interlocutory, of the County Court or a judge; (*d.*) in interpleader . . . . proceedings, when the subject-matter shall equal or exceed one hundred dollars."

This appeal is given as of right and the costs taxable upon such appeal, shall, under section 122 (2), not be allowed upon taxation at a greater sum than $100, where the subject-matter does not exceed $250. By section 117 in interpleader proceedings, where the subject-matter is less than $100, the party dissatisfied with the judgment may appeal to the Court of Appeal as of right upon a point of law or upon the admission or rejection of any evidence, and under section 122 (1), the costs of appeal are limited to $50. So far no appeal lies as of right in interpleader proceedings where the subject-matter is less than $100, except as limited in section 117. Then comes section 119, which is as follows:

GALLIHER, J.A.

"With the leave of the judge of the County Court appealed from, or of the Court of Appeal, an appeal to the Court of Appeal shall lie in respect of any action, cause, or matter in which an appeal is not now allowed, if the judge or Court of Appeal shall think it reasonable and proper that such appeal should be allowed; and in respect of any such appeal the said Court of Appeal shall have and may exercise the jurisdiction and powers mentioned in section 116 hereof."

As both questions of law and fact were argued before us on the appeal, I think we must find that this appeal does not come under section 117, and leave to appeal was asked for and granted by the learned judge below.

Section 122 limits the costs of appeal under section 117, and in appeals from interlocutory judgments, orders or decrees, and also by (subsection (2)) in appeals under section 116. There is a further subsection (3) which has no bearing on this application.

To summarize there is in interpleader proceedings an appeal as of right where the subject-matter is equal to or exceeds $100. There is also in the like proceedings an appeal as of right upon a point of law or the admission or rejection of evidence where the subject-matter is less than $100, and costs are limited to $50. And lastly, an appeal by leave of the County Court judge appealed from (as here), where an appeal did not otherwise lie. Section 122 makes no specific mention of costs where the appeal is, by virtue of section 119 and unless it comes within the exceptions, (1), (2) or (3) of 122, it must come within the general words, "according to the scale in force," etc. Clearly, it does not come within (1), as I have held the appeal was not under section 117, and it is a final order. Equally, it does not come within (3). The question then is: Does it come within (2)?

Mr. *Leighton,* for the application, urged that sections 119 and 116 should be read together and if I understand his submission aright, it is to this effect, that while section 116 gives no appeal as of right where the subject-matter is less than $100 in value, an appeal does lie when leave is obtained under section 119, and the costs in such a case should be governed by the provisions in section 122 (2), and points out that no matter how important the questions to be dealt with in an appeal under 116 (*d*) may be, the costs cannot be taxed at a greater sum than $100; where the subject-matter is of the value of $100 and not greater than $250, and yet where the subject-matter is less than $100 in a similar proceeding (such as here interpleader) where no more important matters are to be dealt with and leave is granted under section 119, the costs have been taxed on the Supreme Court scale amounting to over $400. This certainly does not seem right. It can be said, of course, that 119 provides a right of appeal irrespective of 116, but where we find 116 dealing with a specific class of cases of which this is one, and

GALLIHER, J.A.

COURT OF APPEAL

1923

May 3.

HALL v. LANE

GALLIHER, J.A.

restricting the right and a general section following under which by complying with a condition precedent (*viz.*, obtaining leave) that restriction is removed, it seems to me we should read these sections together and so doing, I think the costs should be regulated by subsection (2) of 122.

I just wish to add that should I be wrong in this conclusion, what has developed here emphasizes the necessity for amending legislation and the exercise of the greatest care in granting leave, this latter speaking generally.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I am in agreement with the judgment given by my brother, the Chief Justice.

EBERTS, J.A.

EBERTS, J.A. would dismiss the motion.

Motion dismissed, Galliher, J.A. dissenting.

HUNTER, C.J.B.C.

1923

May 16.

ORCHARDSON v. THE DOMINION BANK.

Banks and banking — Company in debt to bank — Bank desires further security—Hypothecation of bonds by third person as security—Misrepresentation by debtor—Liability of bank.

ORCHARDSON v. THE DOMINION BANK

If A causes B to get C, a stranger, to transfer his property to A which both A and B believe to be for their own advantage and B induces C to do so by means of fraudulent misrepresentations, A is not in equity a holder in good faith and is in no better position than B.

A company being indebted to the defendant Bank, the secretary thereof on demand of an official of the Bank procured from the plaintiff an hypothecation of certain bonds and powers of attorney in respect thereof to the Bank. In an action to recover the value of the bonds:—

Held, that plaintiff was entitled to succeed on the grounds (1) that her execution of the documents was obtained by the fraudulent misrepresentations of the secretary of the company for which the Bank could not escape responsibility, and (2) the wording of the hypothecation was not sufficient to effect the purpose intended.

Statement

ACTION to recover the value of certain bonds registered in the plaintiff's name which she had hypothecated to the defendant

Bank. The facts are set out fully in the reasons for judgment. Tried by HUNTER, C.J.B.C. at Vancouver on the 20th of March, 1923.

Wilson, K.C., and *C. J. White,* for plaintiff.
Tiffin, and *A. Alexander,* for defendant.

16th May, 1923.

HUNTER, C.J.B.C.: This action is brought by Dora Orchardson, wife of Thomas Orchardson, to recover the value of certain bonds registered in her own name, which had been hypothecated by her to the defendant Bank. She had also signed powers of attorney which enabled the Bank to convert them to its own use.

The argument for the plaintiff was on two grounds, namely, fraud in procuring her signature to the hypothecation and powers of attorney, and that in any event upon the true construction of the hypothecation, no money had been lent to her or at her request.

The main facts are not in dispute, and the only question is as to the proper conclusion.

In 1916 the plaintiff's husband bought the bonds for her with her money and had them registered in her name, and, with her consent, deposited them for safe-keeping in the vault of Griffin & Co., then a trading partnership, but which afterwards became a limited company, of which he was vice-president. It is not disputed that he had no beneficial interest in the bonds, but he was in the habit of collecting the interest and depositing it to her account in another bank. She never had any dealing with the defendant Bank; had no interest in the Company; knew nothing of its business affairs, and in fact, had no knowledge whatever of commercial business. In December, 1919, without her knowledge or consent, one White, the secretary of the company, had taken the bonds out of the vault and deposited them as security for an advance from the Bank to the company, but they were shortly afterwards restored. White was not at the trial, and, so far as the evidence shews, the Bank made no inquiry as to his right to do so, at any rate not from Mrs. Orchardson. On the 30th of March, 1920, without her

Judgment

HUNTER, C.J.B.C.

1923

May 16.

ORCHARDSON v. THE DOMINION BANK

knowledge or consent, they were again deposited by White as security, and the Bank gave him a receipt. On April 7th, her husband being absent in California, the assistant manager of the Bank, J. H. Irving, who was in charge at the time, informed White that the security would have to be perfected, otherwise the Bank would not give any further assistance. On March 30th, according to the Bank's figures, there were direct advances amounting to $31,336.55, and outstanding letters of credit to the extent of $105,156.85, leaving an estimated margin of security of $11,844.19. On April 7th, this margin had fallen to $8,166.52, and was slightly lower on the following day, so that it had fallen over $3,000 during the week and was still falling at the time of the hypothecation. The plaintiff's bonds were of the face value of $2,550, and had been deposited by White for the company as security together with bearer bonds to the face value of $1,000, so that the bonds covered the drop in the margin. Irving, who within 30 days previous to this had been transferred from Toronto to Vancouver, admits that the company's account was discussed in the head office before he left, and there can be no doubt that, owing to the panicky fluctuations in prices the company was in a precarious position, and in fact, it shortly afterwards became bankrupt with a loss to the Bank of upwards of $20,000. On April 7th, Irving handed White the hypothecation and powers of attorney, which he required, drawn up ready for signature, and White returned the next day with the documents executed by the plaintiff. No inquiry was made by Irving, or so far as he knew by any other official of the bank, of Mrs. Orchardson, or any communication had with her of any kind, although she could have been reached by telephone. White was told to bring in the documents signed, or there would be no further aid. While as stated, White did not give evidence, yet it is plain enough that he was afraid of the company failing and losing his place. At any rate, he telephoned the plaintiff and informed her that the matter was urgent, and in answer to her query as to what it was, said he could not tell her over the telephone, whereupon she came to his office at once. He rushed the affair. She says, and I have no reason to doubt it, as she gave her evidence in a simple and

Judgment

straightforward way, that he told her the Bank wanted more security and asked her to put up her bonds. She replied that she wanted to write or telegraph her husband, to which White said there would not be time. He assured her that it would only be for a short time, as on the former occasion. She had on a former occasion consented to a temporary deposit of a small amount but did not execute any documents. She asked if he was sure, saying that it was all the money she had in the world and that she did not want to lose it. He again assured her that it was only for a short time (two or three days) and that she would get back her bonds. On his offering to explain the documents she told him it would be useless as she would not be able to understand them. When he told her it would only be for a short time this won her over, as it had been so on the previous occasion. Whereupon she signed them without reading them or knowing the full effect of her action. But on this occasion there was both the *suppressio veri* and the *suggestio falsi,* as White knew the company was in jeopardy and that it would have a hard time to pull through, and there is no doubt that if the real situation had been disclosed to her she would not have signed the documents, or at any rate until after consulting her husband. That there was a real risk was evidently known to the husband as well as to White and the Bank, as she says in cross-examination, that when she told him what she had done, he said "I had rather you had waited until I came home, I wish you had not done it," which was a week or so after she had signed. In fact, I think a jury would have been warranted in finding that insolvency was impending to the knowledge of both White and the Bank. The first coupons due after she signed, namely, on May 1st and June 1st, were handed to White by the Bank, but thereafter the interest was applied on the company's overdraft, because, according to Irving, "the account assumed a completely different aspect from our point of view" and subsequently the bonds were disposed of by the Bank.

Judgment

Such being the circumstances, if White ought to be regarded as agent of the Bank for the purpose of procuring the hypothecation the case comes within the decision in *Barwick* v. *English*

HUNTER, C.J.B.C.
1923
May 16.

ORCHARDSON v. THE DOMINION BANK

Joint Stock Bank (1867), L.R. 2 Ex. 259, explained and confirmed in *Lloyd* v. *Grace, Smith & Co.* (1912), A.C. 716, and the plaintiff would have a remedy at common law. White was the instrument selected by the Bank to procure the execution of the documents which were prepared by the Bank, and White procured the execution by fraudulent misrepresentations. It is questionable if he was not the Bank's agent *pro hac.* An invitation to do an act which if refused will probably result in material loss to the person invited to do it, to the knowledge of the other person, may, in the particular circumstances amount to a command and therefore, if acted on, would be sufficient in law to create the relation of principal and agent. But even assuming he cannot be correctly described as the Bank's agent, and that it is doubtful if the plaintiff would have any remedy at common law, it seems plain enough in equity. Equity is not anxious about definitions and words, neither has it ever undertaken to define fraud as used in its widest sense, for the simple reason that new phases of fraud are constantly arising, but all kinds of unfair dealing and unconscionable conduct in matters of contract come within its ken.

Judgment

Judged by its initial act the Bank is not *rectus in curia.* It did not do what any prudent business man would naturally have done. It took the bonds without making any inquiry either from White as to his authority to deal with them, or from the registered owner, who could have been communicated with at once either by letter or telephone. By this I do not mean to imply that the Bank would be bound in every case at its peril to inquire into the authority of a person bringing in bonds registered in another's name. For instance, if White had brought in bonds registered in the name of a director or leading shareholder of the company, known by the Bank to be such, it would not necessarily follow that the Bank by not making any inquiry would be chargeable with negligent ignorance, or with not acting in good faith. It would depend in each case on the circumstances. But in this case the Bank had no valid reason to suppose that Mrs. Orchardson was not an utter stranger to the company. The fact that she was the wife of an officer of the company is of course irrelevant, and the fact that on a

former occasion the bonds had been taken from White without any inquiry as to his authority, not only does not justify the second omission, but suggests that it had determined to refrain from any inquiry. At any rate, it remained heedless as far as she was concerned. The security was the only object of its solicitude. Its local officers had been charged to use pressure on the debtor. They prepared the documents. They knew the company was in danger of insolvency. They knew that the man whom they told to get them signed knew it, and that he would exert every effort to save the company and himself. Consequently, having moved him to get the signatures, the documents in their hands were affected by any equity which the plaintiff had in respect of misrepresentations by which he induced her to sign. It seems to me that if A causes B to get C, a stranger, to transfer his property to A which both A and B believe to be for their own advantage, and B induces C to do so by means of fraudulent misrepresentations, A is not in equity a holder in good faith and is in no better position than B.

On the second ground also, I think the plaintiff is entitled to succeed. The so called hypothecation is a printed form, containing a clotted mass of verbiage, which one can readily believe she never would have understood if she had read it. No doubt it is intended to bind the signatory to make good specified loans to himself or others, but there is no mention made of any party primarily liable, nor does the name of the company nor the amount or the nature of its indebtedness appear in the blank provided for that purpose. So far as the document itself is concerned, the Bank might equally claim the right to use the bonds to make good the debt of anyone else. Consequently, if operative at all, it must be to make good any loan made to herself, or at her request, and there is no evidence of any such, nor could there be as she had no business relations of any kind with the Bank. It of course follows, that the powers of attorney being ancillary to the hypothecation, are equally futile.

Judgment

For these reasons I think the plaintiff should have judgment for the amount of the bonds from the time of their deposit, together with the accrued interest thereon less what she has already received.

Judgment for plaintiff.

MURPHY, J. (At Chambers)

1923

May 26.

MONTREAL TRUST CO. v. SOUTH SHORE LUMBER CO.

MONTREAL TRUST COMPANY v. SOUTH SHORE LUMBER COMPANY.

Taxes—Dominion and Provincial—Income and personal property—Bonds pledged to bank—Priority—B.C. Stats. 1917, Cap. 62, Sec. 13.

Certain bonds of the defendant Company were pledged to the Royal Bank of Canada in 1915. The Bank acted as the Company's bankers continuously from that time, but the indebtedness for which the Bank claimed a first charge against the bonds began in October, 1919. The Province claimed priority for taxes that accrued due in 1920, 1921 and 1922.

Held, that the Crown, in right of the Province, has a lien for such taxes in priority to the claim of the Royal Bank by virtue of section 13 of the Taxation Act Amendment Act, 1917.

Held, further, that the Crown, in right of the Dominion, has a lien for business-profits tax in priority to that of the Bank for advances made subsequent to the date when such business-profits tax accrued due.

The Queen v. *Bank of Nova Scotia* (1885), 11 S.C.R. 1 and *Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick* (1892), 61 L.J., P.C. 75 followed.

Statement

APPEALS by the Crown (Dominion) and the Crown (Provincial) to vary the registrar's certificate, dated the 3rd of May, 1923, in so far as it gave priority to the Royal Bank, the holders of debentures of the defendant Company over the claim of the Dominion Government for business-profits tax for the year 1919, and the Provincial Government for personal-property tax for the years 1920, 1921 and 1922. Argued before MURPHY, J. at Chambers in Vancouver on the 17th of May, 1923.

Creagh, for Dominion Government.
Killam, for Provincial Government.
Alfred Bull, for the Royal Bank of Canada.

26th May, 1923.

Judgment

MURPHY, J.: Dealing first with the question of priority claimed by the Crown in right of the Province, I am of opinion that all taxes as herein in question, whether calculated on amount of income or of personal property, are, in deciding the case at bar, to be dealt with as being taxes levied on personal

property. This I think follows from the language used in sections 11 and 55 of the Taxation Act, Cap. 222, R.S.B.C. 1911. I am further of the opinion that the Crown, in right of the Province, has a lien herein for such taxes in priority to the claim of the Royal Bank by virtue of section 13 of the Taxation Act Amendment Act, 1917. I agree that section is not retroactive; that hypothecation of the bonds is equivalent to the issue thereof, and that by virtue of subsection (3) of section 105 of the Companies Act, 1921, bonds are not to be deemed to be paid off merely because the account to which they were collateral came into credit. The facts here are that the bonds were pledged to the Bank in 1915 and have been held by it ever since. The Bank has acted as the Company's bankers from the date of such pledge up to the initiation of these proceedings, but the indebtedness for which the Bank claims priority began only in October, 1919, two years after the passing of the said section 13. The taxes for which the Province is claiming accrued due in 1920, 1921 and 1922. It is argued that because of the foregoing proposition of law, *i.e.*, that the bonds must be regarded as issued to the Bank as of the date of hypothecation, no inquiry into the true state of the account between the Bank and the Company can be made but that the debt now due the Bank must be taken as being a charge created in 1915, and therefore said section 13 has no operation. As everyone is taken to know the law, express notice of the provisions of said section 13 must be imputed to the Bank. The proposition, on its behalf, therefore, comes to this that although the Bank at the time it actually made the advances for which it now claims had full knowledge that the Province would have a prior lien for all taxes accruing thereafter, yet because the debentures were in the Bank's possession, as of a date prior to the legislation creating such lien, the Bank could ignore such legislation. Whatever might be the Bank's position under this state of facts, had the debt for which priority is claimed been secured by a charge created by the Company of which the Bank had express notice when it made the actual advances, I cannot see how the Bank is entitled to assert priority against a statutory lien created by the Legislature in favour of

Judgment

MURPHY, J. (At Chambers)

1923

May 26.

MONTREAL TRUST CO. v. SOUTH SHORE LUMBER CO.

Judgment

the Crown. In my opinion, the reasoning in *West* v. *Williams* (1898), 68 L.J., Ch. 127, is cogent and applicable to the case at bar. I, therefore, hold that the Crown, in right of the Province, has a prior lien as claimed. For the same reasons I hold that the Crown, in right of the Dominion, has a lien for business-profits tax, in priority to that of the Bank, for advances made subsequent to the date when such business-profits tax accrued due. It is true the Dominion legislation does not in so many words give the Crown priority, but I think it is entitled to such by virtue of the decisions in *The Queen* v. *Bank of Nova Scotia* (1885), 11 S.C.R. 1, and *Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick* (1892), 61 L.J., P.C. 75.

Appeals allowed.

COURT OF APPEAL

1923

June 5.

JACKMAN v. JACKMAN

JACKMAN v. JACKMAN.

Husband and wife—Separation—Maintenance—"Deserted or destitute"—Deserted Wives' Maintenance Act, B.C. Stats. 1919, Cap. 19, Secs. 2 and 4.

On appeal from the order of a police magistrate for the payment of maintenance under section 4 of the Deserted Wives' Maintenance Act, if the Court is of the opinion that there was evidence upon which he might be satisfied that the wife is "deserted or destitute" within the meaning of said section, his decision is conclusive.

Rex v. *Nat Bell Liquors, Ld.* (1922), 2 A.C. 128 followed.

Per MARTIN, JA.: On the question of what is "desertion" in general, in its latest aspect see *Pulford* v. *Pulford* (1922), 67 Sol. Jo. 170.

Statement

APPEAL by defendant from an order of MURPHY, J. of the 29th of January, 1923, dismissing an application for a writ of prohibition prohibiting the police magistrate at Victoria from enforcing an order whereby the defendant was ordered to pay the plaintiff $7.50 per week under section 4 of the Deserted Wives' Maintenance Act. The plaintiff and the defendant who were man and wife had both been previously

married, the husband having had two children by his first marriage and the wife six. They were married in 1902 and had two children, a girl of 19 years and a boy of 17, at the time of this action. The husband was a labouring man who earned about $95 a month. The wife, in 1909, had left her husband on account of his bad temper, and treatment to a step-daughter. In June, 1922, she left him again. In December following she attempted a reconciliation but the husband refused to take her back unless her stepson apologized for using threatening language to him. The husband appeared to be sober and industrious. He never struck his wife but he had fits of violent temper, when he used abusive language. He gave up smoking in order to relieve his wife from having to do her own washing, and supplied the family with food, but the wife complained of his penuriousness and that he did not supply sufficient money for clothing. The wife had a house and lot of her own, from which she received a small but irregular income.

Statement

The appeal was argued at Vancouver on the 6th of March, 1923, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Aikman, for appellant: Section 2 of the Act gives a definition of "deserted wife." There were ten children and they were all grown up and working. As to what constitutes cruelty see *Evans* v. *Evans* (1790), 1 Hag. Cons. 35 at p. 38; *Russell* v. *Russell* (1897), A.C. 395 at p. 468. There was no cruelty as alleged; and secondly, she has property of her own yielding $32 a month less taxes. This is sufficient for a woman in her station in life: see *Gatehouse* v. *Gatehouse* (1867), L.R. 1 P. & D. 331 at p. 332.

Higgins, K.C., for respondent: The charge is non-support and abuse. Although not striking his wife he used very abusive language, which constitutes cruelty. He admits he did not pay the doctor's bills and he expected his daughter, who had curveture of the spine, to work. He did not want her back because she had no more money.

Argument

Aikman, in reply.

Cur. adv. vult.

COURT OF APPEAL

1923

June 5.

JACKMAN v. JACKMAN

5th June, 1923.

MACDONALD, C.J.A.: I concur in the judgment of Mr. Justice GALLIHER.

MARTIN, J.A.: After carefully scrutinizing the testimony of all the witnesses before the police magistrate, I am of opinion that there was evidence upon which he might be "satisfied . . . that the wife is deserted or destitute within the meaning of this Act" (section 4), and therefore he had jurisdiction to make the order for maintenance by the husband, because where there is evidence his decision is conclusive: see *Brown* v. *Cocking* (1868), L.R. 3 Q.B. 672; and *Rex* v. *Nat Bell Liquors, Ld.* (1922), 2 A.C. 128; (1922), 2 W.W.R. 30. It follows that the order of Mr. Justice MURPHY refusing prohibition to the magistrate should be affirmed, and the appeal dismissed.

MARTIN, J.A.

On the question of what is "desertion" in general, in its latest aspect, I refer to *Pulford* v. *Pulford* (1922), 67 Sol. Jo. 170.

GALLIHER, J.A.: This is one of the unfortunate cases of unhappy marriage relations, more or less due to there being stepchildren of both parties. The husband seems to be a sober, industrious man, but given to fits of violent temper, but no one accuses him of physical cruelty. No doubt it is very unpleasant to have the frequent quarrels that seem to have been rife in this household and strong language may have been used, which is a species of cruelty in itself. It is quite apparent that the husband and wife have quite different ideas as to how the children should be brought up, and I think the root of the trouble lies there.

GALLIHER, J.A.

The wife left the husband on at least one occasion prior to the last, but returned again, but apparently, except for short periods, not much improvement resulted. On the final occasion of leaving, as I gather from the evidence, it was due principally to the father's coolness to his daughter. When he returned from his work he found they had gone, taking their belongings with them. The father is a hard working labouring man, not earning too much, and his views are in such circumstances that the members of the family should work as well. He may not,

and probably did not, keep them as well clothed as they would wish, and I doubt if he is the only exception in that regard. I would not have said, upon the evidence, that there was sufficient justification for the wife leaving on this last occasion, and while I do not think that wives should be encouraged in leaving their husbands for insufficient cause, and offering to come back when it suited their convenience to do so, yet, as I understand it, the law is that if the wife offers to come back *bona fide,* as would seem to be the case here, the husband cannot refuse to take her back except upon a condition which she cannot control. I would deduce this from what was said by Spragge, C. in *Edwards* v. *Edwards* (1873), 20 Gr. 392.

GALLIHER, J.A.

The appeal should be dismissed.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: This appeal, in my opinion, must be dismissed. The question is essentially one of fact, and I cannot say that there was no evidence upon which the Court below could find that there had been conduct by the husband which entitled the wife to leave him, and live apart from him, and entitling an order being made in the way of maintenance in pursuance of the provisions of the statute. The conduct in some respects of the husband was admirable, such, for instance, as the giving up of tobacco to admit of money being available to cover laundry work, and thus saving the wife this labour, but there was other inconsiderate conduct that had elements of cruelty. Upon the whole, I do not consider that it is a case where there can be a disaffirmance of the judgment under appeal. The requirement that the stepson, who took the part of his mother as against his stepfather, should apologize for the threatening words uttered by him against the stepfather and failing that being done the wife would not be allowed to return to the home, was an unreasonable condition.

I would dismiss the appeal.

Appeal dismissed.

Solicitors for appellant: *Aikman & Shaw.*
Solicitor for respondent: *Frank Higgins.*

COURT OF APPEAL

1923

June 5.

IN RE WINDING-UP ACT AND GIBSON MINING CO.

IN RE WINDING-UP ACT AND GIBSON MINING COMPANY LIMITED.

Winding-up—Creditors' claims—Disallowed—Appeal—Right of—Notice—Extension granted after expiration of statutory period—Leave to proceed under Bankruptcy Act—R.S.C. 1906, Cap. 144, Secs. 73, 101 and 104—Can. Stats. 1920, Cap. 34, Sec. 2.

There is the right of appeal under section 101 (*c*) of the Winding-up Act from an order in winding-up proceedings setting aside a previous order confirming the disallowance of the respondent's claim (which was in excess of $500) to be a creditor of the estate.

The time for appeal from an order as aforesaid which by section 104 of the said Act must be taken within fourteen days "or within such further time as the Court or judge appealed from allows" may be extended by the Court although the fourteen days have already expired.

Under section 2 (*o*) of the Bankruptcy Act, as re-enacted by Can. Stats. 1920, Cap. 34, Sec. 2, leave of the Bankruptcy Court is not necessary to the continuance of winding-up proceedings commenced before said Act came into force.

M. filed a claim as a creditor in winding-up proceedings of a company, but before adjudication he assigned his claim to B. M., who claimed to be attorney in fact for B., was represented by a solicitor on the record who before final adjudication in the matter gave notice that he would no longer act but no change was made on the record. M. appeared at the hearing before the registrar when there was an adjournment and at the following hearing when neither M. nor his solicitor was present the claim was adjudicated upon by the registrar and disallowed. Subsequently on motion, notice of which was served on M.'s solicitor, the registrar's report was confirmed by order of the Court and the Company's assets were ordered to be sold. After the sale B., claiming he had no notice of the motion to confirm the registrar's report, applied for and obtained an order for leave to enter an appearance and setting aside the order confirming the registrar's report in so far as it affected B.'s rights.

Held, on appeal, reversing the order of MORRISON, J., that there was no jurisdiction to open up the matter as an opportunity was given for the claim to be fully considered and if not properly supported it was the fault of the claimant or his representative.

Statement

APPEAL by the official liquidator from the order of MORRISON, J. of the 2nd of January, 1923, allowing one George Busen to enter an appearance in the Winding-up proceedings of the Gibson Mining Company and that the order of the 29th of

May made by himself approving of the registrar's report upon the debts and claims of creditors of said Company be set aside in so far as it affected the right of the said Busen. In the winding-up proceedings one D. K. May made a claim as a creditor but before adjudication he assigned it to George Busen, notice of which was given the registrar. May and his wife claimed to be attorney in fact of Busen. They were represented by a solicitor and attended a number of times on the registrar to prove Busen's claim. There were several adjournments but finally the claim was adjudicated upon and disallowed. Neither of the Mays nor their solicitor was present at the final hearing and their solicitor had previously given notice that he would no longer act in the matter but his name remained on the record. Notice of motion to confirm the registrar's report was later served on the said solicitor and the report was confirmed on the 29th of May, and the assets of the Company were ordered to be sold, Mrs. May being a bidder at the sale. After the sale Busen claimed he had not notice of the motion to confirm the registrar's report and asked to be added as a party and have the report set aside. The order of the 2nd of January was then made. The official liquidator appealed. On the hearing of the appeal preliminary objection was taken to the hearing of the appeal on the grounds (1) that the order was not appealable under section 101 of the Winding-up Act; (2) that the appeal is out of time and there was no authority to extend the time or to give leave after the expiration of the 14 days mentioned in section 104 of said Act; and (3) that no leave to continue the winding-up proceedings under the Winding-up Act had been obtained from the Court of Bankruptcy and all proceedings since July 1st, 1920, were void.

Statement

The appeal was argued at Vancouver on the 27th of March, 1923, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Cantelon, for appellant.

McTaggart, for respondent, raised the preliminary objections that there is no appeal under section 101 as it does not involve

Argument

COURT OF APPEAL

1923

June 5.

IN RE WINDING-UP ACT AND GIBSON MINING CO.

future rights or affect other cases. In the next place the time for taking an appeal was extended after the statutory period of 14 days (under section 104) had elapsed. The application must be made before the 14 days expire: see *Laursen* v. *McKinnon* (1913), 18 B.C. 10; *Re Great Northern Construction Co.* (1916), 53 S.C.R. 128. Lastly, no leave to continue the proceedings was obtained from the Bankruptcy Court under section 2 (*o*) of the Bankruptcy Act as re-enacted by Can. Stats. 1920, Cap. 34, Sec. 2, and the proceedings since the 1st of July, 1920, are void: see *Re Canadian Western Steel Corporation Limited* (1922), 51 O.L.R. 615; *Re Cushing Sulphite Fibre Co.* (1906), 37 S.C.R. 173. The Bankruptcy Act supersedes the Winding-up Act.

Cantelon: The registrar fixed a day for a hearing and both May and Busen were present. It was adjourned and at a later hearing he decided May had no claim. We come under section 101 of the Act. A question of future rights arises: see *Re J. McCarthy & Sons Co. of Prescott Limited* (1916), 32 D.L.R. 441 at p. 443; *Re Sovereign Bank of Canada. Clark's Case* (1916), 35 O.L.R. 448. The claim is for $15,000 and for this reason alone we are entitled to an appeal. As to the application for extension of time for giving notice see *Calumet Metals Ltd.* v. *Eldridge* (1913), 15 D.L.R. 461; *Canadian Bank of Commerce* v. *Burnett* (1921), 3 C.B.R. 220; *Brown* v. *Kelly Douglas & Co.* (1923), 32 B.C. 143; *Blais* v. *Bankers' Trust Corporation* (1913), 14 D.L.R. 277; *In Re Pioneer Children's Wear Manufacturing Company, Limited* (1920), 1 C.B.R. 433.

Argument

McTaggart, in reply referred to *Hill* v. *Canadian Home Investment Co.* (1915), 22 B.C. 301.

Cantelon, on the merits, referred to *City of Greenwood* v. *Canadian Mortgage and Investment Co.* (1921), 30 B.C. 72; *Marshall* v. *Canadian Pacific Lumber Co.* (1922), 31 B.C. 363; *In re St. Nazaire Company* (1879), 12 Ch. D. 88; *Hession* v. *Jones* (1914), 2 K.B. 421; *Oxley* v. *Link, ib.* 734 at p. 737.

McTaggart: The order was justified as the Courts will not deal with the interests of parties behind their backs. The rules

must conform with the statutes, and rule 92 would not apply in face of section 73 of the Act.

Cantelon, in reply.

Cur. adv. vult.

COURT OF APPEAL

1923

June 5.

IN RE WINDING-UP ACT AND GIBSON MINING CO.

5th June, 1923.

MACDONALD, C.J.A.: Preliminary objection was taken by respondent to the hearing of this appeal on three several grounds: (1) That the order was not appealable under section 101 of the Winding-up Act; (2) that the appeal is out of time and there was no authority to extend the time or to give leave after the expiration of the 14 days mentioned in section 104 of said Act; and (3) that no leave to continue the winding-up proceedings under the Winding-up Act had been obtained from the Court of Bankruptcy, and therefore all the proceedings since 1st July, 1920, were void.

I think the case does not fall within subsections (*a*) or (*b*) of section 101, but I am of opinion that it is within subsection (*c*) of that section. The order appealed from is one setting aside a previous order made confirming the disallowance of the respondent's claim to be a creditor of the estate. That claim was in excess of $500 and the effect of the order appealed from is to give the respondent the right to have the claim again adjudicated upon by the Court which confirmed the registrar's order. In other words, the order appealed from sets aside a judgment in appellant's favour. This is quite a different case from that relied upon by the respondent, namely, *Brown* v. *Cadwell* (1918), 25 B.C. 405, where the question was a mere matter of procedure, namely, the legality of an order for service of a writ *ex juris.*

MACDONALD, C.J.A.

As to the second ground, I think it was competent to the judge to give the leave after the expiration of the 14 days mentioned in said section 104. The respondent cited *Laursen* v. *McKinnon* (1913), 18 B.C. 10, as an authority for his submission, but that case has no application to the facts here. It is a decision of this Court following several previous decisions of the Full Court, which we felt we ought to follow, adopting the rule of *stare decisis.* When those previous cases are

COURT OF APPEAL

1923

June 5.

IN RE WINDING-UP ACT AND GIBSON MINING CO.

examined it will be found that they are based upon this, that under the statute then in force, the provisions of which were afterwards incorporated in the Court of Appeal Act, the initial step to bring the case into the Court of Appeal is the notice of appeal. In other words, before the Court of Appeal could have jurisdiction to deal with a matter there must have been a valid notice transferring the proceedings from the lower Court to the higher one, and that as no valid notice could be given after the expiration of the time limited, therefore the Court of Appeal could have no jurisdiction to make an order of any kind. That was very different from a case governed by section 104. Then again, *Re Great Northern Construction Co.* (1916), 53 S.C.R. 128, was relied upon by respondent, but this case is equally inapplicable. Moreover, it has been distinctly held in *Canadian Bank of Commerce* v. *Burnett* (1921), 3 C.B.R. 220, that leave may be granted after the expiration of the 14 days.

The third objection is based on section 2 (*o*) of the Bankruptcy Act, as re-enacted by Can. Stats. 1920, Cap 34, Sec. 2. There is nothing in the material before us to shew when the winding-up proceedings were commenced; it is not shewn that they were commenced since the 1st of July, 1920. I think I must assume in the absence of proof to the contrary, that they were not commenced since the Bankruptcy Act came into force, applying the maxim *omnia præsumuntur rite esse acta*. Therefore, I am to consider whether or not the leave of the Bankruptcy Court was necessary to the continuance of winding-up proceedings commenced before the Bankruptcy Act. The question is one of the construction of said section 2 (*o*). The second half of the clause enacts that:

MACDONALD, C.J.A.

> "Where the debtor is a corporation, as defined by this section, the Winding-up Act . . . . . shall not, except by leave of the Court, extend or apply to it notwithstanding anything in that Act contained, but all proceedings instituted under that Act before this Act comes into force or afterwards, by leave of the Court, may and shall be as lawfully and effectually continued under that Act as if the provisions of this paragraph had not been made."

It is useful to consider the history of the subsection. As originally passed, it in effect repealed the Winding-up Act as to future proceedings within the scope of the Bankruptcy Act.

Hence if by inadvertence for instance, proceedings were thereafter taken under the Winding-up Act, they would be void no matter what the consequences might be, or how satisfied all parties were with them. The subsection was therefore amended in 1920 so as to provide a remedy. The parties were still prohibited from resorting to the Winding-up Act without leave of the Bankruptcy Court, but if they did so they might in effect still validate the proceedings by getting leave subsequently. Did Parliament intend to go further and stay every winding up in Canada lawfully commenced before the Bankruptcy Act came into force, and lawfully continued thereafter until the amendment, unless and until the requisite leave had been obtained? The amendment was passed to relieve not to obstruct the liquidation of insolvent companies. The language is capable of one of two constructions, and I would construe it beneficially as not applicable to proceedings commenced before the Bankruptcy Act. There is nothing against this construction, except the punctuation, and as to that I will quote the words of Lord Esher, in *Duke of Devonshire* v. *O'Connor* (1890), 24 Q.B.D. 468 at p. 478, where he said:

"To my mind, however, it is perfectly clear that in an Act of Parliament there are no such things as brackets any more than there are such things as stops. I shall, therefore, read this exception according to its language."

In *Claydon* v. *Green* (1868), L.R. 3 C.P. 511, Willes, J. at p. 522, speaking of punctuation and marginal notes, as aids to construction, said:

MACDONALD, C.J.A.

"These appendages, which, though useful as a guide to a hasty inquirer, ought not to be relied upon in construing an Act of Parliament."

The words "or afterwards by leave of the Court" were inserted for the purpose of saving proceedings which had been commenced contrary to the prohibition contained in the first four lines of the clause. A misplaced comma cannot be allowed to destroy the reasonable inference to be deduced from the language of the whole clause. That interpretation of the clause ought to be adopted rather than the alternative one which would lead in this case, and doubtless in many other cases, to confusion and injustice. The objections should be overruled.

To come now to the merits: In the winding-up proceedings of this Company, D. K. May made a claim as creditor. Before

COURT OF APPEAL

1923

June 5.

IN RE WINDING-UP ACT AND GIBSON MINING CO.

the adjudication upon the claim he is alleged to have assigned it to one George Busen, of which assignment notice was given to the district registrar appointed to adjudicate upon the creditors' claims. D. K. May and his wife, who claims to be the attorney in fact of Busen, attended before the registrar on several occasions for the purpose of proving the claim. There were several adjournments, but the claim was finally adjudicated upon and disallowed. At the hearing at which the claim was disallowed, neither D. K. May nor his wife, nor their solicitor attended. Up to this time the Mays were represented by a solicitor, but before the final adjudication the solicitor gave notice that he would no longer act in the matter, but no change was made in the record, so that he remained the solicitor of record. Subsequently, a motion was made to confirm the registrar's certificate or report, notice thereof being served upon the said solicitor. The report was confirmed and afterwards the assets of the Company were ordered to be sold. At the sale Mrs. May was a bidder. Now, after the sale of the property, Busen comes forward claiming that he had no notice of the motion to confirm the registrar's report and asking to be added as a party to the proceedings and to have said report set aside, and in the alternative, for an order extending the time for appeal and for leave to appeal.

MACDONALD, C.J.A.

The application was made to Mr. Justice MORRISON who set aside the order confirming the registrar's report, in so far as the same affected the rights of the said Busen, and also gave him leave to enter an appearance, pursuant to rule 56 of the Winding-up Rules.

Busen has made no affidavit in the matter, nor otherwise evidenced his *bona fides*. If he had any beneficial interest in it he allowed the Mays to look after it for him and to treat the claim as Mays'. Mrs. May, his attorney in fact, was present and took part in the proceedings; she was present when the last adjournment was taken, and therefore had notice of the sitting at which the adjudication was made; she was present at the sale of the assets and took part in the bidding. There is nothing to show that Busen was other than the *alter ego* of May.

In these circumstances, I think the appeal of the liquidator

should succeed, and said order of Mr. Justice MORRISON should be set aside, with costs here and below.

MARTIN, J.A.: Several objections were taken to the jurisdiction of the learned judge below to grant leave to appeal under sections 101 and 104 of the Winding-up Act, Cap. 144, R.S.C. 1906, which he did by order dated the 20th of February last. After considering them carefully, I am of opinion that they should be overruled, because (briefly), first: on the facts the appeal "involves future rights" (whatever that very indefinite expression may be taken to mean, which it would be rash to attempt to define) within subsection (*a*) of section 101; second: the learned judge had power under section 104 to allow "further time" after the expiration of the 14 days, to which power our decision (based on special sections of the old Supreme Court Act) in *Laursen* v. *McKinnon* (1913), 18 B.C. 10, 13, has no application; and third: as to section 2 (*o*) of the Bankruptcy Act Amendment Act, 1920, Cap. 34, that cannot be invoked to stay these winding-up proceedings except in the case of one who is a "debtor" as therein defined, and there is no evidence before us that "any act of bankruptcy was done or suffered by" the Company being wound up herein.

I pass then to the question raised on the appeal, as to the jurisdiction of the learned judge to alter or set aside, in favour of Busen, his order of the 29th of May, 1922, approving the adjudication of the registrar, under section 73, in disallowing May's claim, which it is admitted is identical with Busen's and so they stand or fall together. In the circumstances, which it it unnecessary to recite, I have no doubt that there was no jurisdiction to open up that matter because, in brief, an opportunity was given for that claim to be fully considered before the registrar and it is the fault of those advancing it if it were not more convincingly supported; our recent decision in *Marshall* v. *Canadian Pacific Lumber Co.* [31 B.C. 363]; (1922), 3 W.W.R. 1105, has no application to such a case as this.

MARTIN, J.A.

Furthermore, I point out that in any event, according to the documents before us, and in particular May's affidavit, par. 19, it is not Busen but May who could have applied to set aside the order.

COURT OF APPEAL

1923

June 5.

IN RE WINDING-UP ACT AND GIBSON MINING CO.

MARTIN, J.A.

And, finally, in accordance with rule 56 of our (B.C.) Winding-up Rules, the applicant had no *status* till he complied with its provisions, and I have no doubt that the rule is *intra vires* in that it does not conflict with the Act but simply indicates the manner in which the parties concerned must come into Court and participate in the proceedings so as to carry out the objects of the Act in an orderly and ordinary legal way, like entering an appearance to a writ, so that all concerned may be bound by the proceedings; the wisdom of the rule is shewn by the disorderly events that have occurred herein.

It follows that the appeal should be allowed.

GALLIHER, J.A.: On the merits I had no doubt at the end of the argument that the order of the learned judge below opening up his former order, should be set aside.

What has given me a great deal of concern, however, was the preliminary objection taken that by paragraph (*o*) of section 2, of the Bankruptcy Act, as re-enacted by Can. Stats. of 1920, Cap. 34, Sec. 2, the Winding-up Act does not apply to the Company except by leave of the Bankruptcy Court, and no such leave had been obtained or granted.

GALLIHER, J.A.

The force of that objection depends entirely upon the construction to be placed on that paragraph. It is open to two constructions, and after mature consideration, I have decided in favour of the one adopted by the Chief Justice, in whose views on this point and the other points dealt with by him, I concur.

MCPHILLIPS, J.A.

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

EBERTS, J.A.

EBERTS, J.A. would allow the appeal.

Appeal allowed.

Solicitor for appellant: *James O'Shea.*
Solicitor for respondent: *B. O. Oughton.*

HOBSON v. THE CORPORATION OF THE TOWNSHIP OF RICHMOND.

COURT OF APPEAL

1923

June 5.

HOBSON v. CORPORATION OF RICHMOND

Municipal law—Drains—Ditches on highways—Overflow on plaintiff's land —Damages—B.C. Stats. 1914, Cap. 52, Secs. 327 and 329.

In an action for damages for the defendant Corporation's negligence in the failure to construct certain ditches of sufficient size and in the failure to keep them in repair by cleaning them out and removing obstructions, the waters therefrom having overflowed and flooded the plaintiff's land and destroyed his crops, a jury found for the plaintiff and awarded $2,000 damages. Judgment was given in accordance with the verdict.

Held, on appeal, affirming the decision of MORRISON, J. (MARTIN, J.A. dissenting), that there was evidence upon which, if believed, the jury could found their verdict and in the absence of wrong direction by the judge below it would not be proper to interfere with the verdict.

Per MARTIN, J.A.: That as this was a special work undertaken by the Corporation under the powers conferred by section 327 of the Municipal Act, the Corporation was entitled to the benefits of section 329 of said Act, *i.e.*, that every claim for damages under said section 327 should be decided under Part XV. of the Act. There was, therefore, want of jurisdiction to maintain this action and the appeal should be allowed.

APPEAL by defendant from the decision of MORRISON, J. of the 6th of October, 1922, and the verdict of a jury, in an action for damages for negligence. The plaintiff owned 26.54 acres of land on Lulu Island, being a portion of section 5, block 4, north range 5 west (No. 2,200A), having purchased in 1919 and worked it continuously as a farm. Prior thereto the defendant corporation built a ditch on Road 19 and a continuation thereof on Road 6 for the purpose of carrying off drainage and surface waters. The plaintiff claimed the ditches were not large enough and were not kept clean and in proper repair, the result being that the ditches drew all the water from the vicinity close to the plaintiff's farm and the ditches overflowed and inundated the plaintiff's land resulting in the destruction of his crops in September and October, 1921, and in rendering his house so unhealthy to live in that his health suffered by reason thereof.

Statement

COURT OF APPEAL

1923

June 5.

HOBSON v. CORPORATION OF RICHMOND

The appeal was argued at Vancouver, on the 4th of April, 1923, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Mayers, for appellant: On the evidence the ditches have improved the land. Originally the plaintiff's land was a swamp, but since the ditches have been built considerable farming has been done on these lands. Under the Municipal Act (section 329) the proceeding for a claim such as this should be under Part XV. of said Act, and this action should be dismissed for want of jurisdiction.

A. Donaghy, for respondent: There is a good cause of action: see *Moore* v. *Cornwall* (1912), 23 O.W.R. 113. Objection is taken to amending the notice of appeal by adding eleven grounds of appeal that were not raised below. This case does not come within section 329 of the Municipal Act as the damage here was caused by negligent construction and subsequent public user.

Argument

Mayers, in reply, referred to *Scorell* v. *Boxall* (1827), 1 Y. & J. 396, and *Carrington* v. *Roots* (1837), 2 M. & W. 248. As to the Statute of Frauds being a plea in an action for trespass, an action in trespass founded on parol evidence cannot succeed: see Leake on Contracts, 7th Ed., 171 and 204.

Cur. adv. vult.

5th June, 1923.

MACDONALD, C.J.A.: There was evidence upon which the jury could find as they did, a verdict for the plaintiff. The defendant constructed road-ditches to and past the plaintiff's lands, but did not provide a sufficient outlet to carry off the water brought down in the said ditches.

MACDONALD, C.J.A.

The defence was that the water would naturally find its way to the plaintiff's land since the land in its natural state was practically a swamp, and still was a receptacle for all the water of the neighbourhood. There is some force in this contention, but it is one thing to have water seep through land to a given place and quite another to have it poured down through ditches. Much of the water which would fall upon the surrounding lands would be absorbed by the lands upon which

it fell, and some would be taken up by evaporation. Plaintiff's land would not necessarily be flooded, or if so, not for so long a period or to the same injurious extent by water naturally finding its own level. At all events, there was evidence upon which, if believed, the jury could found their verdict, and in the absence of any wrong direction given by the learned judge, it would not be proper for us to interfere.

The damages awarded would appear to be large, but no complaint is made on that score. I would dismiss the appeal.

MARTIN, J.A.: This is an action for damages done to the plaintiff's land because of water being collected and brought upon it by the defendant by means of (as alleged) a "ditch on Road 19 . . . . and a continuation of said ditch on Road 6 . . . . . for the purpose of carrying drainage and surface waters," and it is alleged that the defendant was negligent in its original construction of the ditch of an insufficient size, and also, later, in "failing to keep the said ditch . . . . in repair by cleaning it out and removing obstructions therefrom," because of which the ditch overflowed on to plaintiff's land. It is admitted that the defendant did construct the said ditch (after a petition from residents in that locality and after a report thereon by its engineer) pursuant to a by-law (finally passed on the 21st of November, 1921) reciting the petition and setting out the report which recommended that the old ditch (first constructed in 1904, to form the road-bed in that very wet locality) should be cleaned out and widened (10 feet at top and 4 feet at bottom) and deepened so as to connect with the canal to the north on No. 20 road, which discharged into the slough running into the north arm of the Fraser River as shewn on Exhibit No. 1.

MARTIN, J.A.

At the trial the objection was taken, and renewed before us, that this was a special work undertaken by the defendant under the "General Powers" conferred by Part X. (Highways) of the Municipal Act, B.C. Stats. 1914, Cap. 52, Sec. 327, as follows:

"The Council of any district municipality shall have, and shall be deemed to have had since its incorporation, the right to collect water from the surface of any public highway, and to convey the said water to the nearest and most convenient well-defined natural waterway."

COURT OF APPEAL

1923

June 5.

HOBSON v. CORPORATION OF RICHMOND

And the benefit of section 329 is invoked to oust the jurisdiction of the Court below:

"Every claim for damages or compensation under the last two preceding sections shall be decided under the provisions of Part XV. of this Act."

In answer to this, it is submitted that damage caused by negligent construction or subsequent user is excluded from the arbitration provisions of Part XV. and section 357 is relied upon as shewing that what is complained of here did not "necessarily result from the exercise of such powers." Reliance is placed upon certain Ontario decisions, *e.g., McArthur* v. *Corporation of Collingwood* (1885), 9 Ont. 368, and *Simm* v. *City of Hamilton* (1919), 16 O. W.N. 1; and see also the cases cited in Biggar's Municipal Manual, 11th Ed., 465.

In my opinion the said authorities being based on the Ontario equivalent to said section 357 (see *McArthur* case, *supra,* p. 372, section 486 there quoted) do not apply to the special and additional power conferred by said section 327 to drain a "public highway," which is in substance and effect what was done here; that section contemplates drainage resulting from the "conveyance" of the water, and from the nature of the case the necessity of, and consequences from, that drainage may often be at least recurrent, if not continuous, in different localities. As I regard section 329 it recognizes in the broadest manner and without restriction "every claim for damage" caused by the exercise of the "right to collect water . . . . and to convey" it conferred by section 327, and directs that the machinery for the recovery of damages (quite distinct from the right to "due compensation" conferred under section 357 for lands "entered upon, taken, or used . . . . . or injuriously affected" as therein declared) shall be by arbitration proceedings under Part XV., *viz.,* "decided by three arbitrators to be appointed" under subsection (*a*) of 357, which, with the following sections lays down the procedure to be adopted so far as it may be appropriate. Section 376 has no application to prevent the said invocation; it applies only to save claims from being barred in certain circumstances, and assuming also that it does apply to acts done under 327, which the Council may decide to do of its own motion.

MARTIN, J.A.

It is to be observed that section 329 includes claims for "compensation" as well as "damages," one illustration of which would arise in a case where the Council "conveyed" the water through private property instead of along its highway "to the nearest and most convenient well-defined natural waterway," and what that may be, in case of dispute, is to be summarily decided by an arbitrator appointed under section 328.

Not only do I see no obstacle in law why disputes about damages such as we have here should not be settled by arbitration, but there is everything in reason and the nature of the case to support that procedure, and I am entirely in accord with the following observation of the Appellate Division in Ontario, in *Re Labute and Township of Tilbury North* (1918), 44 O.L.R. 522 at p. 528:

"The rule to be followed in matters of this kind has been laid down by the late Chancellor in *Re Stephens and Township of Moore* (1894), 25 Ont. 600, at p. 605: 'In matters of drainage and other business of local concern the policy of the Legislature is to leave the management largely in the hands of localities, and the Court should be careful to refrain from interference—the meaning of which is always a large outlay for costs—unless there has been a manifest and indisputable excess of jurisdiction or an undoubted disregard of personal rights.' If I may say so without presumption, I entirely approve of the rule so laid down, and would add that, when we are succeeding reasonably well in ridding our practice of the law of mere technicalities, it would be intolerable if petty and purely technical defects should be given weight in municipal affairs, which are largely in the hands of laymen.

"Where a statute is express, full effect must be given to it; but every statute should, where possible, be interpreted so as to accord with common sense and public utility."

MARTIN, J.A.

These observations are most appropriate to the present case because the whole matter in dispute could have been speedily and inexpensively settled by three arbitrators upon the ground.

It follows that, in my opinion, the objection to the jurisdiction should be sustained and the appeal allowed.

GALLIHER, J.A.: Upon the evidence I am unable to say that the jury came to a wrong conclusion. The construction of this ditch or road had the effect of casting on the plaintiff's land in a manner which otherwise would not have obtained large bodies of water which undoubtedly injured his crops and seeded land.

GALLIHER, J.A.

COURT OF APPEAL

1923

June 5.

HOBSON v. CORPORATION OF RICHMOND

The amount of damages awarded is not under review. The action is, I think, properly brought.

Certain members of the jury, at all events, seemed by their questions to have fully appreciated the situation and to be familiar with the conditions which would make it all the more difficult for me to interfere.

The appeal should be dismissed.

MCPHILLIPS, J.A.

MCPHILLIPS, JA.: I concur in the dismissal of this appeal. It is with some hesitancy though, that I have arrived at this conclusion, the evidence not being as complete and satisfactory as I would wish to see it. Further, the damages allowed have, in the amount at which they have been assessed, some evidence of excessiveness, yet, upon the whole, I do not feel that the case warrants a formal dissent, as it cannot be said that there is no evidence which would admit of the judgment being supported.

EBERTS, J.A.

EBERTS, J.A. would dismiss the appeal.

Appeal dismissed, Martin, J.A. dissenting.

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

BRITISH COLUMBIA LAND & INVESTMENT AGENCY LIMITED v. ROBINSON.

MCDONALD, J.

1922

June 22.

COURT OF APPEAL

1923

June 5.

B.C. LAND & INVESTMENT AGENCY *v.* ROBINSON

Mortgage—Interest after maturity—Covenant to pay taxes—Payment of taxes by mortgagee—Right to recover on mortgagor's covenant.

On November 22nd, 1906, the defendant mortgaged a certain property to C. to secure an advance of $5,000, which was made due and payable in three years. The mortgage contained the usual covenant to pay principal and interest when it came due and to pay taxes. There was no mention of the rate of interest payable after maturity. C. assigned her interest as mortgagee to the plaintiff in July, 1907, and in March, 1909, the plaintiff assigned to M. and guaranteed M. payment of principal and interest. In October, 1921, M. reassigned to the plaintiff. In April, 1907, the defendant assigned the equity of redemption to one Carlin who, in December, 1910, executed a second mortgage on the property to the plaintiff to secure $7,000. Carlin did not pay his taxes and in order to protect the property the plaintiff paid the taxes for the years 1918, 1919 and 1920 aggregating $4,646.72. In an action to recover principal, interest, and the amount paid in taxes on the defendant's covenant, it was held that the plaintiff could only recover the statutory rate of interest and that it was entitled to recover the amount paid in taxes. On appeal by the defendant as to his liability for the sum paid in taxes:—

Held, affirming the decision of MCDONALD, J. (MACDONALD, C.J.A. and GALLIHER, J.A. dissenting), that the plaintiff was entitled to protect itself against non-payment of taxes irrespective of Carlin's default, because it guaranteed payment of principal and interest when it assigned the mortgage to M. As guarantor it had a continuing interest that carried the right to protect the security by paying the taxes for which the defendant was liable under his covenant.

Per MCPHILLIPS, J.A.: There was compulsion in law requiring the respondent to pay the taxes to prevent tax sale, the payment of taxes was not a voluntary payment but compulsory and under such circumstances the law implies a promise by the appellant to repay the respondent.

APPEAL by defendant from the decision of MCDONALD, J., in an action tried by him at Victoria on the 20th of June, 1922, to recover principal and interest due and payable upon certain property in the City of Victoria and for taxes paid by the plaintiff to preserve the property, all being payable under a covenant contained in the mortgage. The defendant mortgaged the property in question to Estella H. Carroll to secure $5,000 on the 22nd of November, 1906, the principal being due on

Statement

MCDONALD, J.
1922
June 22.
COURT OF APPEAL
1923
June 5.
B.C. LAND & INVESTMENT AGENCY v. ROBINSON

November 22nd, 1909, and no provision was made for payment of interest after the mortgage had fallen due. There was the usual covenant for payment of principal, interest and taxes. Carroll, as mortgagee, assigned to the plaintiff on July 19th, 1907, and on March 8th, 1909, the plaintiff assigned to Amy L. Musgrave and guaranteed payment of principal and interest on the property but not taxes. On October 25th, 1921, the mortgage was assigned by Musgrave back to the plaintiff. On April 13th, 1907, the defendant conveyed the land in question to one Carlin and others and on December 12th, 1910, they executed a second mortgage on the property to the plaintiff to secure the sum of $7,000. In order to protect the property the plaintiff paid the taxes during the years 1918, 1919 and 1920, aggregating $4,646.72.

Mayers, for plaintiff.
Maclean, K.C., and *C. W. Bradshaw,* for defendant.

22nd June, 1922.

MCDONALD, J.

MCDONALD, J.: By mortgage bearing date the 22nd of November, 1906, the defendant mortgaged to one Estella H. Carroll, certain lands in the City of Victoria, to secure the sum of $5,000 and interest at 6 per cent. per annum, payable half yearly, the principal sum falling due on the 22nd of November, 1909. No provision was made for payment of interest after the principal sum had fallen due. This mortgage was made pursuant to the Mortgages Statutory Form Act and contained the usual proviso that the mortgage should be void on payment of the principal money and interest and taxes and performance of statute labour and the usual covenant that the mortgagor should pay the mortgage money and interest and observe the proviso.

By assignment bearing date the 19th of July, 1907, this mortgage was assigned by the mortgagee to the plaintiff and by a further assignment bearing date the 8th of March, 1908, was assigned by the plaintiff to Amy L. Musgrave. On the last-mentioned date the plaintiff delivered a guarantee to the said Amy L. Musgrave, through her agent, that the plaintiff would pay the principal and interest falling due under said

mortgage, but no guarantee was given in respect of taxes. By a further assignment dated the 25th of October, 1921, the said mortgage was assigned by the said Amy L. Musgrave to the plaintiff and by further assignments, bearing dates respectively, 28th February, 1916, and 5th December, 1921, the said Amy L. Musgrave assigned to the plaintiff certain moneys due for interest upon the said mortgage.

I hold that sufficient notice in writing was given to the defendant of the said several assignments; and the assignments of mortgage were all duly registered save the last-mentioned assignment bearing date the 25th of October, 1921. By deed bearing date the 13th of April, 1907, the defendant conveyed the lands to one Carlin and others, subject to the payment by them of said mortgage, and by mortgage bearing date the 12th of December, 1910, the said Carlin and others executed a second mortgage of the same lands to the plaintiff in the sum of $7,000 with interest at 7 per cent. per annum. The first-mentioned mortgage is in question in this action; the contest arising as to whether the plaintiff is entitled to recover from the defendant on his covenant to pay interest and, if so, at what rate, and for what periods, and also on his covenant to pay taxes. No contest arises in regard to the principal sum, which is still unpaid. Certain payments have been made on account of interest, but the interest is long in arrears, and the plaintiff paid during the years 1918, 1919 and 1920 the sum of $4,646.72 for taxes.

Dealing first with the question of interest, the defendant contends that since the due date of the mortgage, namely, 22nd November, 1909, interest is payable only by way of damages, and that the amount is limited to 5 per cent. per annum by the Interest Act, R.S.C. 1906, Cap. 120, Sec. 3, as amended by Can. Stats. 1900, Cap. 29, Sec. 1, and relies upon the decision in *The Peoples Loan and Deposit Company* v. *Grant* (1890), 18 S.C.R. 262. That was a case originating in Ontario, where the statute in force relating to interest is to the effect 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."

See judgment of MCPHILLIPS, J.A., in the recent case of

MCDONALD, J.
1922
June 22.

COURT OF APPEAL
1923
June 5.

B.C. LAND & INVESTMENT AGENCY v. ROBINSON

McKinnon v. *Campbell River Lumber Co.* (1922), [31 B.C. 18]; 2 W.W.R. 556 at p. 557.

It is argued for the plaintiff that the decision in the *Grant* case must be read having regard to the statutes applicable, and that it has no application to British Columbia so far as the question presently being considered is concerned. In this Province the statute 3 & 4 Wm. IV., Cap. 42, Sec. 28, is in force, and that statute provides, in effect, that in a case such as this the jury may, if they think fit, allow interest at a rate not exceeding the current rate.

The Interest Act above referred to provides that—

"Whenever any interest is payable by the agreement of parties or by law, and no rate is fixed by such agreement or by law, the rate of interest shall be five per centum per annum."

As I understand plaintiff's argument, it is to the effect that inasmuch as the "current rate" is fixed as the proper rate by the above statute 3 & 4 Wm. IV., in other words, is fixed by law, the Interest Act does not apply. I think this argument is based on a fallacy, for the statute, 3 & 4 Wm. IV., does not fix a rate of interest, but simply gives the jury a discretion to allow a rate of interest not exceeding the current rate. In my view, therefore, the decision in the *Grant* case applies, and the plaintiff is entitled to interest at the rate of 5 per cent. per annum, and so far as I have any discretion I would allow that rate.

MCDONALD, J.

The defendant further contends that under R.S.B.C. 1911, Cap. 145, Sec. 50, the plaintiff is limited to two years' arrears of interest, relying upon the clause in said section:

"All actions for penalties, damages, or sums of money given to the party aggrieved, by any statute now or hereafter to be in force."

It was forcefully argued that the plaintiff's right to interest was a right to damages given by statute. In one sense it is, but I cannot think that the word "damages" was intended to include a claim such as this, nor that the plaintiff is a person "aggrieved" within the meaning of that word as used in the clause above quoted. In my view this claim for interest is a specialty debt, created by statute and hence the period of limitation is 20 years.

Now, with regard to the taxes, the defendant contends that there is no obligation on him to pay taxes after the principal

money secured by the mortgage became in default, and relies upon the Mortgages Statutory Form Act, R.S.B.C. 1911, Cap. 167, Second Schedule, Column 11, paragraph 1. It is argued that the words "until such default" in said column 11, paragraph 1, mean that the mortgagor's obligation to pay taxes extends only until such default, and that as the taxes in question in this action accrued due and were paid after the due date of the mortgage, the mortgagor is relieved of any liability.

MCDONALD, J.
1922
June 22.
COURT OF APPEAL
1923
June 5.
B.C. LAND & INVESTMENT AGENCY v. ROBINSON

I was at first struck with the force of this rather startling submission, but on further consideration I am satisfied that the paragraph in question does not bear the meaning contended for, but that the real meaning of the extended form is that the mortgagor shall pay principal, interest and taxes and that no rule regarding taxes similar to that regarding interest after due date prevails. I am further satisfied that the defendant's said covenant to pay taxes was duly assigned to the plaintiff and that due notice of such assignment was given to the defendant. If, however, I am wrong in regard to the sufficiency of such assignment and notice, I would still hold that the plaintiff, having paid the taxes in order to protect its security and to save the land from being sold, was really compelled to pay a sum to pay which the defendant was legally compellable under the covenant, and is entitled to recover from the defendant the amount so paid on the principle of the following cases: *The Orchis* (1890), 15 P.D. 38; *Hales* v. *Freeman* (1819), 4 Moore 21; *Murphy* v. *Davey* (1884), 14 L.R. Ir. 28. If it is correct to hold that the defendant was bound by his covenant to pay taxes, he could not divest himself of that liability by parting with his equity of redemption.

MCDONALD, J.

There will be judgment in accordance with the above findings, and if the parties cannot agree upon the amount the matter may be spoken to again.

From this decision the defendant appealed. The appeal was argued at Victoria on the 24th and 25th of January, 1923, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Maclean, K.C., for appellant: The plaintiff must declare its

Argument

MCDONALD, J.
1922
June 22.
COURT OF APPEAL
1923
June 5.
B.C. LAND & INVESTMENT AGENCY v. ROBINSON

intention of paying or it cannot recover: see *Spencer* v. *Parry* (1835), 3 A. & E. 331; and if it pays before it has to it cannot recover: see *Harris* v. *Hickman* (1904), 1 K.B. 13. The mortgage was due in 1909 and the taxes were paid ten years later. There is no covenant to pay taxes after due date, and we cannot be held liable for these payments: see *The People's Loan and Deposit Company* v. *Grant* (1890), 18 S.C.R. 262. When the plaintiff paid these taxes it was not the holder of the first mortgage; it acquired it subsequently. It cannot sue under a covenant in a mortgage for the amount paid in taxes when it did not hold the mortgage when the payments were made.

Argument

Mayers, for respondent: There was a covenant to pay taxes and we stand as assignee of a covenant that has been broken. We are assignees of a chose in action of which due notice was given defendant. We are entitled to pay the taxes to preserve our security. There is an implied contract to pay and we may recover on the covenant: see *Johnson* v. *Royal Mail Steam Packet Company* (1867), L.R. 3 C.P. 38; *Parkinson* v. *Higgins* (1876), 40 U.C.Q.B. 274. Where one is compelled to pay he may do so without force: see *Hales* v. *Freeman* (1819), 4 Moore 21 at p. 32; *Maydew* v. *Forrester* (1814), 5 Taunt. 614; *Hardoon* v. *Belilios* (1900), 70 L.J., P.C. 9; *Exall* v. *Partridge* (1799), 8 Term Rep. 308; *Taylor* v. *Zamira* (1816), 6 Taunt. 524; *Jones* v. *Morris* (1849), 3 Ex. 742 at p. 745. The plaintiff has a right to indemnify: see *Badeley* v. *Consolidated Bank* (1886), 34 Ch. D. 536 at p. 556.

Maclean, in reply.

Cur. adv. vult.

5th June, 1923.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The defendant mortgaged land to Estella H. Carroll, and covenanted to pay principal, interest and taxes. Carroll assigned the mortgage to the plaintiff on 19th July, 1907. Robinson sold the land subject to the said mortgage to Carlin *et al.,* who became the registered holders of it in November, 1907, and who agreed with Robinson to pay off the Carroll mortgage. In 1909 the plaintiff assigned

the Carroll mortgage to Miss Musgrave, and by a letter accompanying the assignment agreed to guarantee payment of the principal and interest. The plaintiff, in 1910, took a second mortgage on the same lands from Carlin *et al.* wherein they agreed to pay the taxes and if they made default the plaintiff was authorized to pay them.

At the time these several transactions were completed, there were no taxes in arrears. Thereafter Carlin *et al.* allowed the taxes to fall into arrears, and the plaintiff, in 1919 and 1920, paid for taxes the sums which it is in this action claiming from Robinson. It took receipts for the taxes in the names of Carlin *et al.*, the assessed owners, and charged the sums paid in its books against them. In 1921 plaintiff took a reassignment of the Carroll mortgage from Miss Musgrave, after having paid interest from time to time under its guarantee. This reassignment, it will be noted, was taken after the plaintiff had paid the said taxes.

It may be granted at once that the form of tax receipts is not of importance, since they were necessarily taken in the name of the registered owners, Carlin and others. It cannot be disputed that the plaintiff had the right to pay the taxes, since it was given that right by the second mortgage, and had it in equity as well for protection of its security. Its immediate mortgagors, Carlin *et al.*, were, as between all persons concerned in both mortgages, the persons primarily liable for these taxes. The plaintiff had no interest at the time in the payment of them, except as second mortgagee, unless it had it as guarantor of the first mortgage under the agreement between it and Miss Musgrave, or by reason of the subsequent assignment of the first mortgage. It could not have it at the time by reason of the covenants in the first mortgage, since it was not then the owner of that mortgage. The only ground upon which its right to pay the taxes and claim repayment from the defendant, must be founded on its guarantee to Miss Musgrave, or upon its subsequent acquisition of the first mortgage. This latter was strongly relied upon but, in my opinion, it is not a sound contention. If Miss Musgrave had paid the taxes, or if plaintiff had paid them as her agent, no doubt she could have assigned

MACDONALD, C.J.A.

MCDONALD, J.

1922

June 22.

COURT OF APPEAL

1923

June 5.

B.C. LAND & INVESTMENT AGENCY *v.* ROBINSON

her claim to be recouped by defendant, but she did not pay them nor did the plaintiff pay them as her agent, and, therefore, she could not assign a claim for them.

I do not think that the plaintiff had, by reason of its guarantee, the right to charge the defendant with the payment of the taxes, nor do I think it in fact paid them, otherwise than as Carlin's agent or to protect Carlin's interests in the interests of itself. It charged them in its books against Carlin *et al.*, and subsequently, when it was about to take proceedings on the mortgage, its demand upon defendant was for principal and interest, and did not include the taxes. I therefore think the claim for taxes fails.

MACDONALD, C.J.A.

I notice that the defendant has paid some $7,300 into Court. No argument was addressed to us at the hearing as to whether this sum was or was not sufficient to meet the plaintiff's claim outside the claim for taxes. If any difficulty should arise on this score, the parties may have leave to speak to the matter again.

MARTIN, J.A.

MARTIN, J.A.: So far as it goes, I agree with the conclusion reached by the learned trial judge as set out in his reasons, that there was an obligation upon the defendant to pay the taxes and that he has not got rid of his covenant to that effect by the various transactions that subsequently took place, but the reasons given do not touch the further objection, *viz.*, that admitting the defendant's obligation, nevertheless, the plaintiff paid the taxes on behalf of Carlin *et al.*, and therefore cannot recover them from the defendant. It is, however, clear to my mind that the plaintiff Company was entitled to protect itself against the non-payment of the taxes irrespective of Carlin's default, because it guaranteed by letter of the 8th of March, 1909, the principal and interest of the defendant's mortgage to E. H. Carroll, when it assigned it to Musgrave in that month; therefore, as guarantor it had a continuing interest to protect the security which it guaranteed, and that right to protect itself it did not lose in the circumstances before us, when it paid the taxes and charged them against Carlin, as it was entitled to do, and I am unable to see any other circumstances in the evi-

dence which would justify me in thinking that it had otherwise lost its right so to protect itself, particularly in the face of the evidence of the plaintiff's attorney that one of his two motives in paying the taxes was to protect said guarantee. The appeal, therefore, should be dismissed.

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

MCPHILLIPS, J.A.: The action was one for principal and interest due and payable under the covenants contained in a mortgage upon certain real estate in the City of Victoria, of which the respondent (plaintiff) was the assignee, the appellant (defendant) being the mortgagor, and the action was as well for taxes paid by the respondent to the Corporation of the City of Victoria, the taxes being payable under a covenant contained in the mortgage. The learned judge gave judgment for the principal and interest as well as the taxes. The appellant only appealed as to the taxes allowed, contending that there was no liability therefor.

The mortgage deed sued upon was assigned to the respondent on the 19th of July, 1907, but previous thereto, namely, on the 13th of April, 1907, the appellant had conveyed his equity of redemption in the lands, the conveyance expressly providing that it was subject to the mortgage. The respondent on the 8th of March, 1909, assigned the mortgage to one Musgrave, also giving a guarantee covering the payment of the principal and interest payable under the mortgage, and paid interest thereon up to the 27th of October, 1921, and on the 28th of February, 1916, and on the 5th of December, 1921, Musgrave assigned to the respondent all moneys due and payable for interest under the mortgage and paid by the respondent under the guarantee, and on the 25th of October, 1921, Musgrave further assigned to the respondent the mortgage and the principal and interest due thereunder and the benefit of all the covenants therein contained and all the powers and remedies thereunder, and notice in writing was given to the appellant of all these transactions and assignments made. There was default upon the part of the appellant to pay principal, interest and taxes, and the respondent to protect the lands mortgaged

MCDONALD, J.

1922

June 22.

COURT OF APPEAL

1923

June 5.

B.C. LAND & INVESTMENT AGENCY v. ROBINSON

by the appellant, paid taxes during the years 1918, 1919, 1920, aggregating in amount $4,646.72, all of which taxes would appear to have been properly assessed against the lands, the payment of the taxes being necessary to preserve the lands from tax sales, and in order to protect the appellant and preserve the mortgaged hereditaments under which the appellant was liable to the respondent. With great respect to all contrary opinion, the case to me appears to be a very simple one. The appellant being unable to establish any release from his covenants as contained in the mortgage, there must be liability upon him to fulfil the obligations imposed upon him thereunder. No release is forthcoming and admittedly, no release was ever obtained, and as pointed out, the appellant now concedes his liability to pay principal and interest but disputes liability for the taxes paid by the respondent, which went to protect the mortgaged hereditaments, the payments for taxes having enured to the benefit of the appellant.

The action of the respondent in paying the taxes preserved the mortgaged hereditaments for the appellant and upon his paying the moneys due under the mortgage, he will be entitled to a reconveyance of the said lands. The contention made that owing to the fact that the appellant had conveyed away his equity of redemption in the lands, there remained no liability upon him to pay the taxes, is, in my opinion, idle argument. The appellant, of course, has his remedy against the parties to whom he conveyed the equity of redemption (*Mills* v. *United Counties Bank, Limited* (1912), 1 Ch. 231, Fletcher Moulton, L.J., at p. 241, and the appellant could have added the transferees as third parties, which he did not do: *Hamilton Provident Loan Co.* v. *Smith* (1888), 17 Ont. 1; *McMurtry* v. *Leushner* (1912), 3 O.W.N. 1176; 3 D.L.R. 549).

MCPHILLIPS, J.A.

The learned counsel for the appellant at this bar did not dispute, as I understood him, that there might be liability upon the appellant for the taxes, if the taxes were paid to prevent an actual advertised sale for taxes, but that the payments were made before that time. All that need be said upon that point it seems to me, is this, that if the taxes had not been paid the lands would have assuredly been sold for taxes, annual

sales for taxes always taking place. There is not merit in this contention. The legal position is well settled. The mortgagee (which is the position of the respondent) is entitled to protect the lands from being sold for taxes or otherwise lost to the mortgagor so as to admit of it being possible to reconvey the lands to the mortgagor when suit is brought to enforce payment under the covenants contained in the mortgage.

The argument advanced at this bar that the payment of the taxes was a voluntary payment and not one that the respondent could look to the appellant for indemnification, is to forget what the real position of the mortgagee is when, as here, the mortgagor (the appellant) has parted with the equity of redemption in the lands, and in view of the contention advanced by the learned counsel for the appellant, I may be pardoned if I quote in full the judgment of Mr. Justice Stirling in *Kinnaird* v. *Trollope* (1888), 57 L.J., Ch. 905, which completely elucidates the whole matter, and it is plain that the respondent being under the requirement to reconvey the lands upon payment, it follows there was the right to protect the mortgaged hereditaments from tax sale, so as to be able to reconvey the mortgaged property: Stirling, J., at pp. 906, 907, 909 said: [The learned judge quoted the judgment of Stirling, J. and continued].

MCPHILLIPS, J.A.

Further, upon the facts of the present case, the position was that of trustee and *cestui que trust,* and there is the right of indemnity. Note the special clause in the mortgage which reads "and it is agreed that . . . . sums of money paid by the mortgagee for the protection of this security such as taxes . . . . shall bear interest . . . . until all arrears of principal and interest and such other sums are paid and the whole being a charge upon the said lands until paid. . . . ."

In *Matthews* v. *Ruggles Brise* (1910), 80 L.J., Ch. 42, Swinfen Eady, J., said at p. 45:

"And in the case of *Fraser* v. *Murdoch* [(1881)], 6 App. Cas. 855, 872, Lord Blackburn, stating the rule, said: 'No doubt any one who requests another to incur a liability which would otherwise have fallen on himself is, in general, bound, at law as well as in equity, to indemnify him; this principle applies to many cases, and where a trust is for the benefit of the maker of the trust it may apply to a trustee.' In these circumstances, I

MCDONALD, J.

1922

June 22.

COURT OF APPEAL

1923

June 5.

B.C. LAND & INVESTMENT AGENCY v. ROBINSON

have no doubt that all the parties were originally liable to indemnify the trustees in the proportion of their shares in the partnership."

It will also be seen on an examination of the judgment in the case last cited that the fact that the respondent took a second mortgage on the lands from the transferees from the appellant matters not. No novation was created. The transactions are in every way distinct, and the liability of the appellant to the respondent always continued. I would also refer to *Hardoon* v. *Belilios* (1900), 70 L.J., P.C. 9. There their Lordships of the Privy Council held that:

"The relation of trustee and *cestui que trust* is established as soon as it is shewn that the legal title is in one and the equitable title is in another; and where the only *cestui que trust* is *sui juris* the trustee's right to indemnity by the *cestui que trust* against liabilities incurred by the trustee, as such, is not limited to the trust property, but also imposes on the *cestui que trust* a personal obligation enforceable in equity to indemnify his trustee, and the obligation attaches not only where the *cestui que trust* has created the trust, but where he has accepted a transfer of the beneficial ownership with a full knowledge of the facts."

It is not to be forgotten that the mere transfer of the mortgage held by assignment by the respondent, being the mortgage of the appellant sued upon, did not absolve the respondent from the position of trustee for the appellant. The appellant still remained liable upon the mortgage, and the respondent also was liable to its transferee. Further, the respondent, as we have seen, expressly guaranteed the mortgage as to principal and interest. This situation of necessity rendered it necessary for the protection of the appellant as well as the respondent, that the mortgaged hereditaments should be kept intact and in good standing, and in particular it was necessary to see that the taxes were paid, otherwise the lands would be sold, sales being held annually. The respondent gave notice as previously stated to the appellant of the transfer made to Musgrave of the mortgage made by the appellant and sued upon, and that it had guaranteed the same as to principal and interest, and that notice preceded the payments of taxes claimed in the action. This would certainly bring to the mind of the appellant, or should have, that the respondent was interested in keeping the mortgage security intact and protecting the lands from any sale for taxes. In view of this, the appellant would rely upon it that the respondent would do all things necessary to protect the

MCPHILLIPS, J.A.

mortgaged hereditaments, but this would not mean that the respondent would be required to do this without recourse to and indemnification from the appellant. That would, of course, follow and that is the legal position. That the respondent stood in the breach and paid interest and taxes the appellant ought to have paid, and was required to pay, cannot be admitted to be any excuse in law, or create any estoppel against the respondent and prevent the respondent insisting upon the appellant complying with his obligations under the covenants and terms of the mortgage of which the respondent is the assignee.

The fact that the mortgaged hereditaments, that is, the land, stood assessed in the names of the grantees from the appellant and the receipts for the taxes were taken in that way, cannot be deemed material or affect the position of matters in law, as the assessment is by statute always against the owners of the land as registered, and the grantees from the appellant were the registered owners but subject to the mortgage sued upon as well as the subsequent mortgage. Nor can the further fact be any matter of moment that the entries of the payments of the taxes appear in the loan accounts which cover the subsequent loan made upon the lands by the respondent. If there had been a loan made to the grantees from the appellant inclusive of the mortgage sued upon, the situation would, of course, have been different, and the appellant might have had some ground for the contention that he was released, and, further, it is to be remembered that there was no communication to the appellant of the entries in their books in this way, and it can be in no way conclusive against the respondent. The material fact is that the moneys paid for the taxes were the moneys of the respondent, not the moneys of the grantees from the appellant, nor moneys advanced upon the credit of the grantees from the appellant, but moneys of the respondent paid for taxes to prevent a sale of the mortgaged hereditaments which the respondent holds as assignee, in short, payments made to protect the mortgaged hereditaments, and there is the right in the respondent to call upon the appellant for indemnification therefor as a contractual obligation under the covenant in the mortgage of which the respondent is assignee, and the right of the

MCPHILLIPS, J.A.

MCDONALD, J.

1922

June 22.

COURT OF APPEAL

1923

June 5.

B.C. LAND & INVESTMENT AGENCY v. ROBINSON

trustee to be indemnified by his *cestui que trust* against all claims in connection with the trust property (*In re Richardson* (1911), 80 L.J., K.B. 1231; *Fraser* v. *Murdoch* (1881), 6 App. Cas. 855; *Hardoon* v. *Belilios* (1901), A.C. 118).

That the respondent was a trustee for the appellant, in the circumstances of this case in view of the terms of the mortgage made by the appellant and assigned to the respondent, cannot, in my opinion, be open to question, and in this connection I would refer to what Vice-Chancellor Wood said in *Kirkwood* v. *Thompson* (1865), 2 H. & M. 392 at p. 400:

"Now that a mortgagee is in some sense a trustee for the mortgagor may be admitted; for every person in whom the legal estate is vested with a beneficial interest for another person, in a sense is a trustee for that person. In some sense, a mortgagee is in a worse position than a trustee; for a trustee in an ordinary case is not liable to a decree for wilful default, unless a special case be proved against him; whereas, such a decree is merely of course as against a mortgagee in possession."

(Also see *Banner* v. *Berridge* (1881), 50 L.J., Ch. 630.)

I would also refer, relating to the right of recovery for the moneys paid for taxes, to an observation by Willes, J., in *Johnson* v. *Royal Mail Steam Packet Company* (1867), L.R. 3 C.P. 38 at pp. 44-5:

"Moreover, the compulsion of law which entitles a person, paying the debt of another, to recover against that other as for money paid, is not such a compulsion of law as would avoid a contract, like imprisonment. It has been decided in numerous cases that restraint of goods by reason of the non-payment of the debt due by one to another is sufficient compulsion of the law to entitle a person who has paid the debt in order to relieve his goods from such restraint to sustain a claim for money paid."

MCPHILLIPS, J.A.

Here we have the taxes assessed which were a charge against the mortgaged hereditaments and the appellant should have paid the taxes. He failed to do it. The respondent paid them. In my opinion, he was entitled to pay them to save the mortgaged hereditaments from tax sale.

In *Parkinson* v. *Higgins* (1876), 40 U.C.Q.B. 274, Harrison, C.J., at p. 283, said:

"The mortgagee in this case acquired title paramount to the vessel by reason of the admitted neglect and default of the mortgagor to discharge his proper pecuniary obligations. Having so acquired title the mortgagee had an undoubted right to take possession of the vessel. Having taken possession he, like a prudent man, insured the vessel for an amount of money which is not complained of as being too small. He employed the vessel, as he had a perfect right to do, in the proper business of such a

vessel. No complaint is made of anything improper in the use of her. While being so used she was lost by the perils insured against. The plaintiff, who is suing the defendant on his covenant for non-payment of the mortgage money, offers to apply the insurance money less the premium in reduction of the mortgage. All that he claims in this action is the difference between the amount advanced on the mortgage added to the amount advanced to save the vessel when sold in the foreign country, and the amount received from the insurance company. We know of no principle of law, whether administered by Courts of law or equity, which should be held to prevent a recovery under these circumstances. We are of opinion that Mr. Justice Gwynne was right in holding the replication, as now amended, a good answer to the plea."

Here we have the case of the appellant making this mortgage, of which the respondent is the assignee, *i.e.*, the appellant is the mortgagor and the respondent is in the like position to the original mortgagee. The respondent is possessed of the legal estate in the land of the appellant, and the appellant is under contractual obligation to pay the mortgage and perform all the covenants, one of which is to pay the taxes. The appellant created that situation. What then is the obligation in law which rests upon the appellant when the respondent has paid the taxes to prevent the lands being sold under tax sale? I would answer the question by the reasons for judgment of Grose, J., in *Exall* v. *Partridge* (1799), 8 Term Rep. 308 at pp. 310-11:

"The question is, whether the payment made by the plaintiff under these circumstances were such an one from which the law will imply a promise by the three defendants to repay; I think it was. All the three defendants were originally liable to the landlord for the rent; there was an express covenant by all, from which neither of them was released; one of the defendants only being in the occupation of these premises the plaintiff put his goods there, which the landlord distrained for rent, as he had a right to do; then for the purpose of getting back his goods he paid the rent to the landlord which all the three defendants were bound to pay. The plaintiff could not have relieved himself from the distress without paying the rent; it was not therefore a voluntary, but a compulsory, payment; under these circumstances the law implies a promise by the three defendants to repay the plaintiff. And on this short ground I am of opinion that the action may be maintained."

The analogy is, in my opinion, complete with the special facts of the present case. (Also see Gibbs, C.J., in *Taylor* v. *Zamira* (1816), 6 Taunt. 524 at p. 528; *Badeley* v. *Consolidated Bank* (1886), 34 Ch. D. 536, Stirling, J., at pp. 556-7).

MCDONALD, J.
1922
June 22.
COURT OF APPEAL
1923
June 5.
B.C. LAND & INVESTMENT AGENCY v. ROBINSON

It seems to me that the present case resolves itself into what I said at the outset, a simple case. There is the covenant to pay the taxes, the respondent paid them, the appellant should have paid them, that even apart from the covenant the facts establish a trusteeship and there is the right to indemnification. Lastly, the payment was not a voluntary one, it was a compulsory one, and the respondent having paid the debt of the appellant is entitled to recover therefor. All of these grounds of right of recovery are available to the respondent. Therefore, in my opinion, the judgment of the learned trial judge was right and should be affirmed, and the appeal dismissed.

EBERTS, J.A. would dismiss the appeal.

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

Solicitor for appellant: *C. W. Bradshaw.*
Solicitor for respondent: *C. J. Prior.*

COURT OF APPEAL
1923
June 5.
HALL v. COMMISSIONERS OF SUMAS DRAINAGE, DYKING AND DEVELOPMENT DISTRICT

HALL AND HALL v. COMMISSIONERS OF SUMAS DRAINAGE, DYKING AND DEVELOPMENT DISTRICT.

Solicitor—Payment of salary by Government—Acts as solicitor for defendant in matter in which Government is interested—Action dismissed with costs—Right of taxation as against plaintiff—B.C. Stats. 1918, Cap. 42, Sec. 3.

The members of the Land Settlement Board appointed by the Lieutenant-Governor in Council under section 3 of the Land Settlement and Development Act, as re-enacted by B.C. Stats. 1918, Cap. 34, Sec. 3, were appointed Commissioners for the Sumas Drainage, Dyking and Development District. An action was brought against the Commissioners and the Government being interested in the action as mortgagee of the work carried on by the Commissioners, a departmental solicitor paid a yearly salary by the Government, acted as solicitor for the Commissioners. The action was dismissed with costs, and on an

application for review of the taxing officer's certificate the plaintiff was, subject to change of certain items, ordered to pay the defendants' solicitor's costs.

Held, on appeal, reversing the order of MURPHY, J. that the Commissioners were not liable for the costs of their solicitor and with the exception of the actual disbursements could not tax the solicitor's costs against the opposite party.

APPEAL by plaintiffs from an order of MURPHY, J. of the 23rd of January, 1923, directing that the plaintiffs pay the costs of the defendants' solicitor in an action in which the defendants were successful. The appeal was taken on the ground that *J. W. Dixie,* who acted as solicitor for the defendants, was a salaried official of the Government of British Columbia and in defending this action for the defendants he was acting in that capacity as such salaried official and that the defendants were not liable to Mr. *Dixie* for any of the items mentioned in the bill of costs and are therefore not entitled to recover same from the plaintiffs.

Statement

The appeal was argued at Vancouver on the 26th of March, 1923, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

J. A. McGeer, for appellants: Where a suitor is under no liability to pay costs to his solicitor, or is indemnified by a third party against liability he cannot tax costs against the opposite party: see Holmested's Ontario Judicature Act, 4th Ed., 1729; *Gundry* v. *Sainsbury* (1910), 1 K.B. 645; *Stevenson* v. *Corporation of Kingston* (1880), 31 U.C.C.P. 333; *Jarvis* v. *The Great Western Railway Co.* (1859), 8 U.C.C.P. 280; *Galloway* v. *Corporation of London* (1867), L.R. 4 Eq. 90; *Ottawa Gas Co.* v. *City of Ottawa* (1902), 4 O.L.R. 656.

Argument

J. A. MacInnes, for respondents: In a matter in which the Government is interested they may direct a solicitor in their employ to act for the defendant. If the defendant is successful the solicitor is entitled to recover costs from the plaintiff: see *Rex* v. *Archbishop of Canterbury* (1903), 1 K.B. 289.

McGeer, in reply.

Cur. adv. vult.

5th June, 1923.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I think the true inference to be drawn

COURT OF APPEAL

1923

June 5.

HALL v. COMMISSIONERS OF SUMAS DRAINAGE, DYKING AND DEVELOPMENT DISTRICT

MACDONALD, C.J.A.

from the testimony of Mr. *Dixie* is that he acted for the Department of Justice, being the solicitor thereof, either at the instance of the department or tacitly on its behalf. At all events, he makes it perfectly clear that he was not acting as an independent solicitor who was personally entitled to costs, but that any costs which might be recovered by the defendants against the opposite party would not belong to him but would be paid into the department of the Government of which he was the solicitor.

The question raised is, in these circumstances, are the Commissioners entitled to tax the costs against their unsuccessful opponents, the plaintiffs? Plaintiffs' counsel say no. They submit, correctly enough, that costs are given by way of indemnity. They also submit that in this case the defendants are under no legal obligations to pay Mr. *Dixie,* and that as they are not liable they cannot have the costs by way of indemnity. There is a distinction, I think, between a case of this sort and some of the cases in the books, in which, for instance, a corporation had retained a solicitor at a salary. In *Galloway* v. *Corporation of London* (1867), L.R. 4 Eq. 90, it was held that the client was entitled to recover costs from the opposite party because he must be indemnified against the salary of his solicitor. In Ontario the Courts declined to follow this rule, holding that the client could not recover costs from the opposite party incurred by a solicitor under salary. This case, however, is not a case of that kind; it is more akin to *Gundry* v. *Sainsbury* (1910), 1 K.B. 645, in which the Court of Appeal in England held that the successful party in the suit was not entitled to have his costs against the opposite party where the solicitor of the former had agreed not to charge his client anything for costs. That case was decided on the principle already mentioned, that as the client was not liable for costs to his solicitor, he could not have costs against the opposite party to indemnify himself against a liability which did not exist.

Again, in *Esquimalt and Nanaimo Ry. Co.* v. *Hoggan* (1908), 14 B.C. 49, the Full Court held that the successful party to the litigation was not entitled to tax his costs against the other, because the Government of British Columbia had by statute undertaken to bear the expense of the litigation.

The case of *Rex* v. *Archbishop of Canterbury* (1903), 1 K.B. 289, was cited in support of the respondents' claim. In that case the Archbishop was sued and the Crown being interested in the matter assigned the solicitor of the Treasury to defend on behalf of the Archbishop, who was successful in the litigation. It was held that he was entitled to recover costs from the unsuccessful party, but it would appear in that case that the solicitor of the Treasury was himself entitled to be paid his costs either by the Archbishop or by the Crown, therefore the Archbishop was entitled to the costs to indemnify him against his obligations to his solicitor. This case differs from that in a material respect. Here it is not the solicitor but the Province that will get the costs. It is a fair test to ask: Could the Province recover from the defendants for Mr. *Dixie's* services? I think the obvious answer is, no. The Crown cannot recover costs nor is it liable to pay costs, therefore, if the action was one directly against the Crown, it would be apparent that no costs could be recovered from the plaintiffs. Is it different where the Crown was not directly concerned but undertakes the defence? I think not.

The suggestion in argument that these costs would eventually be credited to the persons responsible for dyking charges and dues, carries the matter no further. If it were so it would be a gift to them. There is nothing in the legislation governing the defendants which affects the question one way or the other. The actual disbursements of the defendants may, of course, be taxed to them. The *ratio decidendi* of this decision is that they shall not be entitled to tax costs for assistance rendered by the Crown.

To the extent indicated, the appeal should be allowed.

MARTIN, J.A.: It has long been settled by *Harold* v. *Smith* (1860), 5 H. & N. 381 at p. 385, that:

"Costs as between party and party are given by the law as an indemnity to the person entitled to them: they are not imposed as a punishment on the party who pays them, nor given as a bonus to the party who receives them. Therefore, if the extent of the damnification can be found out, the extent to which costs ought to be allowed is also ascertained."

In quoting this language, in *Gundry* v. *Sainsbury* (1910),

COURT OF APPEAL

1923

June 5.

HALL v. COMMISSIONERS OF SUMAS DRAINAGE, DYKING AND DEVELOPMENT DISTRICT

MARTIN, J.A.

1 K.B. 645 at p. 649, Cozens-Hardy, M.R., says that though party and party costs "are not a complete indemnity [yet] they are only given in the character of an indemnity."

In the light of these observations, I have carefully examined the whole cross-examination of the solicitor concerned (for the respondents), with the result that I can only reach the conclusion that the ordinary relationship of solicitor and client did not exist between him and the respondents (defendants). The situation was very unusual and involved, the said solicitor being an official (departmental solicitor) in the Attorney-General's department, but it is quite apparent to me that the Land Settlement Board (acting as Sumas Commissioners) went to him in his official capacity intending to invoke the legal assistance of the department. In such the circumstances there could have been no expectation that it would be liable to him privately for costs, and hence no question of indemnity for costs can properly arise. It is difficult to define the situation precisely, because the solicitor himself says, in attempting to describe it with precision: "I cannot tell exactly what happened"; but at least it is plain to me that his services were invoked not privately but publicly, the time that he was employed upon the matter was the time of the public, for which he was paid as a public servant; his position has fundamentally no relation to that of the Attorney-General who may practise in his private capacity. Such being the case, the fact that on the 23rd of December last, some four months after motion was made in Chambers to disallow these costs, the Land Settlement Board sent the solicitor a cheque for $500 on account of his taxed costs, can, obviously, have no effect upon the matter. He explains, with regard to this payment, that he was "a conduit-pipe in collecting for the Attorney-General's department," and that he handed over the cheque to be credited to the Parliamentary vote for that department. This view of the matter renders it unnecessary to consider the application of the Crown Costs Act thereto.

I have examined the case of *Rex* v. *Archbishop of Canterbury* (1903), 1 K.B. 289, cited on behalf of the solicitor, but it is based upon statutes and circumstances which are (as I ventured to assert at the time it was cited) quite different from anything

we have in this country. Doubtless the solicitor herein acted with the best intentions, but it is so unusual a thing, quite new to me at least, for a public solicitor to be acting during his office hours and at his office as a private solicitor, that it would require much stronger evidence than is now before us to justify me in holding that "the ordinary relationship of solicitor and client subsisted" as his counsel submitted.

It follows that the appeal should be allowed.

GALLIHER, J.A.: I agree with the Chief Justice, that the appeal should be allowed.

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

EBERTS, J.A. would allow the appeal.

Appeal allowed.

Solicitor for appellants: *J. H. Bowes.*
Solicitor for respondents: *J. W. Dixie.*

IN RE LEGAL PROFESSIONS ACT AND NEWCOMB v. GREEN.

Practice—Solicitor and client—Costs—Taxation orders—Order varying—Jurisdiction—Appeal—R.S.B.C. 1911, Cap. 136.

A judge may vary his own order after it has been drawn and entered in order to make it conform with the judgment as pronounced (*per* MACDONALD, C.J.A. and MCPHILLIPS, J.A.).

Per GALLIHER and EBERTS, JJ.A.: That the first orders having been acted upon is a barrier to their being subsequently varied.

APPEAL by J. R. Green from the order of MURPHY, J., of the 11th of May, 1923, whereby five orders previously made by him on the 5th, 7th, and 13th, and two on the 14th of March, 1923, were varied. The said J. R. Green had previously acted as solicitor for Charles Newcomb and Sarah Newcomb in vari-

COURT OF APPEAL

1923

July 12.

NEWCOMB v. GREEN

ous matters. Upon completion of the work Mr. Green presented bills in ten different matters in which he was acting for them, amounting in all to $5,692.68. A dispute arose. The parties were then at arm's length and their solicitors endeavoured to make a settlement but not succeeding Mr. Green's solicitor issued summonses and took out taxation orders in each of the ten matters in which he acted, five of these orders being made by MURPHY, J. as above stated. The costs were taxed in accordance with the orders and counsel for the Newcombs were notified and appeared on the taxations. By summons dated the 30th of April, 1923, on behalf of the Newcombs an order was made by MURPHY, J. on the 11th of May, 1923, amending the orders of the 5th, 7th, 13th, and two of the 14th of March, 1923, by adding a clause, "that the said solicitor give credit for all sums received on account of the said clients as well as other sums received from them or either of them," and that the clause "and it is further ordered that the costs of and incidental to this application be costs to the solicitor to be taxed and added to the result of the said taxation accordingly" be struck out and the following inserted: "and it is hereby further ordered that upon payment by the said clients or either of them of what (if anything) may appear to be due to the said solicitor, the said solicitor do (if required) deliver to the said clients or either of them or as he or they may direct all deeds, books, papers and writings in the said solicitor's possession, custody, or power, relating to the said clients or either of them." A further clause was added "and it is hereby further ordered that the costs of only one application for the said five orders be allowed to the said solicitor." The reason given by Green for taking out a separate order in each matter was that he acted for Mrs. Newcomb alone in certain matters, for Mr. Newcomb alone in certain matters, and for both together in others.

Statement

The appeal was argued at Victoria on the 12th of July, 1923, before MACDONALD, C.J.A., GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Higgins, K.C., for appellant: The five orders were drawn up and entered and acted upon, counsel for the respondents appearing on the taxations: see Halsbury's Laws of England,

Argument

Vol. 26, p. 791. There was acquiescence and the order appealed from should not have been made: see *McConnell* v. *Wakeford* (1890), 13 Pr. 455. He cannot change the orders he made in the five orders as to costs: see *B. Wood & Son* v. *Sherman* (1917), 24 B.C. 376; *City of Greenwood* v. *Canadian Mortgage Investment Co.* (1921), 30 B.C. 72; *Oxley* v. *Link* (1914), 2 K.B. 734; *In re Gist* (*a person of Unsound Mind*) (1914), 1 Ch. 398 at p. 413.

Argument

Hankey, for respondent: The procedure is set out in the Annual Practice, 1923, p. 1984. There should have been only one order: see *In re Ward* (1885), 28 Ch. D. 719 at p. 724; *Re G. Mayor Cooke* (*a Solicitor*) (1889), 33 Sol. Jo. 397. It should not be done piecemeal: see also *Holland* v. *Gwynne* (1844), 8 Beav. 124 at p. 126; *Re Wavell* (1856), 22 Beav. 634 at p. 636; *In re Law and Gould* (1856), 21 Beav. 481.

Higgins, in reply.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I take it to be settled law ever since the Judicature Act, that judges are not at liberty to change their orders after they have been drawn up and entered. They may do so before entry, but not after except under the slip rule or when the order drawn up is not that pronounced, that is to say, under the inherent jurisdiction of the Court to amend its records, when the record is not in accordance with the judgment pronounced. Unfortunately there has been a good deal of carelessness on the part of the solicitors here. There has been, on the one part, the taking out of ten orders when I think two at the most would have been sufficient, whereby unnecessary costs have been incurred. On the part of the other solicitor there was a want of care in supervising what was being done, and this has brought about the denouement which we now have to deal with.

The reason for making the order appealed from was that the prior orders were not in accordance with the judgment pronounced, and therefore the learned judge thought he had power to correct them so as to make them conform to the judgment which he had actually pronounced. With the exception of one clause, which I shall refer to presently, there is nothing

COURT OF APPEAL

1923

July 12.

NEWCOMB v. GREEN

in the order appealed from which I think need to be changed or challenged. That clause is as follows:

"And it is hereby further ordered that the costs of only one application for the said five orders be allowed to the said solicitor."

I take it that the five orders there referred to, are the five orders made by this particular judge—five of the ten which were made altogether, and that he was dealing only with his own orders, of course. If the five orders had been drawn up in the usual form, as the judge intended they should be, it would have been open to the taxing officer to have disallowed all the costs which he thought were unnecessary; and therefore, if he thought that one order was sufficient, he could have disallowed all the costs of obtaining the other four.

MACDONALD, C.J.A.

What the learned judge has done in inserting this clause, was done to correct the orders, as they ought to have been corrected, and make them conform to what was intended. He could have struck out from the five orders those clauses as to costs. Instead of doing that, he inserted a clause, which, while it may not be a technical cure, yet stripped of technicalities, is a cure. We ought to mark our disapproval of the manner in which this transaction has been carried out, and of the various mistakes made, by refusing costs. It is not necessary to find good cause for depriving the successful party of costs in a case of this kind, since the Court is equally divided; unless a majority agree to give costs, either one way or the other, there can be no costs. I think justice will be done by dismissing this appeal. There will be no order as to costs.

GALLIHER, J.A.

GALLIHER, J.A.: That last section referred to by the Chief Justice, is the one which occasions me to take a different view. Even as this order stands now, we have not the common order for taxation, that the learned judge said he intended to pronounce. With regard to this section, it appears to me that the costs having been dealt with by being taxed, the order is acted upon, and there is a barrier which cannot be overcome by the judge when the matter comes before him on a further application. If I am right in that view, then the appellant was entitled to come here and ask for this judgment to be set aside on that ground. Of course, the natural result of that

is, though I agree with many of the remarks that my learned brother has made, that in my opinion the appeal should be allowed.

McPHILLIPS, J.A.: I am of the like opinion to that expressed by my brother the Chief Justice.

EBERTS, J.A.: I am of the opinion expressed by my brother GALLIHER.

The Court being equally divided the appeal was dismissed.

Solicitors for appellant: *Moresby, O'Reilly & Lowe.*
Solicitor for respondent: *S. T. Hankey.*

THE STANDARD TRUSTS COMPANY v. PULICE.

Judgment—Court of Appeal—Application to amend—Costs—Payable out of any particular portion of estate—Marginal rule 989d.

A judgment of the Court of Appeal as drawn and entered will on application be amended to conform with the judgment of the Court in respect to costs.

Under Supreme Court Rule 989d the Court has power, in an action with respect to the validity of a will, to direct that the costs should be payable out of any particular portion of the estate.

MOTION to the Court of Appeal to amend the judgment of the Court as drawn to make it conform with the judgment of the Court with respect to costs. The action was as to the validity of the last will and testament of the late Franklin Riah Roundy, who died in Victoria on the 15th of April, 1921. His assets in the United States were valued at about $35,000 and in Canada at about $15,000. By his last will he left his American estate to a sister in Minneapolis and his Canadian estate to the defendant Frank Pulice. The judgment of the Court of Appeal was that the will was valid, that the defendant Pulice was entitled to the Canadian portion of the estate as provided in the will and that the costs of all parties be paid out of the estate. The judgment was so drawn, agreed to and entered. The Canadian estate was spoken of in the will as the "residue," from which under the judgment as drawn and

Statement

COURT OF APPEAL

1923

June 27.

STANDARD TRUSTS COMPANY v. PULICE

entered the costs would be paid, the result being that after payment of the costs there would be substantially nothing left for Pulice. Counsel for the defendant Pulice then applied for leave to amend the judgment by adding thereto the following words:

"Such costs to be borne proportionately between the assets of the said estate in the United States of America and the assets of the said estate situate in Canada."

Heard at Victoria on the 23rd of June, 1923, by MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Hankey, for the motion.
Maclean, K.C., and *J. A. McGeer, contra.*

On the 27th of June, 1923, the judgment of the Court was delivered by

MACDONALD, C.J.A.: This is an application to amend the judgment as drawn up so as to make it conform to the judgment of the Court in respect of the costs. Supreme Court Rule 989d gives the Court power to direct that the costs in a case of this kind should be payable out of any particular portion of the estate. Speaking with the concurrence of my brothers MCPHILLIPS and EBERTS, the order made herein as to costs was that they should be payable out of the whole estate and not out of that part which by our judgment goes to the defendant. All through the argument the two funds were spoken of as the "American" fund and the "Canadian" fund. The testator gave the "American" fund to his sister, who resides in the United States, and the "Canadian" fund to the defendant who resides in British Columbia. The defendant was successful in the appeal, but the fact was not called to the attention of the Court that the "Canadian" fund was spoken of in the will as the "residue," therefore the judgment as drawn, in effect, awards the costs against the successful defendant by making them payable out of that fund to which he is entitled, which was never the intention of the Court. The judgment should be amended so as to provide that the costs shall be payable out of the two funds proportionately.

Judgment

Motion granted.

RUCKER AND RUCKER v. WILSON, MACKENZIE AND BROWN.

GREGORY, J.

1922

Oct. 13.

COURT OF APPEAL

1923

June 5.

RUCKER v. WILSON

Water and Watercourses—Division of—Licences—Priority—Transfer of appurtenance—Comptroller—Powers of—Appeal—B.C. Stats. 1914, Cap. 81, Secs. 13(3), 51(2) and 77(3).

Upon an application for a licence to transfer a water right under section 13(3) of the Water Act, the comptroller of water rights has the same power as he has under sections 77 and 78 to refuse to further inquire into objections filed with him within 30 days after publication of the notice of the application under Part V. relating to the acquisition of licences in general, the procedure to be followed being directed *mutatis mutandis* by subsection (3) in applications thereunder.

The Court has no jurisdiction to interfere with the lawful exercise of the comptroller's powers, the remedy against them being an appeal to the minister of lands under section 51 (2) of said Act.

APPEAL by plaintiffs from the decision of GREGORY, J. in an action tried by him at Kamloops on the 5th, 9th, 10th, and 13th of October, 1922, for damages for wrongfully obstructing and diverting water from Sullivan Creek to which the plaintiffs claim they were entitled, and for an injunction. The parties to the action are ranchers in the Knouff Lake District. Sullivan Creek, from which both parties diverted water, was fed from the waters of Lower Knouff Lake, and the waters from Upper Knouff Lake flowed through a stream between the two lakes into the lower lake. In 1885 and 1891 the owners of what are known as the Holford and Dandy ranches obtained water records for diverting water from Sullivan Creek to irrigate their lands and they also obtained a record for the storage of water on the lower lake. These were the first records. In 1908 the plaintiffs' predecessor in title to their property adjacent to Sullivan Creek obtained two records, one to store 192 acre feet in Upper Knouff Lake and the second to bring the water through the creek adjoining the two lakes and through Lower Knouff Lake to a certain point of diversion on Sullivan Creek below the point of diversion under the records held by the owners of the Holford and Dandy ranches. Upon the present

Statement

GREGORY, J.

1922

Oct. 13.

COURT OF APPEAL

1923

June 5.

RUCKER v. WILSON

Statement

Water Act being passed the former "records" were replaced by "licences." In 1922 the defendants, owners of land adjacent to Sullivan Creek above the plaintiffs' land, bought the licences which were appurtenant to the Holford and Dandy ranches and there being a provision in the Act whereby the use of water may be detached from the land to which it is appurtenant and attached to other land, this provision was invoked by the defendants to enable them to transfer the appurtenancy to their lands. This was effected by a licence issued by the comptroller on the 29th of June, 1922. The defendants then diverted the water from a point above the plaintiffs' point of diversion in the summer of 1921, and prevented any of it from reaching the plaintiffs' land.

A. D. Macintyre, and *Chalmers,* for plaintiffs.
Fulton, K.C., and *E. Clark,* for defendants.

GREGORY, J.: In this matter I think there should be judgment for the defendants. The plaintiffs' rights whatever they are or were, are subject to the rights of the settlers at the mouth of Sullivan Creek. These peoples' rights were not cancelled merely by their executing a consent that the licences should be transferred to the defendants and some others. The exact date when their rights were extinguished is not clear to me, but I think they remained in existence until transferred to the defendants. The plaintiffs are only entitled to such water as remained after the prior licences were satisfied and there has been no evidence before me to shew that there was water to satisfy these licences and leave some for the plaintiffs.

GREGORY, J.

The plaintiffs contend that the water was wasted. I find against them on that as a matter of fact. The evidence was entirely unsatisfactory. One witness or two suggested that there was a waste, but it was not such evidence as would justify me in coming to a conclusion that there was water wasted in such quantities as to be of any value. There might be a pint or a quart wasted, but I am not satisfied that there was even that.

The comptroller said that he decided this matter on the 13th of May. The money was paid, the $6,500, on the 22nd of May.

My impression is that the transfer became effective then when the money was actually paid, the comptroller having given his decision, but if it was not, there was no water in the creek, no water used by the defendants that belonged to the plaintiffs, or to anybody else for that matter, except between the 4th of June and the 29th of June assuming the licence had no value until the 29th of June, the date on which it was issued.

There were only, I think, 110 acre feet of water passed down the creek during that period. I am unable to say of how much value that would have been to the plaintiffs. There is absolutely nothing before me to shew how much of that water would have reached their lands if allowed to go and if they were entitled to it. There is evidence that there would have been a great deal of waste between the point of diversion and the place where they used it, so I think I must assume 110 acre feet would never have reached their farms and how much would have reached it I do not know and of how much value it would have been to them I do not know.

It is quite evident from the evidence that the water supply in the year in question was very much poorer than the previous year, the only year in which I have any evidence as to the amount of produce the plaintiffs raised.

There must be judgment for the defendants and as I have already said I find that there was no waste and I find, as a matter of fact, that Wilson's record on the spring is a good and valid record, that there is a spring there.

The action will be dismissed. Judgment for the defendants with costs.

From this decision the plaintiffs appealed. The appeal was argued at Vancouver on the 9th of March, 1923, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Maclean, K.C., for appellants: It is about a mile from the upper to the lower lake and three miles from the lower lake to plaintiffs' lands. Rucker, who purchased in 1918, was entitled to 192 acre feet of water from the upper lake obtained by his predecessor, and time and labour were spent in preparing the

Argument

GREGORY, J.

1922

Oct. 13.

COURT OF APPEAL

1923

June 5.

RUCKER v. WILSON

outlet from the lake for storage of water. They claim priority through the transfer from Holford and Dandy but we are prior licensees for 192 acre feet from the upper lake which we store there in accordance with our licence. The comptroller changed the appurtenancy under section 13 of the Water Act. The procedure is set out in section 69 *et seq.* and under section 77 persons whose rights may be injuriously affected should be heard: see *Lapointe* v. *L'Association de Bienfaisance et de Retraite de la Police de Montreal* (1906), A.C. 535 at p. 539; *Bonanza Creek Hydraulic Concession* v. *Regem* (1908), 40 S.C.R. 281 at p. 288. Our record was never subject to theirs as it was different water, *i.e.*, from the upper lake. Secondly, they had no rights until the 29th of June, 1922. Thirdly, there had to be assent in writing of the licensee to the transfer of the appurtenances and what is most important to us there was no hearing: see *George* v. *Mitchell* (1911), 16 B.C. 510.

Argument

Fulton, K.C., for respondents: The main point is the transfer of the appurtenancy from Holford and Dandy. Section 13 gave a new right to transfer the appurtenancy. Under section 77 (3) the comptroller must consider objections and he did so. The objections before him did not set out in what way the plaintiffs would be affected by the change of appurtenancy applied for. The comptroller knew the position of the licences and the rights of the parties. Rucker lost an opportunity not a right. Under section 51 there is the right of appeal from the comptroller but this was not taken advantage of so the plaintiffs are now precluded from raising any objection to the comptroller's action.

Maclean, in reply.

Cur. adv. vult.

5th June, 1923.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The parties to the action live in what is called the "Dry Belt." Most of the lands in that belt require irrigation, and hence water is of very great importance to the owners; in fact, in many instances the land is valueless without irrigation. The Legislature, therefore, has paid considerable attention to the problems involved in the use of water in that

section of the Province. In the infancy of the Province records were obtained, by landowners, of specified quantities of water which under the records they were permitted to divert from natural watercourses and lakes for purposes of irrigation, each record having priority according to date; successive records were often granted upon the same stream, the subsequent ones being subject to the rights of the prior record-holders. As the Province became more populous, records were granted for the storage of water in lakes or other reservoirs. In the case of lakes this was affected by damming the outlet of the lake thus raising the level of the water therein. During the winter and spring seasons the lakes would fill to the height of the dam, making additional water available for irrigation.

In the year 1885 and again in 1891, the owners of what are known as the "Holford and Dandy" ranches, situate near the mouth of Sullivan Creek, obtained several grants, which were then called "records," of water to be taken from said creek for the purpose of irrigating their land and also for the same purpose, a record for the storage of water in Lower Knouff Lake, one of the tributaries of said creek. These several records were the first upon the creek and lake, and authorized the holders thereof to divert the water at a point below the plaintiffs' land hereinafter mentioned. For the purposes of this case, it may be taken that the holders of the Holford and Dandy records, were entitled to all the natural flow of Sullivan Creek as well as to the water stored by them in Lower Knouff Lake. In 1908 the plaintiffs' predecessor in title to the west half of the east half of section 5, township 23, range 16, west of the 6th meridian, in the County of Yale, situate adjacent to Sullivan Creek, obtained two records, the one authorizing him to store 192 acre feet of water in Upper Knouff Lake, a tributary of Sullivan Creek, above Lower Knouff Lake, the second entitling him to the use of the said water for irrigation of said lands and authorizing him to conduct it from Upper Knouff Lake through a creek connecting the two lakes, and through the lower lake to Sullivan Creek, the natural courses of the water, to a point of diversion on Sullivan Creek adjacent to his said lands. The situation at that time was that the

GREGORY, J.

1922

Oct. 13.

COURT OF APPEAL

1923

June 5.

RUCKER v. WILSON

Holford and Dandy record-holders had the right to divert only from the natural flow of Sullivan Creek, and from the stored water which they should bring down from Lower Knouff Lake, while the plaintiffs had an entirely independent right; their right was to store water in Upper Knouff Lake, to let it flow through the small creek between the two lakes, and through the lower lake into Sullivan Creek from which they could take it at the point of diversion in that creek specified in their record. In the eye of the law these rights were as distinct subjects of ownership as their respective farms were.

After the present Water Act was passed the former "records" were replaced by "licences" conditional or final, but nothing in this case turns upon this change, except the nomenclature applicable to the grant.

In the year 1922, the defendants, who were the owners of lands on or adjacent to Sullivan Creek above the plaintiffs' land, bought the said licences which were appurtenant to the Holford and Dandy ranches. There is a provision in the present Water Act by which the right to the use of water may be detached from the land to which it was appurtenant and attached to other land, and this provision was invoked by the defendants to enable them to obtain a transfer of the appurtenancy of these licences from the Holford and Dandy ranches to their lands aforesaid.

MACDONALD, C.J.A.

That was effected on the 29th of June, 1922, and evidenced by licences issued by the water comptroller. Acting under these the defendants diverted water above the plaintiffs' point of diversion. They diverted all the water which came down the creek after the 5th of June and prevented any of it from reaching the plaintiffs' land.

As the case was presented at the trial a good deal of attention was given to the fact, and in truth the chief complaint of the plaintiffs was, that the defendants had used the water and thus injured the plaintiffs prior to the issue of the licences of the 29th of June, in other words, that the defendants had taken the water from the creek before they had procured the change of appurtenancy. In my view, this has nothing to do with the case. The plaintiffs had no interest in the water which the holders of the Holford and Dandy licences were entitled to

enjoy, or if any, only a secondary right, which is not shewn to have been affected.

The question to be decided is, did the defendants divert from the creek, water to which the plaintiffs were entitled under their said licences? By far the greater part of the 400 pages of evidence is entirely beside the mark. The real points involved were very lightly touched upon at the trial and were not very satisfactorily dealt with in evidence, but I think this much may be gathered from such evidence as we have, that the plaintiffs under their storage licence had raised Upper Knouff Lake about two and a half feet, a height more than sufficient to retain the 192 acre feet authorized to be stored by them and that the water was there at the beginning of the irrigation season.

There was a suggestion by defendants' counsel, not raised by the pleadings however, that there had not been enough water collected during the winter and spring to fill Lower Knouff Lake to the height of defendants' dam, and that therefore the stored water in Upper Knouff Lake really belonged to the defendants, since it was required to fill their lake, but there is no suggestion in the evidence of a shortness of water during the winter and spring which was the period of retention of the water which would flow into the lakes from the watersheds.

On the 14th of May, Ira Rucker was at the upper lake. It was then overflowing the dam. He put in an extra plank in the dam raising it six inches. He thinks this would have little effect on the overflow since the lake would soon fill up from the spring freshets. I have been unable to find that this evidence has in any way been controverted.

If there be any evidence which would indicate that at the beginning of the irrigation season of 1922, Lower Knouff Lake was not filled to the height of its dam, that condition was not caused by lack of water during the storage season; it would have arisen from defective retention or from depletion of it by defendants prior to June, of which there is evidence. Assuming that it was open to them to do so, defendants have given no evidence upon this point at all, and I must therefore assume that the plaintiffs were entitled to the water which they, under their licence, stored in the upper lake.

GREGORY, J.

1922

Oct. 13.

COURT OF APPEAL

1923

June 5.

RUCKER v. WILSON

From what I have said above, it will be apparent what the respective rights of the parties were at the commencement of the irrigation season of 1922. It appears that all the stored water which as I have already said amounted to at least 192 acre feet, contained in Upper Knouff Lake, was released and allowed to come down during the irrigation season through the natural channels, which if it had not been interfered with would have been available at the plaintiffs' point of diversion on Sullivan Creek. It is equally clear that very little, if any, of that water was allowed to reach the plaintiffs' land. Each of the defendants irrigated his own lands from Sullivan Creek above the plaintiffs' authorized point of diversion, and thus intercepted and used not only the natural flow of the creek, and the stored waters of Lower Knouff Lake, but also the water stored by the plaintiffs in the upper lake.

Something has been said about loss of water by seepage and evaporation during its progress down, but it is apparent to me that very little of the plaintiffs' water was lost in this way since there was the natural flow in Sullivan Creek to soak the ground about it and prevent any material loss from the extra water going down. The loss of natural flow would have to be borne by those who were entitled to the natural flow and therefore only the loss occasioned by the increased flow of the plaintiffs' water should be deducted, and this, I think, is practically negligible. Between the lower lake and plaintiffs' ditch there would not be much loss and between the two lakes, none. In the evidence there is much confusion between loss of water in the creek and loss in the ditches, which are quite different things.

MACDONALD, C.J.A.

It was said that the summer of 1922 was a dry one, but this fact would not affect the matter in any way as I see it, since the plaintiffs were entitled to 192 acre feet, which were sufficient to irrigate the lands which they were entitled to irrigate, namely, 64 acres, and hence the dryness of the summer would not reduce the damages for loss of the water.

On the case as presented in evidence, I am satisfied that the defendants abstracted from the creek the said water belonging to the plaintiffs, and thereby prevented it from reaching the

plaintiffs' lands and as the defendants claim the right to take all the water irrespective of the plaintiffs' rights, and as they have obstructed their ditches which in any case they had no right to do, there should be an injunction.

This brings me to the question of the *quantum* of damages; plaintiffs' lands are in hay principally; they have at all events, 64 acres of hay lands; their total acreage in hay in 1921 was 80, from which they obtained 120 tons. The evidence is that hay in 1922 was worth $25 per ton. Therefore, on the basis of 1921, they should have got 96 tons from the 64 acres. They actually got 30 tons. At most, therefore, they lost 66 tons of hay by reason of defendants' wrong. There should be some deduction from their loss on account of harvesting and selling, but this amounts to little as between the harvesting of a good crop and a poor one. On the whole evidence, I think $1,500 will cover the plaintiffs' loss.

The appeal, should, therefore, be allowed and judgment entered for that sum.

MARTIN, J.A.: The principal, and decisive point in this appeal arises under section 13 (3) of the Water Act, 1914, Cap. 81, and relates to the power of the comptroller, upon an application for a licence to transfer a water privilege, to refuse to further inquire into objections filed with him within 30 days after publication of the notice of application under Part V. relating to the acquisition of licences in general, the procedure of which is directed to be followed *mutatis mutandis* by said subsection (3) in applications thereunder.

After careful consideration of the sections involved I am of opinion that there is no good reason why he should not have the same power of refusal in both cases when the applications come under his "consideration." In both subsection (3) and section 78, for example, there are provisions declaring and limiting his duties and powers when his "consideration" is being exercised, and the matters to be decided are of wider and greater importance under the general provisions of sections 77-8 than under subsection (3): the expression "if it is shewn" in (3) does not at all necessarily mean "shewn" by an objector,

GREGORY, J.

1922

Oct. 13.

COURT OF APPEAL

1923

June 5.

RUCKER v. WILSON

but by such very varied material as he may have before him including, *e.g.*, the report of the engineer of the district and, to quote section 78 "any other material information at his command," which in this case includes also the best possible "information," *viz.*, his own observation of the locality.

Being of opinion, therefore, that he had the power to refuse to fix a hearing of the objections, as he did not "consider the alleged grounds sufficient to warrant inquiry," section 77 (3), it is only necessary to add that a close examination of all the evidence on the point shews that he did after admittedly honest "consideration" of the application come to a "decision" (3) on the 13th of May, 1922, in favour of granting the application, as his letters of that date and of the 18th following shew, and though on Tuesday, the 27th of June following he did by letter consent to allow the plaintiffs' solicitors to "go into the matter with him" at his office "during the remainder of the week" as the licences had not been actually issued, yet he notified them that "the matter of the licences is being proceeded with." But despite the obvious urgency of the matter the said solicitors did not even acknowledge that letter till the 3rd of July, after the licences had been issued, on the 29th of June. In such circumstances it is obvious that the attempt, by telegram on 26th June, on behalf of certain soldier settlers (even assuming they had the right) to withdraw the filed consent of The Soldier Settlement Board, came too late.

MARTIN, J.A.

I have no doubt that no Court has jurisdiction to interfere with the lawful exercise of the comptroller's powers, the remedy against them being the appeal to the minister under section 51 (2).

It follows that the appeal should be dismissed.

GALLIHER, J.A.: I have taken the trouble to read all the evidence in this case, as on the argument before us the present situation of the water rights seemed to me to impose a hardship upon the plaintiffs especially in a dry season. However, they never appealed from the comptroller's decision which right is given by the Act, and the discretion conferred on the comptroller by the Act to either grant or refuse a hearing (section

GALLIHER, J.A.

77 (3) of Cap. 81, 1914) cannot, I think, be interfered with except on appeal as given by the Act.

It might seem that a hearing should have been held but there is also this to say: the comptroller had been upon the ground and understood the situation prior to his decision. This disposes of any question of the defendants having a prior right to the water as evidenced by the licences granted 29th June, 1922, so that the present action must stand or fall upon whether between June 5th and 29th, 1922, the defendants had the prior right to water out of Sullivan Creek and Knouff Lakes. The defendants had the consent of the prior holders of the rights sought to be transferred and had paid their money $6,500 on the 22nd of May, 1922. Their application had been made and notices posted and the necessary proceedings taken under the Act, and the comptroller's letter refusing to entertain the plaintiffs' objection, were all prior to June, 1922. The comptroller swears he had decided the matter ere that and it was only a question of preparing and issuing the transfer licences.

There was a question raised as to a withdrawal of the consent and even if the parties granting the consent could at the time when the alleged withdrawal was made do so (which I doubt) the evidence does not convince me that any actual and proper withdrawal was made.

Upon the other features of the case, I would not be justified in saying the learned trial judge was wrong in the conclusions he arrived at on the evidence.

The appeal should be dismissed.

McPhillips, J.A.: This appeal raises a question of great importance in the administration of the Water Act, 1914, which constitutes a code defining how water rights are to be validly held and the procedure in relation thereto when there is conflict and the determination of priority of right. Water, especially in the "Dry Belt," where the water in question is, is vital and necessary in the carrying on of farming operations, and care was taken to safeguard all existent or vested rights to water when the legislation now governing in the matter was introduced. The scheme of the Act was to settle and adjust all existent rights

GREGORY, J.

1922

Oct. 13.

COURT OF APPEAL

1923

June 5.

RUCKER v. WILSON

GALLIHER, J.A.

MCPHILLIPS, J.A.

GREGORY, J.

1922

Oct. 13.

COURT OF APPEAL

1923

June 5.

RUCKER v. WILSON

at the time of the passage of the Act and to reconcile conflicts in records to the end that there should be the most advantageous beneficial user of water in the interest of the general development of the country by a conservative utilization of all available waters. To this end elaborate machinery was brought into play to effectuate this purpose and the Water Board held sittings throughout the Province and careful attention was given to all the attendant facts, the priorities studied, and adjustments made, the adjudications in all cases being subject to appeal.

Now, in the present case there was an adjudication by the comptroller under section 77 (3) of the Water Act, 1914, the holding being that a *prima facie* case was not established which warranted an inquiry, and no appeal from this decision was taken. In my opinion, this failure is fatal. The appellants cannot be admitted to here litigate a question which should have been determined in plain compliance with the statutory provisions. This case is not one of there being a denial of natural justice. If the appellants had invoked the proper and plain provisions of the Act, it would have been possible to have had the decision of the comptroller reviewed (see sections 49, 50, 51), and if upon appeal it had been determined that a *prima facie* case was present, then a hearing would have followed with further right of appeal from any final adjudication in the matter. Even if the question were open and could be determined upon the merits, the facts as developed would appear to clearly establish that the judgment of the Court below was right, and it could only be disturbed if this Court were of the opinion that it was clearly wrong. In the present case none of the elements warranting interference with the judgment upon the facts would appear to be present. *Coghlan* v. *Cumberland* (1898), 1 Ch. 704; *Ruddy* v. *Toronto Eastern Railway* (1917), 86 L.J., P.C. 95 at p. 96; *McIlwee* v. *Foley Bros.* (1919), 1 W.W.R. 403 at p. 407.

MCPHILLIPS, J.A.

I would dismiss the appeal.

EBERTS, J.A.

EBERTS, J.A. would dismiss the appeal.

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

Solicitor for appellants: *R. M. Chalmers.*
Solicitor for respondents: *E. Clark.*

CORPORATION OF THE DISTRICT OF BURNABY v. OCEAN VIEW DEVELOPMENT LIMITED.

HOWAY, CO. J.

1922

Dec. 8.

COURT OF APPEAL

1923

June 5.

CORPORATION OF DISTRICT OF BURNABY v. OCEAN VIEW DEVELOPMENT LIMITED

Taxation—Ground held for cemetery purposes—Exemption—"Actual use solely as such"—R.S.B.C. 1911, Cap. 32, Secs. 2, 3, 21 and 27—B.C. Stats. 1919, Cap. 63, Sec. 7.

On the 6th of June, 1919, the defendant Company became the registered owner of the north-east quarter of district lot 150, group 1, New Westminster. In contemplation of its use as a cemetery, the Company prepared a plan before purchase shewing the proposed scheme which was never filed, and the board of health granted permission to use the whole property as a cemetery. After the purchase ten acres were cleared and prepared for use for burial purposes and on the 17th of July, 1919, were conveyed to the Ocean View Burial Park Company. A further acre and a half was sold to the plaintiff but the remaining 27 odd acres remained registered in the name of the defendant. The drains on the ten acres that were cleared were continued through the 27 acres, but on the 9th of February, 1920, when the Court of Revision sat the 27 acres were largely in a state of nature. In an action for taxes assessed on the 27 odd acres for 1920, it was held by the trial judge that this ground was not a "cemetery in actual use solely as such" within the meaning of section 206(2) of the Municipal Act as enacted by B.C. Stats. 1919, Cap. 63, Sec. 7, and the defendant was liable for the taxes so assessed.

Held, on appeal, affirming the decision of HOWAY, Co. J., that the land was not in use for the purposes of a cemetery. The Cemetery Companies Act only applies to companies registered thereunder and the appellant Company not being so registered, land registered in its name was not exempt under section 206(2) of the Municipal Act.

APPEAL by defendant from the decision of HOWAY, Co. J. in an action tried by him at New Westminster on the 10th of November, 1922, for taxes for the year 1920 on 27.165 acres of land being a portion of the north-east quarter of district lot 150, group 1, New Westminster District. The defendant who was the owner of the whole of said north-east quarter claimed that the whole property including the 27.165 acres in question was a cemetery in actual use solely as such and has been so used prior to 1920. The facts are set out fully in the judgment of the trial judge. Statement

McQuarrie, K.C., for plaintiff.
Higgins, K.C., for defendant.

HOWAY, CO. J.

1922

Dec. 8.

COURT OF APPEAL

1923

June 5.

CORPORATION OF DISTRICT OF BURNABY *v.* OCEAN VIEW DEVELOPMENT LIMITED

8th December, 1922.

HOWAY, Co. J.: This is an action for taxes assessed on 27.165 acres of the north-east quarter of district lot 150, Group 1, New Westminster District.

The defence is that the "whole of the property in question is a cemetery in actual use solely as such" and hence is exempt from taxation by virtue of section 206 (2) of the Municipal Act, as enacted by B.C. Stats. 1919, Cap. 63, Sec. 7.

The main facts are not in dispute. On June 6th, 1919, the defendant Company was registered as the owner in fee of the north-east quarter of district lot 150 aforesaid. On June 17th, 1919, it conveyed to the Ocean View Burial Park Company, a duly incorporated cemetery company, a part thereof containing ten acres; and a portion 1.435 acres was conveyed to the plaintiff. These conveyances were registered in June, 1919. The remainder of the property, 27.165 acres, is the portion still registered in the name of the defendant. The question before me is whether, at the time the assessment roll for 1920 became effective, this 27.165 acre portion was exempt from taxation as being a "cemetery in actual use solely as such."

The defendant, before its purchase of the property, in contemplation of its use as a cemetery, caused a plan shewing the general proposed scheme to be prepared. This plan covered the whole north-east quarter. It was not filed of record. There was nothing binding the defendant so to use the property; the plan was only on paper and prepared apparently for the defendant's own use.

HOWAY, CO. J.

In January, 1919, the Provincial board of health, under R.S.B.C. 1911, Cap. 33, granted permission to use the whole property as a cemetery. Ten acres were cleared by the defendant, prepared for use for burial purposes, and plotted in detail on the ground. This is the portion conveyed to the Ocean View Burial Park Company on June 17th, 1919, and the only part of the property, which at the time the assessment for 1920 became effective, was registered in the name of the cemetery company. It is admitted that this ten acres is exempt from taxation and it has not been taxed by the plaintiff. The first permit for burial was issued July 22nd, 1919, and since that date many burials have taken place in it.

The 27.165 acre portion has been fenced (at any rate in great part), but I take it on the evidence before me that it was in 1919 and on February 9th, 1920, when the Court of Revision sat, largely in a state of nature, some of the larger trees had been felled, the drains from the ten-acre portion had been continued through it to an outlet, but it was not then and is not now in a condition to be used as a cemetery. It is contended that because the paper plan shews the intention to utilize this 27.165 acres for a cemetery, because the Provincial board of health has given permission, to use the whole north-east quarter as a cemetery, and because the work on the ground is carried out with the view of connecting it with the work on the 27.165 acres at some later date, therefore the 27.165 acres was in 1920 a "cemetery in actual use solely as such."

In my view this 27.165 acre portion was not then such a cemetery. For the reasons which I set out in the case of *Burnaby* v. *Clowes* [not reported], I hold that it was not even the property of the cemetery company under agreement. It is difficult to understand how it can be a cemetery, while the title to it is held by, and registered in the name of, the defendant company, which is not shewn to be empowered to carry on a cemetery. The agreement does not contemplate any right in the cemetery company to obtain and use any portion of the property until it has been developed by the defendant Company. The recital shews this in stating that the defendant Company "has agreed with the Burial Park Company to lay out and develop the same so that such land may be utilized as a burial park or cemetery by the Burial Park Company."

The agreement between the defendant Company and the cemetery company does not contemplate the present use of the whole property as a cemetery, for example section 4 provides that:

"The Burial Park Company shall, as soon as the first ten (10) acres of said burial site are laid out by the Development Company forthwith proceed to sell sites for graves therein and continue to sell sites for graves in all other parts of the said burial site as are from time to time laid out and developed by the Development Company."

I therefore hold that the land in question is not exempt from taxation under section 206 (2) above referred to.

HOWAY, CO. J.

1922

Dec. 8.

There will be judgment in favour of the plaintiff for $602.45 with interest at 8 per cent. from December 31st, 1920, to be computed by the registrar, and costs.

COURT OF APPEAL

1923

June 5.

From this decision the defendant appealed. The appeal was argued at Vancouver on the 28th of March, 1923, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

CORPORATION OF DISTRICT OF BURNABY *v.* OCEAN VIEW DEVELOPMENT LIMITED

Higgins, K.C., for appellant: We claim exemption because the ground is part of a burial ground and cemetery. The development company was to develop the property in accordance with the Cemetery Companies Act. As regards ownership see *Armstrong City Corporation* v. *Canadian Northern Pacific Railway Company* (1920), A.C. 216; *Municipal Corporation of City of Toronto* v. *Virgo* (1896), A.C. 88. Section 2 of the Cemetery Companies Act makes this a cemetery. The public have a right to use the cemetery under the Cemetery Companies Act. Several sections indicate this. It is not a question of registration but of user. The only way we can get our money is by it being carried out as a cemetery and sold in burial lots: see *Smith* v. *Humbervale Cemetery Co.* (1915), 33 O.L.R. 452; *Ottawa Young Men's Christian Association* v. *City of Ottawa* (1913), 29 O.L.R. 574; *In re Ponsford and Newport District School Board* (1894), 1 Ch. 454.

Argument

Mayers, for respondent: A municipal corporation cannot take note of any one but the registered owner. The duties of the Municipality are set out in the Act. A person who has no registered interest is one of whom strangers are not bound to take any notice at all: see *Levy* v. *Gleason* (1907), 13 B.C. 357; *Bank of Hamilton* v. *Hartery* (1919), 58 S.C.R. 338; *Smith* v. *Humbervale Cemetery Co.* (1915), 33 O.L.R. 452 at p. 460; *Ottawa Y.M.C.A.* v. *City of Ottawa* (1910), 20 O.L.R. 567 at p. 568. Next whether there is ownership or not it must be used for burial purposes or there is no exemption. The actual state of the ground is what determines whether it is exempt. Clearly on the evidence it is not a cemetery in actual use.

Higgins, in reply.

Cur. adv. vult.

5th June, 1923.

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

The land claimed to be illegally assessed, was, in my opinion, not land in actual use for the purposes of a cemetery. The business of the Development Company, the registered owners, was to prepare the land for use as a cemetery, and when they had done this to turn it over to the cemetery company, with whom they had an agreement for sale. They had already conveyed a part of their land for actual use for cemetery purposes to the said company, but the land in question was not then even fit for such purposes, and was therefore not conveyed.

I agree with the learned County Court judge.

MARTIN, J.A.: As I agree with the reasons of the learned judge appealed from I shall only add the following observations.

A careful perusal of all the sections of the Cemetery Companies Act, R.S.B.C. 1911, Cap. 32, makes it clear to my mind that it applies only to a company registered thereunder (section 3) which has actually acquired the whole of "the land to be used exclusively as a cemetery" by obtaining title thereto in its own name so that it may be assessed as the owner thereof: see particularly sections 2, 3, 15, 25 and 27; the appellant Company is not a company under this section. The pertinent Ontario decisions to which we have been referred deal with companies or associations which own the whole area in question and must be read and restricted in that light. The decision of the Privy Council in *Armstrong City Corporation* v. *Canadian Northern Pacific Railway Company* (1920), A.C. 216 (on an appeal from this Court) which refines and curtails, in effect, its former decision, is on a special statute, and no general rule can be extracted from it.

As to the approval granted by the Provincial board of health under section 2, Cap. 33 of R.S.B.C. 1911, the Cemetery-sites Approval Act, that goes no further than to approve the site as "a fit and proper place for burial," and while it would be of benefit in assisting an incorporated cemetery company to shew that the whole of the "land acquired by the company" (section 27) for a cemetery was in "actual use solely as such" under

HOWAY, CO. J.

1922

Dec. 8.

COURT OF APPEAL

1923

June 5.

CORPORATION OF DISTRICT OF BURNABY v. OCEAN VIEW DEVELOPMENT LIMITED

MARTIN, J.A.

HOWAY, CO. J.

1922

Dec. 8.

COURT OF APPEAL

1923

June 5.

CORPORATION OF DISTRICT OF BURNABY v. OCEAN VIEW DEVELOPMENT LIMITED

section 206 of the Municipal Act, as enacted by 1919, Cap. 63, Sec. 7, yet it does not so assist other companies.

Perhaps the weakest point in one aspect of the appellant's case, despite the able and persuasive way it was presented by Mr. *Higgins,* is to be found in the exception in the first clause of the agreement of the 23rd of January, 1919, which frees the appellant Company from the obligation therein set out. I entertain no doubt that there is nothing in the Cemetery Companies Act or otherwise to prevent the parties to that agreement from coming to any arrangement they please to vacate its further operation; section 19, on the facts before us would only affect graves in the ten-acre block now admittedly used as a cemetery.

GALLIHER, J.A.

GALLIHER, J.A.: While on the evidence here the act might be open to the construction urged by Mr. *Higgins,* it is, I think, also open to the construction given it by the learned trial judge, and while I quite see that there is room for difference of opinion, and being myself inclined to the view adopted by the learned judge, I feel I would not be justified in interfering with the judgment and would dismiss the appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I concur in dismissing the appeal. The situation is one of some apparent difficulty in the working out of the scheme of the maintenance and up-keep of a cemetery and ensuring permanency of conditions, yet it would not appear to be possible to effectively claim exemption from taxation, save where the title in the land is vested in and actually conveyed to the cemetery company.

EBERTS, J.A.

EBERTS, J.A. would dismiss the appeal.

Appeal dismissed.

Solicitor for appellant: *Frank Higgins.*
Solicitors for respondent: *McQuarrie, Cassady & Macgowan.*

MARSHALL v. WAWANESA MUTUAL INSURANCE COMPANY.

MCDONALD, J.

1923

June 21.

MARSHALL v. WAWANESA MUTUAL INSURANCE CO.

Fire insurance—Holder of property under agreement for sale—"Owner," meaning of—Creditor in addition to statutory conditions—Ineffectual unless inserted as provided by Fire-insurance Policy Act, R.S.B.C. 1911, Cap. 114.

The plaintiff, a returned soldier, purchased under agreement for sale from the Land Settlement Board, a certain property on which was subsequently built a dwelling-house and barn which he agreed to insure against loss by fire. An agent of the defendant Company then examined the premises, made arrangements with the plaintiff as to a policy, and had him sign an application in blank which the agent agreed to fill out from the information received. The policy covered $500 on household furniture, $500 on a barn, and $500 on the produce in the barn. The plaintiff told the agent he held the property under agreement for sale from the Land Settlement Board but a question in the application as to applicant's title was answered by the word "owner." The plaintiff admitted the agent said the Company would only insure for two-thirds of the actual cash value of the property insured. The value of the contents of the barn varied and it was agreed that the cash value thereof should be stated in the application at $750. A fire took place and the barn and contents were destroyed. The actual value of the contents of the barn at the time was $423.50. The Company paid $282.30 (two-thirds of the value of the contents of the barn) into Court but refused to pay for the loss of the barn owing to plaintiff's statement that he was "owner" thereof. In an action to recover for the loss of the barn and the full value of the contents:—

Held, that the word "owner" has no definite meaning and may be applicable to various interests including the plaintiff's and is not a ground for refusing to pay the insurance on the barn.

Hopkins v. *Provincial Insurance Co.* (1868), 18 U.C.C.P. 74, followed.

Held, further, that the policy purported to insure the produce in the barn for $500, and although the application contains a clause that "not more than two-thirds of the cash value thereof at the time of the loss shall be "recoverable" such a condition would be an addition to the statutory condition and is ineffectual unless written in the policy in the manner provided by the Fire-insurance Policy Act. The plaintiff is therefore entitled to recover the full value of the produce in the barn at the time of the fire.

Statement

ACTION on a fire-insurance policy covering $500 on household furniture, $500 on a barn and $500 on the contents of the barn. The facts are sufficiently set out in the reasons for

MCDONALD, J. judgment. Tried by McDONALD, J. at Victoria on the 14th and 18th of June, 1923.

1923

June 21.

Clearihue, and *Straith,* for plaintiff.

MARSHALL v. WAWANESA MUTUAL INSURANCE CO.

Harold B. Robertson, K.C., for defendant.

21st June, 1923.

McDONALD, J.: Action upon a fire-insurance policy covering $500 on household furniture, $500 on a barn, and $500 on the produce in said barn.

The plaintiff, the assured, was one of a group of returned soldiers who took up land in the District of Merville, in the Province of British Columbia, from the Land Settlement Board of the Province. The plaintiff's title was acquired under an agreement for sale, dated 25th October, 1920, whereby the Land Settlement Board agreed to sell and the plaintiff agreed to purchase the lands upon which the building in question was subsequently built; the purchase price was payable in 25 annual instalments of $108 each, the first instalment falling due on the 1st of October, 1922. The agreement contained a clause whereby the purchaser agreed to keep the buildings on the lands insured against loss or damage by fire to their full insurable value.

Judgment

On the 7th of September, 1921, one Lewall, an agent soliciting insurance on behalf of the defendant Company, called upon the plaintiff at his farm and examined the premises, and took notes of information received from the plaintiff relating thereto. The plaintiff signed an application in blank and the agent agreed to fill the same out from the information received from the plaintiff. The agent was advised that the land in question was held under agreement from the Land Settlement Board. One of the questions in the application reads as follows: "What is your title to or interest in the property herein proposed for insurance"? The answer to which was filled in by the agent as follows: "Owner." The next question is: "If mortgaged, state to whom and for how much," which question is left unanswered.

On or about the 6th of July, 1922, a fire occurred, whereby the barn and its contents were destroyed. The defendant has

paid into Court the sum of $282.30, being two-thirds of the value of the contents of the barn, and contests any liability with regard to the insurance on the barn, or as to the further one-third of the value of the contents. With regard to the barn it is contended that the answer given to the above question as to the title to the property is untrue, and that the plaintiff cannot recover. This contention, I think, cannot succeed, on the authority of such cases as *Hopkins* v. *Provincial Insurance Co.* (1868), 18 U.C.C.P. 74; *Davidson* v. *Waterloo Mutual Fire Insurance Co.* (1905), 9 O.L.R. 394; *Drumbolus* v. *Home Insurance Co.* (1916), 37 O.L.R. 465; *Rockmaker* v. *Motor Union Insurance Co.* (1922), 69 D.L.R. 177; 70 D.L.R. 360.

On the authority of the above cases, I think the plaintiff is entitled to recover the sum of $500 in respect of the insurance on the barn, the word "owner" being a sufficient description of the plaintiff's title to the property insured.

With regard to the insurance on the contents of the barn, the defendant contends that it is liable only for two-thirds of the loss, for the reason that the application is in the following form:

"Application of F. R. Marshall of Merville, B.C., for insurance (for not exceeding two-thirds of the actual cash value) against loss or damage by fire," etc.

The application has a further clause to the effect that the application "shall form a part and be a condition of the insurance contract," and the "applicant agrees that it is also a special condition of the insurance hereunder affected, that upon any property herein insured, not more than two-thirds of the cash value thereof at the time of loss will be recoverable from said Company." And it is further agreed that "if the agent of the Company sign the application he will in that case be the agent of the applicant and not the agent of the Company."

Judgment

It will be noted that in this case the agent did not sign the application but filled it out after the applicant had signed it. The uncontradicted evidence of the applicant was that the agent told him that the Company would only insure for two-thirds of the cash value of the property insured, and that the contents of the barn varied from time to time, sometimes running as high as $1,700 to $1,800. It was agreed therefore, that the cash value of the contents should be stated in the application to be

MCDONALD, J.

1923

June 21.

MARSHALL v. WAWANESA MUTUAL INSURANCE CO.

$750 and the amount of insurance based thereon $500. The policy purported to insure the produce in the barn for $500, and provides that the Company shall make good unto the assured all such immediate loss or damage (not exceeding in amount the sum assured), as shall happen by fire or lightning to the property insured. No reference is contained in the policy to the limitation of two-thirds of the actual cash value of the property destroyed. The actual value of the contents of the barn on the date of the fire was $423.50.

Assuming as against the plaintiff that he is bound by all the terms of the application, which he did not read, we have here an attempt on the part of the Company to incorporate in the policy a condition which is virtually to the effect, that notwithstanding the amount of the insurance provided for by the policy, only two-thirds of the amount of the actual loss shall be payable. Such a condition would be an addition to the statutory conditions and, in my opinion, is ineffectual unless written upon the policy in the manner provided for by the Fire-insurance Policy Act.

Judgment

There will be judgment, therefore, for the plaintiff for $923.50, and costs on the appropriate County Court scale.

Judgment for plaintiff.

REX v. GEFFLER.

CAYLEY, CO. J.

1923

June 22.

REX v. GEFFLER

Criminal law—Keeping common gaming-house—Shooting-machine—Mixed game of chance and skill—Criminal Code, Sec. 226.

Accused operated a machine known as a "straight aim machine" in a pool-room. A revolver was mounted on a curved traveller and about 30 inches beyond were five diamond-shaped targets. The mouth of the revolver contained a slot into which the player inserted a ten-cent. piece. The player pulled the trigger and endeavoured to shoot the ten-cent piece into one of the diamond-shaped receptacles. If he succeeded it released a number of dimes contained in a cup beneath, which he received. If he missed, the dime would either fall into one of the cups or to the bottom of the machine, in which latter event it would belong to the owner of the machine.

Held, that there was no evidence to warrant the Court in finding that the element of "chance" was present in the shooting of this revolver at a mark when in the hands of an expert. It is substantially target-shooting which is not "a mixed game of chance and skill." The accused should be discharged.

TRIAL of the accused by CAYLEY, Co. J., at Vancouver on the 22nd of June, 1923, on the following charge:

"For that he the said Emile Geffler, at Powell River, in the said County of Vancouver, Province aforesaid, on Wednesday the 13th day of June, A.D. 1923, did unlawfully keep a disorderly house to wit: a common gaming house to wit—a place kept for gain to which persons resort for the purpose of playing at a game of chance or mixed game of chance and skill contrary to the form of the statute in such case made and provided."

Statement

The accused operated a machine known as the "Straight Aim Machine," in a pool-room at Powell River, B.C. The machine was an arrangement whereby a revolver (or gun) was mounted on a curved traveller. Opposite the mouth of the revolver at a distance of about 30 inches were five diamond-shaped targets. The gun contained a slot into which the player dropped a ten-cent piece. Upon pulling the trigger (which was worked by a spring) the revolver shot the ten-cent piece; if the player was successful in shooting the dime into one of the diamond-shaped targets it released a number of dimes contained in a cup beneath the target which the player hit; the cup automatically emptied the dimes into another cup fixed on the front of the machine and they thereupon became the property of the

CAYLEY, CO. J.

1923

June 22.

REX v. GEFFLER

player. If the player missed the target the dime would either fall into one of the cups or to the bottom of the machine, in which latter event the dime would belong to the owner of the machine. Constable Hadley, a witness for the Crown, swore that he was accustomed to the use of fire-arms and had shot 20 dimes without hitting the target; he had watched the machine all day and no one had won anything. The next day one man won $8.40 and another $7.10. He further stated that with sufficient practice a man could become an expert. Otherwise in his opinion it was a game of chance. The accused gave evidence on his own behalf. He stated that he was the inventor of the machine and that the revolver was true. He had hit the target himself three out of five times. He claimed that it was a matter of knowing how to handle the gun.

Statement

Wood, for the Crown: Section 226 deals with a mixed game of chance and skill. There is some chance in this game and the section therefore applies: see *Rex* v. *Smith* (1916), 23 B.C. 197 at p. 199; and *Rex* v. *O'Meara* (1915), 25 Can. Cr. Cas. 16; there is also the element of gain present here.

Maitland, for the accused: The element of chance under section 226 must be a determining factor in the game. Parliament never intended to stop a game of this kind. There is an element of chance in all games, even games of skill. This case is clearly distinguished from *Rex* v. *Smith* (1916), 23 B.C. 197 at p. 199, and *Rex* v. *O'Meara* (1915), 25 Can. Cr. Cas. 16, where they depend upon the turn of a card or the flip of a coin.

Argument

Wood, in reply.

CAYLEY, CO. J.: This is one of those cases of a new invention to which it is endeavoured to apply the Code, which was framed with respect to matters which were then matters of common knowledge and practice. It is very difficult to take a new invention and say it so nearly resembles an old one that the Code should be considered to apply.

Judgment

In the first place here, I have got no evidence whatever to warrant me determining whether, in the hands of an expert, there is any chance at all. The evidence of Hadley is to the

effect that he fired 20 shots with this new device, and did not win out once. I might shoot 20 shots myself out of the gun but that would not be any guide to me as to whether a skilful man could not win out every time. On the other hand the only expert testimony is the expert testimony of the man who brought out the invention, who describes the operation of it, and he claims there is no chance at all. From what I have seen of the machine myself I would form the opinion that a man who was thoroughly familiar with the machine might hit the bullseye just as often as an ordinary expert with a rifle would hit his mark. An expert with a rifle has to undergo such chances as a gale of wind, or change of atmosphere, of light, and various chances of that kind, yet no one can say that target-shooting is a mixed game of chance and skill, although there is certainly some chance in every game of that kind. For these reasons I acquit the accused.

Judgment

Accused acquitted.

BROWN v. COLUMBIAN COMPANY LIMITED.

Assessment—Income and personal property—Taxation—Court of Revision—Powers—B.C. Stats. 1921 (Second Session), Cap. 48, Secs. 29, 72, 81 and 83.

On cross-appeal from the decision of the Court of Revision under the Income and Personal-property Taxation Act reducing the allowances for depreciation on the respondent's plant from 10 per cent. of the original cost to 7½ per cent. of the actual value for the years 1921 and 1922, objection was taken that the mere demand by the collector of a sum for allowance is under section 29(1)(*i*) of the Act "an amount allowed at the discretion of the minister" which is final and not open to review but only to appeal under subsection (2) of section 29.

Held, that as the Act contemplates an actual personal decision of the minister, as distinguished from the ordinary acts of his departmental inferiors, and it is not alleged, and there is nothing from which to infer, that the minister applied his "discretion" to the allowance in question, the Court of Revision may therefore so apply its powers under section 81 of the Act.

COURT OF APPEAL

1923

July 6.

BROWN v. COLUMBIAN COMPANY LIMITED

Statement

APPEAL by plaintiff and cross-appeal by defendant from the decision of HOWAY, Co. J., sitting as a Court of Revision under the Income and Personal-property Taxation Act. The plaintiff appealed from the reduction by the Court of Revision of the assessment of the plant of the respondent Company for the years 1918, 1919 and 1920, and the Company cross-appealed on the ground that the decision of the Court of Revision should be varied by striking out certain amounts added to the income for the years 1921 and 1922, and that the depreciation in the value of the plant for the year 1922 should have been 10 per cent. of the original cost and not 7½ per cent. of the actual value. At the termination of the hearing the appeal was dismissed and judgment reserved on the cross-appeal.

The appeal was argued at Vancouver on the 12th of March, 1923, before MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Geo. E. Martin, for appellant.

Gibson, for respondent, on cross-appeal: They reduced the amount allowed for depreciation in the plant, which they had no jurisdiction to do under section 29 (1)(*i*) of the Act. They must not proceed without a proper hearing: see *Lapointe* v. *L'Association de Bienfaisance et de Retraite de la Police de Montreal* (1906), A.C. 535. The learned judge was wrong in his calculation and no opportunity was had to correct it.

Argument

Martin: The action of the Court of Revision was within their powers: see section 81, subsection (*d*).

Gibson, in reply.

Cur. adv. vult.

6th July, 1923.

MARTIN, J.A.

MARTIN, J.A.: After dismissing the appeal of the assessor from the Court of Revision sitting under section 72 of Cap. 48 of the Income and Personal-property Taxation Act, B.C. Stats. 1921 (Second Session), we reserved judgment on the cross-appeal of the Company, respecting allowances for depreciation in 1921-2. The most substantial point arises on the extent of the power of the Court of Revision to readjust the allowance for depreciation, a question which arose out of the

appeal brought by the Company to the Court of Revision. It is objected that the mere demand by the collector of a sum for allowance is necessarily, under section 29 (1)(*i*), "an amount allowed at the discretion of the minister," which is final and not open to review, but only to an appeal under subsection (2), which provides that an appeal may be taken "from any decision of the minister under clause (*i*) . . . . to the Lieutenant-Governor in Council." From the language employed I think the Act contemplates an actual personal decision of the minister, as distinguished from the ordinary acts of his departmental inferiors, and it is not alleged as a fact, nor is there anything from which such an inference can be drawn, that the minister did apply his "discretion" to the allowance in question. It was, therefore, open to the Court of Revision to apply its wide powers under section 81 to the adjustment and correction of the assessment in such a way "as to the Court may seem just," as the section hath it (*d*), and as there was evidence upon which the Court could allow depreciation of this sort of machinery in the way it has done, its decision should not, I think, be disturbed, and so the cross-appeal should be dismissed.

MARTIN, J.A.

GALLIHER, J.A.: I agree with my brother MARTIN in dismissing the cross-appeal.

GALLIHER, J.A.

MCPHILLIPS, J.A.

MCPHILLIPS and EBERTS, JJ.A. would dismiss the appeal and cross-appeal.

Cross-appeal dismissed.

Solicitors for appellant: *Martin & Sullivan.*

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

COURT OF APPEAL

1923

July 6.

MOLDOWAN v. B. C. ELECTRIC RY. CO.

MOLDOWAN v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED.

Negligence—Street railway—Collision with motor-car—Damages—Excessive speed of street-car—Contributory negligence—Verdict.

The plaintiff, when driving a motor-car easterly on 19th Avenue in Vancouver in the evening when it was nearly dark, entered Main Street intending to cross the street-car tracks and turn north on Main. On reaching the easterly track he was struck by a street-car going north on Main Street at an excessive speed. The motor-car was carried 100 feet and the plaintiff was badly injured. The jury found the defendant guilty of negligence owing to excessive speed, that the plaintiff was not guilty of contributory negligence, and assessed damages at $1,500, for which judgment was entered.

Held, on appeal, affirming the decision of MACDONALD, J. (MCPHILLIPS, J.A. dissenting), that the judge below rightly submitted the case to the jury, that there was evidence for the jury to consider on the questions submitted to them, and the verdict should not be disturbed.

APPEAL by defendant from the decision of MACDONALD, J. of the 22nd of January, 1923, and the verdict of a jury, in an action for damages for injuries sustained owing to the negligence of the servants of the defendant Company. The facts are that on the evening of the 26th of September, 1922, when it was getting dark and the street lights were turned on, the plaintiff was driving a motor-car (not his own) easterly on 19th Avenue West, Vancouver. He entered Main Street intending to cross the car tracks and turn north, but when he reached the easterly track he was struck by a street-car going north on Main Street at an excessive rate of speed. The plaintiff's motor-car was carried about 100 feet on the front of the street-car, and the plaintiff's collar bone was broken, ribs were fractured and he suffered from contusions of the stomach, being totally disabled for one month. The jury brought in a verdict for the plaintiff and awarded $1,500 damages. The Company appealed on the grounds that the plaintiff should have been found guilty of contributory negligence; that he did not go around the centre of intersection of the two streets and that as the street-car was

Statement

coming from his right the street-car had the right of way and he should have waited until it passed, and in fact he drove his motor-car right in front of the street-car without looking to his right for if he had done so he would have seen the street-car.

The appeal was argued at Vancouver on the 13th and 14th of March, 1923, before MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

McPhillips, K.C., for appellant: There was admission of negligence on both sides. He went from 19th Avenue onto the track without looking to his right at all. The jury's finding that he was not negligent is absolutely in the teeth of the evidence: see *Tait* v. *B.C. Electric Ry. Co.* (1916), 22 B.C. 571; *Maltby* v. *British Columbia Electric Ry. Co.* (1920), 28 B.C. 156. There is a by-law that you must not impede a street-car: see *Quinn* v. *Walton* (1921), 30 B.C. 401. Further, on contributory negligence, see *The Canadian Pacific Ry. Company* v. *Smith* (1921), 62 S.C.R. 134; *The Ottawa Electric Railway Co.* v. *Booth* (1920), 63 S.C.R. 444; *Skidmore* v. *B.C. Electric Ry. Co.* (1922), 31 B.C. 282; *Winch* v. *Bowell* (1922), *ib.* 186; *The Grand Trunk Railway Co.* v. *Labreche* (1922), 64 S.C.R. 15; *Fraser* v. *B.C. Electric Ry. Co.* (1919), 26 B.C. 536 at p. 539; *Doane* v. *Thomas* (1922), 69 D.L.R. 476; *Milligan* v. *B.C. Electric Ry. Co.* (1923), 32 B.C. 161; *Ontario Hughes-Owens Limited* v. *Ottawa Electric R.W. Co.* (1917), 13 O.W.N. 156; *Cammack* v. *New Brunswick Power Co.* (1922), 70 D.L.R. 697. In this case there was joint negligence and no ultimate negligence and, secondly, he disobeyed the Highway Act and the by-law and did not go around the centre of the two roads.

Argument

J. E. Bird, for respondent: The by-law does not apply as the west side of the road is not in Vancouver. As to the pivotal point of the intersection this has no bearing on the case whatever. The Company is bound to take due care: see *Smith* v. *South Vancouver and Corporation of Richmond* (1923), 31 B.C. 481. Persons driving across railway tracks are entitled to assume that the cars running over them will be driven prudently: see *The Toronto Railway Company* v. *Gosnell* (1895),

COURT OF APPEAL

1923

July 6.

24 S.C.R. 582. The cases are collected in *Steele* v. *Cape Breton Electric Co.* (1918), 39 D.L.R. 609 at p. 615.

McPhillips, in reply.

Cur. adv. vult.

6th July, 1923.

MOLDOWAN v. B. C. ELECTRIC RY. CO.

MARTIN, J.A.

MARTIN, J.A.: Whatever view may be taken of the meaning of "intersecting highway," under the Highway Act, Cap. 99, R.S.B.C. 1911, and amendments, I am of opinion that there was evidence to go to the jury upon the questions submitted to them, and therefore this appeal should be dismissed.

GALLIHER, J.A.

GALLIHER, J.A.: I feel that this is not a case where I should interfere with the verdict. The learned trial judge was clearly right in not withdrawing the case from the jury.

In accident cases such as this, each must, to a great extent, depend on its own particular facts, and though this is a case, perhaps, pretty close to the line, I feel that I would not be justified in reversing the judgment below.

The appeal should be dismissed.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: The evidence establishes, in my opinion, joint and contemporaneous negligence and in the circumstances the verdict of the jury cannot be upheld (*Admiralty Commissioners* v. *S.S. Volute* (1922), 1 A.C. 129, Viscount Birkenhead, L.C. at p. 137). The answer to question 3 as made by the jury is contrary to the evidence and perverse. The question and answer read as follow:

"3. Was the plaintiff guilty of negligence contributing to the accident? No."

Turning to the evidence of the independent witness, Hudson, a witness for the plaintiff, we find him saying:

"It was just one block away? When I first noticed the street-car, yes.

"It was a block away? Yes.

"By that time, where was Mr. Moldowan? Mr. Moldowan was on the corner of 19th Avenue West making the turn when the street-car was 20 yards away.

"Had Mr. Moldowan got over on the track by the time the B.C. Electric car was 20 yards away? No. Moldowan was on Main Street, not quite over the tracks."

"Now, tell the jury what you noticed about the B.C. Electric car or the motorman or what he was doing? At the time of the accident, at the

time the accident occurred the street-car was travelling really at an excessive speed and in my estimation——

"What is your estimate of the speed, what estimate would you give? I estimate it really at 30 or 35 miles an hour.

"Is there a grade there? There is a grade from 25th Avenue right to 18th."

"Within what distance of Mr. Moldowan's car did he [the motorman] apply the brake? As I would imagine, about the same 20 yards.

"What attracted your attention with regard to the applying of the brakes? How would you know or how did you know? I imagined the street-car motorman must have seen Moldowan's car coming from 19th West with the glimmer from his lights that would draw the motorman's attention and the brakes were applied right then."

"Now, about this grinding, where did it commence? It commenced about 20 yards before he came to the corner of 19th West.

"Did you say that brought a lot of people out? Yes, on account of the excessive noise, the terrible noise the wheels made.

"At that time then the plaintiff's motor-car was just about on the southwest corner of 19th West and Main? Yes.

"He had practically just about come out of the street? Just exactly he came out all of a sudden, that is how I noticed it and what was going to happen.

"You say the gong rang at that point? The gong did ring at that point.

"How much did it ring? The motorman no doubt was kind of excited and I was excited. I could see what was going to happen and I merely heard the noise.

"Why did you think it was going to happen? I could see the speed of the street-car coming, and there was nothing to avoid it, there was going to be something.

"Why couldn't the street-car man stop it? He was travelling at such a speed.

"Couldn't he have stopped? Not in my estimation, at the speed he was travelling.

"Do you say that the automobile was coming across the street at a speed at the most of four or five miles an hour? Yes, sir."

It is clear from the evidence that the plaintiff was reckless and careless. He entered upon the street and attempted to cross it with a street-car within 20 yards of him, *i.e.*, 60 feet. The street-car was running at a high speed and the plaintiff suddenly precipitated himself in his automobile right in front of the street-car, then only 60 feet from him. Could one be more reckless than this? It would seem to me that there can be but one answer, and that must be that the plaintiff was himself the author of the injuries sustained by him (*McPhee* v. *E. & N. Ry. Co.* (1913), 49 S.C.R. 43, Duff, J. at p. 53).

COURT OF APPEAL

1923

July 6.

MOLDOWAN v. B. C. ELECTRIC RY. CO.

Now, turn to the plaintiff's own story of the occurrence in cross-examination:

"In examination-in-chief you said to my learned friend in answer to a leading question that you did not see anything south that looked at all dangerous. Can you tell me what you meant by that? I meant, that if I would see the car, and I was sure that it was so far that there was no danger of me crossing Main Street.

"You cannot say whether you saw anything or not when you looked? I am sure I did not see anything near enough that I should not have crossed.

"I am not asking that, I want to know what you did see? As far as I remember I did not see anything.

"When you say you did not see anything that looked at all dangerous, you mean you did not see anything? Within a distance that was dangerous.

"I want to know whether you saw anything or not. Did you see anything or not? As I told you on my examination I cannot swear to it.

"You cannot swear whether you saw anything or not? I might have seen the car if it was close enough.

"I am not asking what you might have seen, I want to know when you looked south if you saw anything? I could not swear to it.

"But you won't swear that you did not see anything? I won't swear that I did not, no."

This evidence of the plaintiff is most unsatisfactory, in truth it is unbelievable. If he had looked he would have seen the street-car, then only 60 feet from him. If he did not look it was reckless conduct. If he did look and saw the car, as he must have, it was still more reckless to enter upon the street in front of the street-car, and how impossible it can be to found an action upon such reckless and heedless conduct.

MCPHILLIPS, J.A.

It can reasonably be deduced from the answer to the last question above quoted that the plaintiff saw the street-car and took the chance that he could cross safely, and taking that chance and failing, it is futile to seek a remedy in law for the injuries sustained. Those injuries he brought upon himself by his own conduct.

This case has analogous features to that of *Davie* v. *N.S. Tramways & Power Co. Ltd.* (1918), 52 N.S.R. 316; 41 D.L.R. 350, affirmed on appeal to the Supreme Court of Canada, 59 S.C.R. 648, the judgment at the trial in favour of the plaintiff being reversed. That was the case of an attempt to cross when a car was approaching. The case of *The Grand Trunk Railway Co.* v. *Labreche* (1923), 64 S.C.R. 15, is very

much in point. There it was held that the determining cause of the accident was the act of respondent's husband in projecting himself in front of the coming train. In view of the excessive speed of the street-car being an element in the present case, I would refer to what Anglin, J. said at pp. 21-22:

"I doubt whether upon the evidence it can be said that the locality through which the train was passing when it struck Sarrazin was thickly populated. But, if that fact be assumed in the plaintiff's favour, having regard to the conditions as to fencing shewn by the evidence, it would probably have been incumbent on the defendants to restrict the speed of their train at that place to 10 miles per hour. Granting this, however, it does not, in my opinion, entitle the plaintiff to recover, because the excess of speed over 10 miles per hour was not the cause of Sarrazin being killed, and probably also because s. 309 was not passed for the protection of yard employees of the railway company whose duties require them to be within the fences erected along the right of way.

"The evidence in my opinion leaves no room for doubt that the determining cause of Sarrazin's death was not the speed of the train but his own act—whether culpable or wholly innocent is on this issue quite immaterial—in projecting himself almost immediately in front of the Ottawa express."

Then we have in this Court at least two cases which, in my opinion, entitle this appeal being allowed (*Fraser* v. *B.C. Electric Ry. Co.* (1919), 26 B.C. 536; *Milligan* v. *B.C. Electric Ry. Co.* (1923), [32 B.C. 161]; 1 W.W.R. 1373), being cases where, as in this case, there was present evidence establishing reckless conduct and disregard of all proper precautions when about to cross a street upon which street-cars are operated (*The Canadian Pacific Ry. Company* v. *Smith* (1921), 62 S.C.R. 134, Sir Louis Davies, C.J. at p. 135). Reckless conduct of this kind is liable to result, as it has in some cases already, in loss of life, not only to the reckless driver of the automobile and its occupants, but probable loss of life of passengers in a loaded street-car, as there is risk of derailing the street-car. Upon the whole case I am of the opinion that the appeal should succeed and the action should be dismissed.

MCPHILLIPS, J.A.

EBERTS, J.A. would dismiss the appeal.

EBERTS, J.A.

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitors for appellant: *McPhillips, Smith & Gilmour.*
Solicitors for respondent: *Bird, Macdonald & Co.*

COURT OF APPEAL

1923

July 6.

WADDINGTON v. BUSH

WADDINGTON v. BUSH.

Sale of land—Covenant to pay—Novation—Statute of Frauds—Signature of party to be changed—Action for specific performance—Laches.

W. sold certain property to V. and A. under an agreement for sale and two days later V. and A. sold under an agreement for sale for a larger sum to the members of a certain family. About a year and a half later V. and A. assigned all their rights under the second agreement for sale to B. (one of the family referred to) and two weeks later W. signed a memo. attached thereto consenting to the assignment and agreeing to accept B. in lieu of V. and A. under the first-mentioned agreement for sale but this memo. was not signed by B. About a year and a half later B. endeavoured to obtain an assignment of the first agreement for sale from V. and A. but they refused to give it and nothing further was done for four years when B. prepared and executed a quit claim to the property which he offered to W.'s executrix (W. having died) in consideration for his release from taxes or any other liability on the agreements for sale but the executrix refused to accept it. In an action against B. for the balance due under the first agreement for sale it was held by the trial judge that although there had been a release of V. and A. from liability under the first agreement for sale novation was not established as it was not shewn that B. ever agreed to assume the liability and the action was dismissed.

Held, on appeal, affirming the decision of MCDONALD, J. (MARTIN, J.A. dissenting), that B.'s endeavours to obtain a release from any possible claim the plaintiff might have against him were done by way of precaution and is not a ground for implying an acknowledgment by him that he was under liability to W. under the agreements for sale. The Statute of Frauds applies and liability can only be established by an acknowledgment in writing.

Statement

APPEAL by plaintiff from the decision of MCDONALD, J. of the 26th of October, 1922, in an action to recover $18,000 balance due under an agreement for sale of lot 97 "G," including suburban lots 50, 51, 52 and 53, lot 2, section 1, Nanaimo District. On the 14th of March, 1912, Waddington agreed to sell the lot to C. W. Von Schade and D. T. Ashley under agreement for sale for $29,100, and two payments were made under this agreement ($5,100 and $6,000). On the 16th of March, 1912, Von Schade and Ashley sold under agreement for sale to a number of persons known as the Bush family for $36,175.

On the 25th of October, 1913, Von Schade and Ashley assigned to the defendant O. B. Bush (one of the Bush family) all their interest in the agreement for sale of the 16th of March, 1912. This agreement was signed by Von Schade, Ashley and Bush. Later, on the 5th of November, 1913, the plaintiff Waddington added to the assignment of the 25th of October, 1913, in writing a consent to said assignment and agreed to accept O. B. Bush in lieu of Von Schade and Ashley under the agreement of the 14th of March, 1912. This was signed by Waddington but not by Bush. The solicitors for the defendant prepared an assignment of the property for the signature of Von Schade and Ashley dated the 20th of March, 1915, assigning to the defendant the Waddington agreement of the 14th of March, 1912, but they refused to sign it unless they obtained a document from Waddington releasing them from any obligations to Waddington. Nothing further was done until 1919, when the defendant prepared a quit-claim deed and executed it and invited the executrix of Waddington (who died in January, 1919) to accept it on consideration of releasing him from payment of taxes or all other liabilities under the several agreements for sale of the property in question, but those interested in the Waddington estate declined to accept the quit-claim deed.

Statement

The appeal was argued at Vancouver on the 7th and 8th of March, 1923, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Mayers, for appellant: The question is whether the evidence is sufficient to establish a novation. Although Bush's signature is not on the additional memorandum of the 5th of November, 1913, his name is in the typewritten document with his authorization. As to what is a sufficient signature to meet the Statute of Frauds see *Schneider* v. *Norris* (1814), 2 M. & S. 286; *David Gibb & Co.* v. *Northern Construction Company* (1918), 26 B.C. 429; *Ogilvie* v. *Foljambe* (1817), 3 Mer. 53 at p. 62; *Johnson* v. *Dodgson* (1837), 2 M. & W. 653; *Bleakley* v. *Smith* (1840), 11 Sim. 150; *Torret* v. *Cripps* (1879), 27 W.R. 706; *Evans* v. *Hoare* (1892), 61 L.J., Q.B. 470; *Halley* v. *O'Brien* (1920), 1 I.R. 330.

Argument

COURT OF APPEAL

1923

July 6.

WADDINGTON v. BUSH

Argument

O'Brian, for respondent: This is an action for specific performance. He must prove title, the performance of all conditions precedent, and that default has been made. There is nothing to shew that Bush even consented to novation: see *Forget* v. *Baxter* (1900), 69 L.J., P.C. 101; Phipson on Evidence, 5th Ed., 479; Halsbury's Laws of England, Vol. 7, p. 505, par. 1026; *Wilson* v. *The Land Security Company* (1895), 26 S.C.R. 149. On the question of laches, writ was issued 6 years after claim was due and they ask for specific performance: see Fry on Specific Performance, 6th Ed., p. 514, par. 1100; *Eads* v. *Williams* (1854), 24 L.J., Ch. 531 at p. 535; *The Marquis of Hertford* v. *Boore* (1801), 5 Ves. 719; *Ungley* v. *Ungley* (1877), 5 Ch. D. 887. There are no facts to justify the delay. Whether there is novation or not is a question of fact found in our favour by the trial judge and it should not be disturbed.

Mayers, in reply.

Cur. adv. vult.

6th July, 1923.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: Waddington, deceased, sold land to Von Schade and Ashley, by agreement dated 14th March, 1912. Two days thereafter, *viz.,* on 16th March, Von Schade and Ashley sold the same land to four members of a family named Bush, including defendant. On 25th October, 1913, Von Schade and Ashley assigned the said agreement of the 16th of March to the defendant. On the 5th of November, 1913, a memorandum of agreement between Waddington and Von Schade and Ashley was made at the foot of this assignment, whereby for value, Waddington consented to the assignment and agreed to relieve Von Schade and Ashley from the Waddington agreement, and to accept in lieu of them the defendant. In other words, this memorandum consented to a novation by which defendant should be substituted for the orginal purchasers in the Waddington agreement for sale.

If this memorandum had been signed by the defendant there would have been no difficulty, but it is not so signed, and in this action by the executrix of Waddington deceased, defendant pleads the Statute of Frauds.

On the argument counsel for the appellant (plaintiff) while not abandoning anything, conceded that he must rest his case substantially on the documents, Exhibits 9, 10, 12, 13 and 14.

It is a well-known proposition of law, that a verbal agreement is not void. What the statute requires is evidence of it in writing. Any writing signed by the defendant or by his authorized agent if sufficient in substance although subsequent to the agreement in date, would satisfy the statute.

Turning then to the documents in the order of their dates, Exhibit 9 is a letter dated 20th March, 1915, written by the solicitor of Von Schade and Ashley to plaintiff's solicitors, in reply to theirs enclosing an assignment, Exhibit 11, for signature by Von Schade and Ashley, assigning to the defendant the Waddington agreement of 14th March, 1912. Now, if the plaintiff's contention be right that there was a novation nearly two years previously, this assignment was entirely superfluous. The answer of Von Schade and Ashley should have been: "We have nothing to assign, you have become a party to that agreement and we have ceased to be parties to it." In their reply the defendant's solicitors say, with reference to a request of Von Schade and Ashley's solicitor, that they should have a release from Waddington from any obligations that were due to him, and, referring to the document of the 5th of November, 1913, say, "We think that Mr. Waddington's consent as indorsed on the quit-claim deed is all that is required." They have reference there to the assignment of the 25th of October, not to the quit-claim deed, and to the consent indorsed thereon. This correspondence is not an acknowledgment in writing of the defendant's consent to the novation claimed by the plaintiff. It illustrates what will appear later on when I come to discuss the real quit-claim deed, that neither the parties nor their solicitors had any clear conception of the exact situation of the parties towards each other. The above negotiations came to nothing, and four years thereafter, namely, in 1919, further correspondence took place, this time between the plaintiff and the defendant. The defendant prepared and executed a quit-claim deed, Exhibit 13, inviting the plaintiff to release the defendant "from all and any liability *re* taxes due or past due and from all

COURT OF APPEAL

1923

July 6.

WADDINGTON v. BUSH

or any liability on any agreements of sale" of the property in question. Plaintiff declined to sign this document. The other Exhibits, 12 and 14, are the letters of the solicitors, the one enclosing the quit-claim deed and the other replying to it. These letters, in my opinion, add nothing to the substance of the argument which was made in respect of the quit-claim deed itself. It will be noted that the quit-claim deed makes no specific reference to the document of the 5th of November, 1913. But it was submitted by plaintiff's counsel that there was by implication an acknowledgment that the defendant is under liability to the plaintiff in connection with some agreements for sale of the property. He very naturally argued that if the defendant had not assumed by novation the obligations of Von Schade and Ashley to Waddington, why should he have prepared such a document? One answer may be that which was suggested a moment ago, that neither the parties nor their solicitors, nor Von Schade and Ashley had any clear conception of what their legal rights and obligations were, and that Bush, as a matter of precaution, wished to obtain a release of any possible claim which the plaintiff might have against him. But, however this may be, it appears to me that it is not enough that there should be a strong implication of liability, the defendant, if liable at all, is liable because of an acknowledgment of this liability in writing, and that writing must clearly shew all that the Courts have held necessary to constitute such under the Statute of Frauds. Now, there is nothing in the case which impels me to the conclusion that by reason of the quit-claim deed signed by the defendant he meant to acknowledge, or did acknowledge, that he had taken Von Schade and Ashley's place in the Waddington agreement for sale. There is nothing in the quit-claim deed referring to the memorandum of agreement of the 5th of November, 1913; there is nothing in writing to connect them together, and hence, I think the plaintiff must fail in this action.

MACDONALD, C.J.A.

The appeal should, therefore, be dismissed.

MARTIN, J.A.: In my opinion the novation has been established herein, and I am led to take that view almost upon the document (Exhibit 5) itself, as explained by the expert in

MARTIN, J.A.

handwriting, and there is the less difficulty in reaching this conclusion because the submission put forward, with all respect, that the learned judge fell into obvious error in holding that there could be a partial novation, must be, in my opinion, given effect to, his finding being self-contradictory. Moreover, it is an unfortunate, not to say suspicious thing, that the defendant was not put into the box to explain his position, if possible, though we were informed, without objection, that he was present at the trial. Once the novation is established I see no obstacle, in the circumstances, to prevent judgment being given for the plaintiff, and therefore the appeal should be allowed.

MARTIN, J.A.

GALLIHER, J.A.: After a perusal of the evidence and documents referred to in the appeal book, I am not prepared to say that the learned trial judge came to a wrong conclusion, and would dismiss the appeal.

GALLIHER, J.A.

MCPHILLIPS, J.A.: This appeal resolves itself essentially into the determination of the question of fact (*Conquest's Case* (1875), 1 Ch. D. 334, 341; 45 L.J., Ch. 336)—was a novation established? The facts and circumstances surrounding the transaction cannot be said to be so clear and satisfactory as in my opinion would entitle one to disagree with the conclusion arrived at by the learned trial judge (*Coghlan* v. *Cumberland* (1898), 1 Ch. 704). Nevertheless, I cannot refrain from saying that there is considerable evidence which goes to shew that there was a course of action which well entitled it being considered that the defendant was intending to undertake the burden of the agreement for sale between Ashley and Von Schade of the one part and Samuel Waddington of the other part, Ashley and Von Schade being released and the defendant to bind himself and assume the liability of Ashley and Von Schade to Waddington, and I think it very regrettable indeed, that the evidence does not sufficiently support it being so held. The *onus probandi* was, of course, upon the plaintiff and in my opinion, it was not satisfactorily discharged. Further, the case is not one which entitles a Court of Equity to assist intentions which have been ineffectively carried out. If it could have been said that the liability was on covenant, which

MCPHILLIPS, J.A.

COURT OF APPEAL

1923

July 6.

WADDINGTON v. BUSH

was attempted, then, undoubtedly, nothing short of release or estoppel would avoid it.

I would, therefore, dismiss the appeal.

Appeal dismissed, Martin, J.A. dissenting.

Solicitor for appellant: *F. S. Cunliffe.*

Solicitors for respondent: *Black, Pierce & Bush.*

MCINTOSH, CO. J.

1923

July 23.

GOODALL v. COUSINS

GOODALL v. COUSINS.

Sale of land—Bringing about sale—Commission—B.C. Stats. 1920, Cap. 48, Sec. 21.

The plaintiff, a store-keeper in Colwood, B.C., brought about the sale of certain lands of the defendant to another person. In an action for 5 per cent. commission for bringing about the sale:—

Held, that the provisions of section 21 of the Real-estate Agents' Licensing Act do not apply to the plaintiff. The inclusion of the words "as a real-estate agent or real-estate salesman" in the section shews it was the intention of the Legislature to limit the operation of the Act to the regulation of a class; it was not to apply to individual transactions.

Statement

ACTION to recover the sum of $183.75 being a commission of 5 per cent. for bringing about the sale of certain lands of the defendant to one Herchmer. The facts are set out in the reasons for judgment. Tried by MCINTOSH, Co. J. at Victoria on the 28th of February, 1923.

D. S. Tait, for plaintiff.

Maclean, K.C., for defendant.

23rd July, 1923.

Judgment

MCINTOSH, Co. J.: The plaintiff is a storekeeper at Colwood, B.C. and sues for $183.75, being commission at 5 per cent. on the sale of lands of the defendant to one Herchmer. The defence especially pleads the provisions of section 21 of the Real-estate Agents' Licensing Act, B.C. Stats. 1920. Although the facts are in dispute the evidence is that the plaintiff negotiated the sale entitling him apart from this Act to the commission sued for.

In my opinion the provisions of the Act do not apply to the case at bar. Section 2 interprets "real-estate agent" as "any person . . . . . as a whole or partial vocation" which does not include the plaintiff, a storekeeper, and there is no evidence of similar transactions on his part giving him a "partial vocation" in this respect. The Act is one regulating real-estate agents as a class and does not affect special individual arrangements concerning the payment of a commission on the sale of lands. This is amply shewn in the wording of section 21 pleaded in defence. If one should eliminate the words "as a real-estate agent or real-estate salesman" in the third line thereof, the section would then amount to a prohibition if no licence is had or obtained, but the inclusion of these words shews clearly that it was the intention of the Legislature to limit the operation of the Act to the regulation of a class and not affecting individual transactions.

Judgment

This is borne out in decisions rendered in like cases, as I find no decisions directly founded on this Act. In *Rex* v. *Buckle* (1803), 4 East 346, on the interpretation of 31 Geo. II., c. 32, s. 4. which enacts "that all persons using the trade of selling . . . . . plate . . . . . etc., shall . . . . . be deemed traders in, sellers or vendors of gold or silver plate . . . . . and shall take out a licence." Although these words are more stringent than the words of the Act under review "as a whole or partial vocation" it was held that one, not a general trader in silver plate, who sells a piece of plate for a price above the value of old silver was not within the operation of that Act. In *Regina* v. *Andrews* (1866), 25 U.C.Q.B. 196, it was held that a conviction under the Pawnbrokers' Act was not sustained by evidence of one transaction alone; for the penalty attaches only on persons "exercising the trade of a pawnbroker."

Therefore, the plaintiff having negotiated the sale of the defendant's lands being a storekeeper and not "a real-estate agent or real-estate salesman," as defined by the Act, is entitled to the commission agreed to be paid him by the defendant.

There will be judgment for the plaintiff for $183.75, and costs.

Judgment for plaintiff.

COURT OF APPEAL

1923

July 6.

PIONEER LUMBER CO. v. ALBERTA LUMBER CO.

PIONEER LUMBER COMPANY v. THE ALBERTA LUMBER COMPANY LTD.

Contract—Sale of goods—At certain grade—Resale by buyer while goods in transit—Goods forwarded to sub-purchaser as of higher grade—Sub-purchaser refuses goods as not up to grade—Delay in giving notice to vendor and making claim—R.S.B.C. 1911, Cap. 203, Secs. 49, 50 and 67.

Defendant sold a car-load of spruce lumber to the plaintiff graded No. 1 common and better, to be shipped from Vancouver to Minnesota Transfer, State of Minnesota, by C.P.R. or G.N.R. The car was billed over the Canadian Pacific Railway. In the meantime the plaintiff resold to one Cook in Chicago and on receipt of invoice the plaintiff paid the purchase price of the lumber and procured a fresh bill of lading from the Railway Company by which the lumber was shipped to Cook in Chicago, the plaintiff grading the lumber as No. 3 clear and better (a higher grade). The car arrived in Cook's yard in Chicago and was rejected by him. The defendant was not advised of this until three months later. The plaintiff obtained judgment in an action for damages for breach of warranty.

Held, on appeal, reversing the decision of MORRISON, J. (MARTIN, J.A. dissenting), that the appeal should be allowed and the action dismissed.

Per MACDONALD, C.J.A.: That the plaintiff had not sufficiently proved that the lumber shipped was not of the grade of No. 1 common and better. The measure of damages if the plaintiff was entitled to any would be the difference between what No. 1 common and better was worth on its arrival in Chicago and what the lumber received would sell for at that date. But there is no evidence on which a finding on this issue can be based so the plaintiff has failed to make out a case.

Per GALLIHER, J.A.: That the evidence of the lumber shipped from Vancouver materially differs from the evidence as to the class of lumber received in Chicago. The plaintiff took charge of the shipment and the onus is cast upon it to satisfy the Court that there was no interference with the car from that time until it reached Chicago. This onus has not been satisfactorily discharged.

Per MCPHILLIPS, J.A.: That a purchaser of lumber under a contract who accepts same without examination and makes delivery to a sub-purchaser shipping by a different bill of lading and to a changed point of destination deals with it in a manner inconsistent with the ownership of the seller and loses his right to reject the lumber on the ground that it is not up to grade.

Statement

APPEAL by defendant from the decision of MORRISON, J. of the 22nd of December, 1922, in an action to recover

$1,045.99 as liquidated damages for breach of contract and breach of warranty in respect to a sale by the defendant to the plaintiff of a car-load of lumber on the 14th of January, 1920. The plaintiff Company was incorporated in the State of Washington with head office in Seattle and is registered as an extra-provincial company with an office in Vancouver, and the defendant Company is incorporated with head office in Vancouver. The defendant Company sold the plaintiff a car-load of spruce lumber to grade No. 1 common and better, f.o.b. mill at Vancouver to be shipped to Minnesota Transfer in the State of Minnesota by the Canadian Pacific Railway or the Great Northern Railway. The car was loaded on the 21st of January, 1920, and was billed to Minnesota Transfer a few days later over the Canadian Pacific Railway. Invoices were furnished the plaintiff who paid for the lumber and then procured fresh bills of lading from the railway company by which the lumber was shipped to Chicago, the plaintiff having in the meantime sold the carload to one Cook of Chicago and graded the lumber as No. 3 clear and better which was a higher grade than that at which he had purchased. Upon the arrival of the car at Chicago it was refused by Cook as not up to grade. The car was then sold under instruction from the plaintiff at best price obtainable. There was delay in advising the defendant as to the refusal of Cook to accept the car and as to the forced sale. After an attempt at settlement the plaintiff brought this action and obtained judgment.

Statement

The appeal was argued at Vancouver on the 12th and 13th of April, 1923, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

A. H. MacNeill, K.C., for appellant: The sale was made between Lewis for the plaintiff and Stover for defendant. Stover shewed Lewis the lumber and he was satisfied that the lumber graded 3 clear, but Stover did not agree to that and it was sold at 1 common. The plaintiff accepted the car and disposed of it to another. Having done so it is now precluded from suing on a warranty: see Addison on Contracts, 10th Ed., 565; Blackburn on Sale, 3rd Ed., 543-5; *Merrill* v. *Waddell* (1920), 47 O.L.R. 572; *Street* v. *Blay* (1831), 2

Argument

COURT OF APPEAL

1923

July 6.

PIONEER LUMBER CO. v. ALBERTA LUMBER CO.

B. & Ad. 456; *Heilbutt* v. *Hickson* (1872), L.R. 7 C.P. 438; *Chapman* v. *Morton* (1843), 11 M. & W. 534; *British Westinghouse Electric and Manufacturing Company, Limited* v. *Underground Electric Railways Company of London, Limited* (1912), A.C. 673 at p. 689; *Perkins* v. *Bell* (1893), 1 Q.B. 197; *Payzu, Ld.* v. *Saunders* (1919), 2 K.B. 581. The purchaser must take care to inspect his purchase; *caveat emptor* applies: see Addison on Contracts, 10th Ed., 525-6 and 535; Halsbury's Laws of England, Vol. 25, p. 158, par. 284.

Mayers, for respondent: The price of No. 1 common is the same as No. 3 clear. The grading is different when estimated from a structional standpoint than from a "factory" standpoint. In fact when the material arrived in Chicago we did not even have No. 1 common. We sold as 3 clear, and the reason for that was that what Lewis saw when making the contract was up to that grade. Our contention is, and the evidence supports it, that they shipped our car to someone else and we got the refuse. On measure of damages see *Slater and Another* v. *Hoyle and Smith* (1920), 2 K.B. 11.

Argument

MacNeill, in reply.

Cur. adv. vult.

6th July, 1923.

MACDONALD, C.J.A.: The defendant sold to the plaintiff a car-load of spruce lumber to grade No. 1 common and better, f.o.b. mill at Vancouver, to be shipped to Minnesota Transfer by C.P.R. or G.N.R. The car was loaded on the 21st of January, 1920, and was billed to destination through Canadian Pacific a few days later. An invoice of the lumber was furnished to the plaintiff, who thereupon paid the price. They had in the meantime resold the lumber to one Cook, of Chicago. They therefore procured a fresh bill of lading from the railway company, by which they purported to ship the lumber from Seattle to Cook in Chicago. On the resale to Cook, the plaintiff graded the lumber as No. 3 clear and better, a higher grade than No. 1 common and better. The car arrived in Cook's yard on the 25th of March, and was rejected by him.

MACDONALD, C.J.A.

The plaintiff is suing for damages for breach of contract and consequently have to admit acceptance of the lumber.

The discrepancies between what was sworn to have been put into the car at the mill and what was taken out at Chicago are very great. Cummings and Wilson, who superintended the loading of the car at defendant's mill, make out a clear case to the effect that the lumber put in was all No. 1 common and better, and this testimony was not shaken in cross-examination. Macrae, who is the defendant Company, was unable to speak specifically as to what was put into the car, but he does speak of the logs from which the lumber was cut and of the stock of lumber after it was cut, which according to his testimony was all No. 1 common and better. This evidence is, to some extent, corroborated by the plaintiff's witness Lewis, who bought the lumber for the plaintiff and who, after a partial inspection of it, reported to his principals that it would grade No. 3 clear and better, and also by plaintiff's letter, Exhibit 7. It was on this report that the plaintiff resold as No. 3 clear and better. When this evidence is compared with the evidence of the persons who were employed by the plaintiff to inspect the lumber at Chicago, Hanbury and Jarman, great discrepancies are found. The learned trial judge appears to have come to the conclusion that a mistake had been made at the mill and the wrong car had been billed to the plaintiff. The difficulty about this solution is, that such a mistake is not only not supported by the evidence but is contrary to the evidence. In fact, I think the judgment is founded almost entirely on erroneous conclusions of the effect and even the admissibility of some of the evidence. The car record, not having been made by the person who gave evidence as regards the seals, is wholly inadmissible, since Cook says he was not there when the car was opened.

The judgment being founded, so far as it deals with the facts, and I say this with great respect, upon erroneous conclusions, I am at liberty to form my own conclusions without embarrassment.

After the arrival of the car of lumber at Chicago, the plaintiff was advised by its purchasers that the lumber would not grade No. 3 clear and better. The correspondence shews that on the 25th of March plaintiff had become aware that

COURT OF APPEAL

1923

July 6.

PIONEER LUMBER CO. v. ALBERTA LUMBER CO.

Cook objected to the grade of the lumber. Without telling the defendant that it had sold it to Cook as No. 3 clear and better, it informed defendant that it had ordered an inspection and that it would promptly notify the defendant of the result of it. Nothing further appears to have been done until the 10th of May, when plaintiff wrote a letter to its agent Lewis, saying:

"Inspector called and looked at the stock but did not make an office inspection and wired us as follows: 'E. L. Cook car 106410 off grade, will develop practically all shop and box, considerable amount thin and not dry, advise that you make adjustment if possible. Cook short of labour, can't handle for some time advise if we shall inspect.'"

They then proceed to say to Lewis:

"In view of the fact that we bought a No. 1 common and sold a No. 3 clear and better, I am writing to you rather than taking up direct with the Alberta Lumber Company. We have wired Sine Bros. at Chicago who sold the car to get the best offer possible for the car and have also wired for an official inspection. Please take this up with the Alberta Lumber Company and explain our actions."

Lewis, however, appears not to have advised the defendant of these transactions until the 22nd of June, six weeks after the date of the letter from which the above quotations are made. He then enclosed the said letter of the plaintiff and ends his enclosing letter by saying:

"We would like to have an expression from you as to the best way of making adjustment on this."

MACDONALD, C.J.A.

Thus it appears that defendant was not informed until three months after the arrival of the car that it had been inspected not as No. 1 common but as No. 3 clear.

The balance of the correspondence is not of much importance, as the plaintiff's letters were not answered by the defendant. Lewis, however, had one or more interviews with the plaintiff which produced no results, and the nature of which is not disclosed. If there is any inference to be made from these facts, it is that the defendant declined to have anything further to do with the car of lumber.

The questions, therefore, which I think must be decided are, firstly, has the plaintiff sufficiently proved its main cause of action, *viz.*, that the lumber was not of the grade of No. 1 common and better? and secondly, if that issue be found in its favour, has it sufficiently proved its right to damages and the *quantum* of damages? On the first point, I think the plaintiff

has failed. The evidence of Cummings and Wilson is clear and specific. Wilson verified the invoice which shews each piece with its dimensions. Hanbury and Jarman do not. Hanbury made a tally, he says, which was not produced, nor embodied in his report. It is therefore impossible to compare Hanbury's tally with that of Wilson. Had Hanbury's tally been produced it would have settled the question as to whether the lumber shipped was that which was inspected in Chicago. In saying this I am not suggesting fraud on plaintiff's part. I simply suggest that it has not satisfied the onus on it to prove that the lumber inspected by Hanbury was the lumber shipped by the defendant. In other respects, Hanbury's evidence is far from satisfactory. His report is based on factory standards, which are different from those applicable to the lumber sold, and his evidence given for the purpose of the trial is apparently founded on his report and not on his recollection of the lumber. Jarman's evidence is utterly at variance with that of Cummings and Wilson. I say nothing as to his *bona fides,* but since this inspection was made under circumstances of date and want of personal knowledge of the identity of the pile which he examined, it is of little value against that of witnesses whose credibility has not been questioned by the trial judge.

MACDONALD, C.J.A.

This is sufficient to dispose of the appeal, but as the case is one on which there may be a difference of opinion, I will proceed to consider the second point. Without repeating it, I refer to the evidence of delay in closing up the transaction at Chicago. I would also refer to the evidence as to the state of the lumber market at the time of the arrival of the lumber, and at the time of its sale by plaintiff in February, 1921. The market began to fall in April or May, 1920, after the lumber was rejected by Cook. It fell during the year to half its value, while storage and other expenses brought about further losses. No account is taken of this by the judgment. No specific evidence was furnished by the plaintiff of an effort on its part to minimize the loss. It knew the market was falling, but instead of selling as it proposed, see Exhibit 7, it kept pestering the defendant for a settlement without any hope being held out by

COURT OF APPEAL

1923

July 6.

PIONEER LUMBER CO. v. ALBERTA LUMBER CO.

it that it would recognize the plaintiff's claim. The real measure of the plaintiff's damages, if it is entitled to any, would *prima facie* be the difference between what No. 1 common and better was worth at that date and what the lumber in question would sell for at that date. There is no evidence upon which a finding on this issue can be based, and hence the plaintiff has failed to make out its case.

Assuming that there was a breach of the contract, and that plaintiff had the right to call in an inspector at Chicago, their right, at the highest, was to have it inspected to ascertain if it would grade No. 1 common, not No. 3 clear. The report of the inspector amounts to nothing as against the defendant. The right to reject rests therefore on the plaintiff's own actions when it first had the opportunity to inspect, which was on the 25th of March. If it wished to reject the lumber it must have done so promptly. If not, it is deemed to have accepted, in which case the measure of damages is to be ascertained according to section 67 of the Sale of Goods Act.

MACDONALD, C.J.A.

MARTIN, J.A.: In my opinion the learned judge below has reached the right conclusion, the main fact being that the identity of the car of lumber as delivered with that which was sold was not established: some unexplained mistake in despatching the car has, to my mind, beyond doubt, occurred. I see no reason to interfere with the judgment upon the grounds, and therefore the appeal should be dismissed.

MARTIN, J.A.

GALLIHER, J.A.: I am satisfied, upon the evidence, that the appellant loaded a car of lumber at its mill in compliance with the order received. I am also satisfied, upon the evidence, that the car which reached Chicago did not contain lumber that could in any sense comply with that order, and that such lumber as was unloaded from the car there was not tampered with at Chicago. Two suggestions at once present themselves: (1) Was there a mistake in shipping the right car from Vancouver? (2) If the right car was shipped, was it tampered with *en route?*

GALLIHER, J.A.

This case is one which has caused me considerable difficulty in deciding, and on first consideration I was inclined to think

that we could not interfere with the judgment below, but having gone into it again thoroughly, I have concluded that the appeal should be allowed.

The only direct evidence that car No. 106410, the one in dispute and which arrived in Chicago, contained the order filled for the plaintiff, is that of Wilson, and this can hardly be classed as direct evidence, such as it would have been if he had said, "I took the number of the car containing this order and remembered it." It is more or less inferential, but there is this in his evidence, at all events, that he superintended the loading of all cars being shipped at that time, that he was around to each car being loaded about 50 times and saw practically every piece that went in, that all that went into this car was No. 1 common and better.

Then there is McRae's evidence:

"All our lumber goes into building."

"All I am certain about is that there could not possibly be 5 per cent. cull in the car we shipped to any person."

"Our books disclose the fact that we did not sell any better grades to any persons else, three and four feet logs, high grade and there was 25 per cent. clear lumber, and they got clear."

In describing the spruce logs from which the lumber was cut, McRae says:

"Well, they were a good grade; they were straight and a good grade of logs, and we have manufactured a quantity of these 30 or 40 thousand, had it stacked up in the yard behind the dry kiln. Now I saw the sawyers, how they were cutting them and passed through the mill tally to see how they cut them."

GALLIHER, J.A.

See also Cummings's.

In addition to all this, when we consider that its lumber was all building lumber, different entirely from what would be shipped for shop or box (in fact, if McRae is to be believed, it did not have the class of spruce lumber that reached Chicago at all), it seems hard to conclude that any such lumber left its yards at all, the presumption is all against it. On the other hand, if the order was properly filled, and in this car it was certainly not that class of lumber that reached Chicago, and it must have been tampered with by some one. This, I must also admit, seems improbable. But there is a circumstance which turns the scale with me. The car of lumber was originally billed from Vancouver to Minnesota Transfer,

COURT OF APPEAL

1923

July 6.

PIONEER LUMBER CO. v. ALBERTA LUMBER CO.

GALLIHER, J.A.

January 22nd, 1920. This was according to buyer's orders. Six days later the bill of lading was taken up and the lumber paid for at Seattle, where the head office of the plaintiff Company is located, and a new bill of lading taken out by them, routing the car through to Chicago, taking the place of the first bill to Minnesota Transfer; having resold the lumber to one Cook. The plaintiff by its act took charge of the shipment and the onus is cast upon it to satisfy the Court that there was no interference with the car from that time until it reached Chicago, or in Chicago. The onus is a heavy one and may be hard to discharge, but it took it upon itself and has not discharged it to my satisfaction. It has not satisfied me that the seal of the car was unbroken when it reached Chicago or, if it was, that it was the same seal put on at Vancouver.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: The action had relation to the sale of three cars of lumber, but was dismissed save as to one car, *viz.*, C.P. 106410. It was set up that there was refusal to accept the lumber, and a further claim for breach of warranty as to quality.

The evidence amply establishes that there was an acceptance of the lumber within the meaning of section 50 of the Sale of Goods Act. The lumber, which was sold as No. 1 common and better, kiln dried, rough spruce, was seen generally by Lewis, the agent for the respondent, at the mills of the appellant, as it came from the kiln, and there is evidence that he saw some, if not all, the lumber loaded upon the car, C.P. 106410, which in accordance with the contract of sale was billed to Minnesota Transfer, a point in the State of Minnesota, one of the United States of America, and delivery was in this way made to the respondent. After being billed and the shipping bill handed over to the respondent, the car being routed over the Canadian Pacific Railway, the respondent, without communicating to the appellant at all, and after there had been compliance with the contract of sale by the appellant, delivered up the shipping bill to the C.P.R. and rerouted the car from Seattle to a purchaser of the lumber, one Cook, of Chicago, so that the point of destination was changed, and in making the sale the respondent sold the lumber as No. 3

clear and better, a grade obtaining in the United States but not in Canada, really a higher grade, and further, lumber different in class to No. 1 common and better, the grade upon which the sale was made by appellant to the respondent. The course of action pursued by the respondent amounted necessarily to an acceptance of the lumber; the acts done were wholly "inconsistent with the ownership of the seller" (section 50, Sale of Goods Act, and *Parker* v. *Palmer* (1821), 4 B. & Ald. 387; *Chapman* v. *Morton* (1843), 11 M. & W. 534; *Harnor* v. *Groves* (1855), 15 C.B. 667; *Taylor* v. *Great Eastern Railway* (1901), 1 K.B. 774; *Mechan & Sons, Limited* v. *Bow, M'Lachlan, & Co., Limited* (1910), S.C. 758). Therefore, if the respondent has any cause of action it can only be for breach of warranty as to quality, and even as to this, in my opinion, with every respect to the learned trial judge, there has been failure to establish any such cause of action. If there was any right to inspect the lumber still existent, considering the knowledge in Lewis of the lumber being loaded in the car, the inspection for the purpose of determining whether the lumber was of the quality agreed to be sold, would be at Minnesota Transfer, but that was rendered impossible by the act of the respondent in rerouting the car to Chicago after making a sale of the lumber to the consignee, Cook, so that it is perfectly idle to contend that there was the right to reject the lumber in Chicago. Unquestionably there was acceptance of the lumber upon all the facts and circumstances of the present case.

MCPHILLIPS, J.A.

That leaves only the bare possibility of there being a right of action for breach of warranty, if not of the quality sold, but can that right be extended to the time of delivery of the lumber by the respondent to its purchaser in Chicago? I think not. If it was an existent right even then, the inspection made was not for the ascertainment of whether the lumber was No. 1 common and better, but whether it was up to the U.S. standard of No. 3 clear and better. The evidence as to the inspection of the lumber is valueless and cannot be deemed relevant evidence to establish that the lumber was not of the grade sold, *viz.*, No. 1 common and better. The *onus probandi* was upon

COURT OF APPEAL

1923

July 6.

PIONEER LUMBER CO. v. ALBERTA LUMBER CO.

the respondent to establish that there had been no tampering with the car and its contents after taking delivery of same from the appellant. This onus was not discharged in giving up the original bill of lading and taking the car and rerouting the same from Seattle to Chicago, the responsibility for the contents of the car was wholly upon the respondent. It was quite possible that the car was unloaded and reloaded with lumber to satisfy, presumably, the U.S. grade of No. 3 clear and better, being the grade of lumber sold by the respondent to Cook of Chicago. The procedure adopted by the respondent cannot be approved. The purchase was made at one grade, and what is alleged by the respondent is that the same lumber was sold to its purchaser at a different grade. This action in itself throws suspicion upon the transaction, and if there is to be burden cast anywhere, it must be upon the respondent, not upon the appellant. In any case, I am clear upon it, that the course of action of the respondent, in dealing with the car and lumber, rendered it absolutely impossible to further look to the appellant by way of a claim for breach of warranty, or any other class of claim.

However, even if the merits are to be gone into, the evidence is complete and ample to establish that the car, C.P. 106410, was loaded with the class of lumber sold by the appellant to the respondent, *viz.*, No. 1 common and better. I cannot, with great respect to the learned trial judge, agree with him that there is a lack of evidence as to what lumber went into the car, or its quality—this evidence is, according to my view, most satisfactory in every particular. To itemize some of the evidence, Wilson, the superintendent for the appellant, conversant with the transaction in question here, stated that No. 3 clear is a better grade of lumber than the No. 1 common and better. The lumber sold was No. 1 common and better, and Lewis said, "it was nice and dry, and light—had dried nicely," and the lumber was shipped in a box-car and was all kiln-dried. Wilson is positive that the lumber loaded in car C.P. 106410 was of the proper grade, *i.e.*, No. 1 common and better, and not lumber of the quality of No. 1 shop, No. 2 shop, No. 3 box, and No. 3 shop, and he is a most competent man. Wilson saw

MCPHILLIPS, J.A.

Lewis watching the lumber being put into the car, watching the lumber put into the kiln and going out from the kiln, also watching it going from the sawmill to the kiln, everything points to Lewis giving the most careful supervision to the lumber purchased and to the lumber delivered in conformity with the purchase made by the respondent. Wilson is enabled to speak positively as to the lumber in question, as there never was a car-load of this lumber, which was spruce, ahead at any one time, and Wilson remembered car C.P. 106410 and practically saw every piece that went into it. Then there is the evidence of Cummings, who at the time when the lumber in question was loaded into the car, was assistant to Wilson, the superintendent, and at the time his evidence was given, was Pacific Lumber Inspection Bureau Inspector, and his experience extended over 25 years inspecting lumber. He stated that there was only one car being loaded the day car C.P. 106410 was loaded, and he is clear upon it, that the contents of the car consisted of No. 1 common spruce, "all grades of spruce in it No. 1 common up," and nothing lower than No. 1 common all kiln-dried, and Cummings was the one who attended to the loading of the car. Then the witness Stover was the salesman for the appellant, and made the sale of the lumber to Lewis, who was acting for the respondent, and he speaks to the action of Lewis in saying that the purchase was of the grade No. 3 clear and better. Stover objects to this and Lewis makes the alteration that the purchase was grade No. 1 common and better (letter of 16th January, 1920). Cummings saw the car loaded, his duty was to see that lumber of the proper grade only went into the car, and is clear upon it, that nothing other than the proper grade of lumber went into the car, and could speak very clearly as to the contents of the car, as only one car was loaded that day. Notwithstanding that Lewis made the change insisted upon by Stover, that the lumber sold was No. 1 common and better, the respondent makes the sale of the lumber as No. 3 clear and better. This course of action was, in its nature, the inviting of trouble and trouble ensued.

MCPHILLIPS, J.A.

The lumber market, after the purchase of the lumber in question by the respondent from the appellant, commenced to

COURT OF APPEAL

1923

July 6.

PIONEER LUMBER CO. v. ALBERTA LUMBER CO.

MCPHILLIPS, J.A.

decline, and values fell. The sale was made at $50 per thousand feet, and the lumber alleged to have been in car C.P. 106410 only realized $35 per thousand feet, but the price received in a market when there was a collapse in the building trade, indicated nothing as to the quality of the lumber sold. If upon the facts of the present case it could be contended at all successfully that an action for breach of warranty existed, then the damages have been wrongly assessed, and there is no material upon which they can be assessed. The rule is, in fact the Sale of Goods Act (section 67) defines it, that *prima facie* the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they answered the warranty (*Loder* v. *Kekule* (1857), 27 L.J., C.P. 27; *Jones* v. *Just* (1868), L.R. 3 Q.B. 197; *Heilbutt* v. *Hickson* (1872), L.R. 7 C.P. 438 at p. 453; *Slater and Another* v. *Hoyle and Smith* (1920), 2 K.B. 11).

Upon the whole case, I am of the opinion that there was delivery and acceptance of the lumber sold. Further, that the weight of evidence supports it being held that lumber in complete conformity with the sale made, *i.e.,* No. 1 common and better, was loaded upon car C.P. 106410. That being established, it follows, that the action should have been dismissed. I therefore am of opinion that the appeal should be allowed and the action dismissed.

EBERTS, J.A.

EBERTS, J.A. would allow the appeal.

Appeal allowed, Martin, J.A. dissenting.

Solicitors for appellant: *John & George Robertson.*
Solicitors for respondent: *Wilson & Jamieson.*

COURT OF APPEAL

1923

July 16.

REX v. ELSIE SIMMONS

REX v. ELSIE SIMMONS, GREENWOOD AND DONG WING.

Crimnial law—Attempt to commit murder—Evidence of an accomplice who confessed—Discrepancy in his evidence—Right to fullest cross-examination—Admissibility of evidence—Judge's ruling—New trial—Criminal Code, Sec. 264.

On appeal from the refusal of a case stated the Court of Appeal may, if the application has merit, grant a new trial instead of sending the case back for a statement.

In a criminal action on a charge of attempted murder the chief witness for the Crown (a Chinaman) was a self-confessed accomplice. He had made statements in writing, on the preliminary hearing and in the examination-in-chief at the trial which contained contradictions and inconsistencies. Counsel for the accused was stopped in his cross-examination of this witness. On appeal from an order refusing a stated case:—

Held, that counsel for accused is entitled to the fullest opportunity of convincing the jury either by demeanour of the witness or his answers to questions, that his story is unreliable. In so stopping counsel in his cross-examination there was error that may have influenced the verdict of the jury and caused the accused substantial wrong. There should therefore be a new trial.

Per MACDONALD, C.J.A.: When counsel has asked a question which the judge is disposed to rule against, it is the duty of counsel to ask the judge for a definite ruling.

APPEAL by accused Elsie Simmons and Greenwood from an order of MORRISON, J. of the 23rd of June, 1923, dismissing an application for a case stated. The three accused were charged with attempted murder. Elsie Simmons (*alias* Alice Langford) was the keeper of a house of ill-fame in Revelstoke. Harry Greenwood (*alias* "Sticks") was a gambler who lived in and about Revelstoke and Dong Wing was a Chinese cook employed in the Canadian Pacific Railway cook-house in Glacier, but being infatuated with a girl in Elsie Simmons's house (Daisy West) he went there from time to time. On the night of the 10th of August, 1922, two explosions of dynamite took place under the house of Mrs. Christine Smith (formerly Lilian Douglas) doing about $500 damage to the house and $2,000 damage to the furniture. Mrs. Smith, with Daisy West and Miss Burnett, were in the house. They smelled fuses burning so they went outside and saw the fuses burning

Statement

COURT OF APPEAL

1923

July 16.

REX v. SIMMONS

Statement

and going to the house next door the Chinaman (cook) employed there came out and tried to put the fuses out by turning the hose on them but did not succeed in doing so. The accused Chinaman confessed to the crime saying that he and Elsie Simmons put the two lots of dynamite with fuses attached under Mrs. Smith's house and lit the fuses. His story was that "Sticks" went to where he was working with a parcel on the afternoon of the 9th of August and asked him to take it to Revelstoke. That on that evening he went to Revelstoke on the train, "Sticks" also being on the train, and on arrival at Revelstoke he gave the parcel to "Sticks." On the following evening he went to Elsie Simmons's house where he saw the parcel that he carried to Revelstoke for "Sticks." He saw Daisy West but they had some words over the picture of a Chinese girl which he took from his pocket and shortly after she disappeared. Elsie Simmons then became very angry and complained that Mrs. Smith was taking away her girls and used abusive language towards her. She then took the parcel and with the Chinaman went to Mrs. Smith's house (just across a lane from her own house) and placed the dynamite, with fuses attached, in two lots under the house and, after lighting the fuses, went away. Both Elsie Simmons and Greenwood denied the Chinaman's story. There was evidence of dynamite being lost at Glacier. A washerwoman and her son gave evidence that they were in Elsie Simmons's house for over an hour and left when the fire-bell rang just before the explosion and that Elsie Simmons was there all the time. The main points taken by counsel for the accused were: (a) That the learned judge should have warned and cautioned the jury that it would be unsafe to convict on the uncorroborated evidence of an accomplice; (b) that the learned judge erred in admitting evidence that one of the accused had threatened to burn other houses; (c) that substantial injury was done by counsel for the accused being stopped or prevented from cross-examining Dong Wing, an accomplice, upon material evidence.

The appeal was argued at Victoria on the 9th and 10th of July, 1923, before MACDONALD, C.J.A., GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

M. A. Macdonald, K.C., for appellants: The first objection is that there were many contradictions in the Chinaman's evidence (he having confessed to the crime) and the learned judge would not allow me to cross-examine: see section 10 of the Canada Evidence Act; *Brownell* v. *Brownell* (1909), 42 S.C.R. 368; *William Smallman* (1914), 10 Cr. App. R. 1. *Lucas* v. *Ministerial Union* (1916), 23 B.C. 257 at p. 261 deals with the atmosphere created when there is trouble between judge and counsel. The guilt of each accused must be carefully distinguished: see *Rex* v. *Murray and Mahoney* (1916), 27 Can. Cr. Cas. 247; *Moses Pritchard and Mary Jane Pritchard* (1913), 9 Cr. App. R. 210. That a substantial wrong has been done see *Allen* v. *Regem* (1911), 44 S.C.R. 331; 18 Can. Cr. Cas. 1. There was error in admitting evidence that one of the accused had threatened to burn certain houses: see *Rex* v. *Iman Din* (1910), 15 B.C. 476; 18 Can. Cr. Cas. 82. There was a substantial wrong in this: see *Rex* v. *Walker and Chinley* (1910), 15 B.C. 100; 16 Can. Cr. Cas. 77 at p. 81; *Rex* v. *Picariello and Lassandro* (1923), 1 W.W.R. 1489 at p. 1499. As to allowing in evidence of other crimes see *Brunet* v. *Regem* (1918), 57 S.C.R. 83; *Rex* v. *Ellis* (1910), 2 K.B. 746 at p. 751; *Rex* v. *Bond* (1906), 2 K.B. 389 at p. 395. As to danger of relying on the uncorroborated evidence of an accomplice see *Rex* v. *Tate* (1908), 2 K.B. 680; *Rex* v. *Ratz* (1913), 21 Can. Cr. Cas. 343. There is no other substantial evidence. As to corroboration of the evidence of an accomplice see *Rex* v. *Baskerville* (1916), 2 K.B. 658; *Rex* v. *Dumont* (1918), 29 Can. Cr. Cas. 442; *Rex* v. *Feigenbaum* (1919), 26 Cox, C.C. 387. On the question of sufficient evidence see *Rex* v. *Jenkins* (1908), 14 B.C. 61 at p. 66; *Rex* v. *O'Neil* (1916), 25 Can. Cr. Cas. 323.

Argument

Killam, for the Crown: On failure to caution the jury see *Rex* v. *Davis* (1914), 19 B.C. 50; *Thomas Henry Curnock* (1914), 10 Cr. App. R. 207 at p. 208. On the question of extraneous evidence see *Rex* v. *Gallant* (1922), 37 Can. Cr. Cas. 234; *Rex* v. *Armstrong* (1922), 2 K.B. 555 at p. 568; *Rex* v. *Miller* (1923), [*ante* p. 298]; 2 W.W.R. 625; *Rex* v. *Ellis* (1826), 6 B. & C. 145. Previous acts have

COURT OF APPEAL

1923

June 5.

REX v. ELSIE SIMMONS

Argument

been given in evidence: see *Reg.* v. *Ollis* (1900), 2 Q.B. 758; *Rex* v. *Boyle and Merchant* (1914), 3 K.B. 339; *Rex* v. *Labrie* (1919), 34 Can. Cr. Cas. 407. On the question of misdirection see *Rex* v. *Baugh* (1917), 38 O.L.R. 559 at p. 566. He must establish there was substantial wrong: see *Rex* v. *Romano* (1915), 24 Can. Cr. Cas. 30. That evidence tends to shew there were other crimes does not render it inadmissible: see *Makin* v. *Attorney-General for New South Wales* (1894), A.C. 57 at p. 65; see also *Thomas Evans, Arthur Flint* (1917), 12 Cr. App. R. 257.

Macdonald, in reply.

Cur. adv. vult.

16th July, 1923.

MACDONALD, C.J.A. (oral): I would grant a new trial.

I want to say a word on the question of stopping counsel when examining witnesses. When counsel has asked a question which the judge is disposed to rule against, but does not do so in specific terms, counsel ought to secure a definite ruling. He ought not to leave it for this Court to decide whether the judge ruled or whether he did not; in other words he should ask the judge for a ruling, and not leave it to be inferred.

MACDONALD, C.J.A.

GALLIHER, J.A. (oral): This is an application to have the learned judge below state a case on certain grounds. They are some five or six in number. We, of course, have the power, if we think the application has merit, instead of sending it back for a statement, to grant a new trial. On one ground, at all events, in my opinion, the prisoners are entitled to a new trial; that is the sixth ground argued before us, *viz.*, that the counsel for the prisoners had not been allowed to continue his cross-examination upon a line which I think he was entitled to pursue further—it was during the examination of the Chinaman, who was, you might say, the star witness for the Crown. He had made two or three contradictory statements, in writing, and on the preliminary hearing counsel for the prisoner was examining him with regard to those contradictions and statements. And, as I view what took place, he was stopped by the learned judge. I regard this witness as what you might

GALLIHER, J.A.

term the keystone in the arch; if his testimony fell down, the whole structure crumbled. Counsel for the prisoner was entitled to the fullest cross-examination—he was entitled to more than simply reading the evidence and pointing out to the jury the inconsistency of the different statements. Because he was entitled to, if possible, bring out, either by the demeanour of the witness or the answers of the witness, on a very close examination (I will say without repetition, because I think it is not advisable that there should be repetition of questions), but he was entitled, at all events, along those lines, to have the fullest opportunity of convincing the jury that this man's story was unreliable. Whether he could do so or not, is another question. I have always understood when I was at the bar myself, and sometimes engaged in the same kind of duty, that I should have the fullest opportunity of examining. I think it is the right of the prisoner. Under those circumstances, on that ground, without deciding any of the other questions raised, some of which I think are trivial, but without considering those other objections, I am satisfied that there should be a new trial.

GALLIHER, J.A.

McPHILLIPS, J.A.: In my opinion an order should be made for a new trial, in that there was error in law in the course of the trial and I am of the opinion that substantial wrong and miscarriage was thereby occasioned. Several grounds were urged by the learned counsel for the prisoners, Mr. *M. A. Macdonald,* in his very able argument, that a new trial should be directed. I content myself with dealing with one only, which I think is sufficient to warrant the ordering of a new trial. This was the stopping of counsel in his cross-examination of Dong Wing, a confessed accomplice. With great respect to the learned trial judge, and whilst not disputing the very extensive powers of the trial judge to control the course of the trial, yet in the special circumstances of the present case, it was not one in which the curtailment of cross-examination should have been resorted to, as so much depended upon the demeanour of this witness, as it might be said that if the evidence of Dong Wing was not accepted by the jury, the prisoners would in all probability be acquitted. It is well known that an untruthful witness may shew no signs of untruthfulness in his examination-

MCPHILLIPS, J.A.

COURT OF APPEAL

1923

July 16.

REX v. ELSIE SIMMONS

in-chief, but under skilful cross-examination it may be disclosed that he is unworthy of belief—that he is affected by some motive or bias, which wholly destroys the value of his evidence. Here we have the case of several stories told and several inconsistent statements made. The learned trial judge would appear to have thought that counsel could fully effectuate his purpose of discrediting the witness by relying solely upon the apparent inconsistencies and that it could be done by comparison only, but that is not the extent of the right of counsel; he is entitled under our form of jurisprudence to break down the witness in his testimony by cross-examination. The demeanour of the witness is for the jury, they are the judges of the facts, and they are entitled to see the demeanour of the witness as that witness is taken over all the material points of evidence that he has undertaken to swear to. Here we have statements in writing and alleged inconsistencies in same. Cross-examination in such a case is most important, statements in writing are well known to afford valuable material for cross-examination. It is most likely that the jury, if the witness contradicts his previous statements, especially those made under oath, will wholly disbelieve him.

MCPHILLIPS, J.A.

Then events occurring following upon alleged happenings, *i.e.*, subsequent conduct becomes material and where there is apparent inconsistency, this calls for a searching cross-examination. Further, in the present case it was material in valuing the evidence of the accomplice, to probe into the manner in which the evidence was procured, when it was forthcoming and many other points in connection therewith that would suggest themselves to experienced counsel. In this connection I would refer to what Lord Wensleydale said in *Mir Asadulah* v. *Bibi Imaman,* 5 Cal. W.R., P.C. 26—a case in the Privy Council (Indian Appeal):

> "There is no better criterion of the truth, no safer rule for investigating cases of conflicting evidence, where perjury and fraud must exist on one side or the other, than to consider what facts are beyond dispute, and to examine which of the two cases best accords with those facts, according to the ordinary course of human affairs and the usual habits of life."

It is, of course, a mistake to attempt to arrive at the truth by a count of the witnesses—the jury is entitled to have the evidence laid bare and demeanour is all-important, especially in

a case such as this, where it may be said everything depends upon this accomplice if guilt is to be brought home to the prisoners. The jury must weigh the evidence and to do so must be put into the position to do so intelligently. In *William Smallman* (1914), 10 Cr. App. R. 1 at pp. 3-4, Reading, L.C.J., said:

"Counsel for the Crown, not persisting in his argument that the cross-examination was properly stopped, argues that in pursuance of our powers under the proviso in s. 4 (1) of the Criminal Appeal Act, although we find that the Deputy-Recorder took a wrong view in stopping the cross-examination, we ought to hold that there has been no substantial miscarriage of justice. This Court has often had to deal with that proviso, and has expressed the opinion that, once it comes to the conclusion that a wrong decision has been given during the course of the case, the Court should never allow the conviction to stand unless it comes to the conclusion that the jury would certainly have convicted even if such wrong decision had never been given. In this case, bearing in mind that the appellant gave evidence in considerable detail and on the very point on which cross-examination had been stopped, and that his counsel also called Bell and examined him on the point, we have come to the conclusion that, even if the cross-examination had been allowed and counsel had persisted to the end, the jury would have come to the same decision. Therefore, acting on the proviso, we think that the conviction must stand, notwithstanding the fact that the cross-examination ought not to have been stopped."

In the present case I have, of course, no hesitation in saying that there was substantial miscarriage of justice and I am far from believing that if the cross-examination had been allowed to be continued, the jury would have nevertheless come to the same conclusion. In any case, all that I am called upon to say is that that which was done at the trial was error and "not according to law" (Sec. 1019, Canada Criminal Code) and "may have influenced the verdict of the jury and caused the accused substantial wrong" (*Allen* v. *Regem* (1911), 44 S.C.R. 331, Sir Charles Fitzpatrick, C.J., at p. 341), and being of that opinion the proper order, as I view it, would be that a new trial be had.

MCPHILLIPS, J.A.

The present case is one that called for the exercise of great patience. No doubt cases calling for the translation of evidence and the examination of foreign witnesses usually have that feature, but the tribunal to weigh that evidence must content itself in patience and time must needs be consumed in eliciting the salient facts, and the system of jurisprudence which is

COURT OF APPEAL

1923

July 16.

REX v. ELSIE SIMMONS

carried out in British Courts must be followed, not unduly curtailed. I say this with the greatest respect to the learned trial judge, and one of the fundamentals in the fabric is the right of counsel to cross-examine the witnesses. It is true that the cross-examination must not amount to an abuse of the right and counsel must always be subject to the control and direction of the trial judge, yet that control and direction is within well-understood limits. That which is essential is what Parliament has well indicated in section 1019 of the Canada Criminal Code, and it is this, that nothing shall be done at the trial which is not "according to law," and if done, then it follows that the conviction may be set aside or a new trial directed, unless in the opinion of the Court of Appeal no "substantial wrong or miscarriage was thereby occasioned on the trial," and in the present case I am quite unable to say that no substantial wrong or miscarriage took place, in truth, I am of the opinion that there was substantial wrong and miscarriage. With respect to the evidence generally, I refrain from discussing it, as there will be a new trial, and in this connection would refer to what Lord Shaw of Dunfermline said in *Baikie* v. *Glasgow Corporation* (1919), S.C. (H.L.) 13 at p. 17:

MCPHILLIPS, J.A.

> "It is not usual, as your Lordships have observed, to make any remarks whatsoever upon the merits of a case which is ultimately to be tried."

I am therefore of the opinion that a new trial should be directed.

EBERTS, J.A. (oral): I cannot add anything to what has been said. I have read the evidence through very carefully, and there have been some glaring misstatements made by the Chinaman, who was the principal witness in the trial, giving the principal evidence against the prisoners. A good deal has been said with reference to the counsel for the prisoner Greenwood not having the opportunity of closely cross-examining the Chinaman. I think probably it would be in the interests of justice if a declaration came from this Court also that counsel defending should have the freest and the best opportunity of cross-examining the witness. Of course the counsel for the prisoner had the statements, the first, second and third statements of the accomplice; in each one of these statements he made different

EBERTS, J.A.

COURT OF APPEAL

1923

July 16.

REX v. ELSIE SIMMONS

statements, which would go a good deal towards convicting the prisoner Greenwood, especially. And under the circumstances I think it would tend to the better administration of justice, and carry out the principles that should actuate the trial of cases, to give those who are tried the opportunity of being absolutely tried in the best way possible.

I would agree to a new trial.

New trial ordered.

Solicitor for appellant: *G. S. McCarter.*
Solicitor for respondent: *Cecil Killam.*

GRAND TRUNK PACIFIC DEVELOPMENT COMPANY LIMITED v. MUNICIPALITY OF THE CITY OF PRINCE RUPERT.

COURT OF APPEAL

1923

July 5.

GRAND TRUNK PACIFIC DEVELOPMENT CO. v. CITY OF PRINCE RUPERT

Municipal law—Assessment—Appeal from Court of Revision to County Court—Appeal to Court of Appeal—Point of law—Condition precedent to appeal—B.C. Stats. 1919, Cap. 63, Sec. 7.

Under the provisions of subsection (7) of section 223 of the Municipal Act Amendment Act, 1919, it is a condition precedent to the right of appeal to the Court of Appeal that a point of law was raised upon the hearing of the appeal from the Court of Revision by the judge below.

APPEAL by plaintiff from the decision of YOUNG, Co. J. dismissing an appeal from the Court of Revision of the Municipality of Prince Rupert with respect to the assessment of sections 3, 4 and 9 and unsubdivided parcels 1, 2A, 19 and 30, all in the City of Prince Rupert, for the year 1923. Statement

The appeal was argued at Victoria on the 4th and 5th of July, 1923, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Patmore, for appellant.

Harold B. Robertson, K.C., for respondent, raised the pre- Argument

COURT OF APPEAL

1923

July 5.

GRAND TRUNK PACIFIC DEVELOPMENT CO. v. CITY OF PRINCE RUPERT

liminary objection that under section 223, subsection (7), of the Municipal Act Amendment Act, 1919, there was only an appeal from the decision of a judge to the Court of Appeal when a point of law was raised before the judge appealed from. No point of law was raised in the Court below: see *Clarkson* v. *Musgrave* (1882), 9 Q.B.D. 386. As to its being a condition precedent to raise the question in the notice of appeal and that the point be taken at the trial see *Smith* v. *Baker & Sons* (1891), A.C. 325 at pp. 333 and 338; *Waller* v. *Thomas* (1921), 1 K.B. 541. A request to the judge below to take a note is not a condition precedent: see *Wohlgemuthe* v. *Coste* (1899), 1 Q.B. 501; see also *Taylor* v. *National Amalgamated Approved Society* (1914), 2 K.B. 352 at p. 359; *Chapman and Sons* v. *Withers & Co.* (1887), 58 L.T. 24.

Argument

Patmore, contra: The learned judge below did raise a point of law. On the evidence it appeared that in previous years the appellant had paid on larger assessments without dissent and the question was raised as to whether it was not now estopped from claiming a lower assessment.

Robertson, in reply, referred to *Clifford* v. *Thames Ironworks and Shipbuilding Company* (1898), 1 Q.B. 314.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I think the appeal ought to be dismissed. It was incumbent upon the appellant to shew clearly that he was within the statute giving him the right to appeal. Unfortunately the learned judge appealed from has used some expressions which might be construed as a decision upon a point of law, but there is much ambiguity about the real point of his decision and it was for the appellant to shew clearly that a point of law was raised, and I do not think we should be justified in saying that it has been made to appear that a point of law was raised in the Court below. The learned judge at first made a clear declaration that it was incumbent upon him to decide on the facts, that is, as to the market value. Then as he proceeded he did use the expression "estoppel of law," but it seems to me he used it in a loose sense, that is, that the appellant having paid the taxes in other years without protest, that fact might be taken as a factor in arriving at the true value.

Then as to counsel raising the question in the Court below,

it is conceded that counsel did not raise it, but I do not desire to express an opinion on the effect of that. The appeal is quashed.

MARTIN, J.A.: In my opinion this motion to quash the appeal for lack of jurisdiction should be granted. Section 7 provides that there shall only be an appeal from a decision of the judge below upon any point of law raised on the hearing of the appeal by such judge below. It is admitted that as to what is now suggested as a point of law nothing was said below and no action was taken with regard to it. If you say nothing and do nothing, nothing can result, and therefore there was, in fact, no point of law raised below. The decisions in the cases referred to by Mr. *Robertson,* in my opinion, completely cover the point, particularly the last one, *Clifford* v. *Thames Ironworks and Shipbuilding Company* (1898), 1 Q.B. 314, in which an objection was sought to be taken on appeal to the Divisional Court from a judgment of the County Court because the judge had misdirected the jury; the objection had not been taken below. Mr. Justice Channell outlines the practice, and he says:

"I think we have no jurisdiction to hear this appeal. The objection to the direction complained of should be taken at the trial wherever it is possible to do so. Here it was quite possible. The misdirection complained of in the notice of appeal is in the nature of nondirection, and the County Court judge could without either inconvenience or disrespect have been asked at the end of his summing-up to direct the jury in the way it is now contended that he should have directed them."

MARTIN, J.A.

Now what is the difference in principle between the misdirection by a judge of the jury in order to ascertain the facts upon the proper basis, and a misdirection of himself in the same endeavour? It is, to me, quite obvious that if the judge's misdirection to the jury must be objected to then misdirection to himself should likewise be objected to at the hearing, if possible to do so, as it was here. For that reason I am clearly of opinion that there was no point of law raised below and therefore we have no jurisdiction, and so the appeal should be quashed.

GALLIHER, J.A.: I base my opinion solely on this, that on a close reading of subsection (7) of section 223 it appeared to me it has not been sufficiently shewn that a point of law was

GALLIHER, J.A.

COURT OF APPEAL

1923

July 5.

GRAND TRUNK PACIFIC DEVELOPMENT CO. v. CITY OF PRINCE RUPERT

raised and decided on the hearing of the appeal by the judge, and I will only add that, at the moment at all events, there does seem to me to be a difference between the *Clifford* v. *Thames Ironworks and Shipbuilding* case and cases such as this, and further that had I considered that a point of law had been raised I would have taken from the judge's own reasons that he applied the principle of estoppel in his judgment and it was the chief factor of his decision.

MCPHILLIPS, J.A.: It is my opinion that the appeal is incompetent, seeing that the necessary condition precedent admitting of an appeal is not present. The enactment seems to me to be in plain language from one point of view and from another point of view very ambiguous. The section is 223, subsection (7), as enacted by section 7 of the Municipal Act Amendment Act, 1919, Cap. 63, and it reads:

"There shall be an appeal from the decision of the judge of the Supreme Court or the County Court judge to the Court of Appeal upon any point of law raised upon the hearing of the appeal by such judge."

Now if the Legislature meant that the point of law might be one raised by the judge, then upon the facts of this case there would be an appeal, if the hearing is continuing until the judge has given his reasons for judgment. I invited the attention of counsel to this point but it was not adopted in the argument, and I am not prepared to adopt the view. I think the Legislature means a point of law raised upon the hearing upon appeal by counsel for either party, and unless that is the case, there is no appeal. Otherwise it would mean, that although no point of law was raised or debated in the Court below by counsel, an appeal is permissible if the learned judge in his reasons for judgment proceeds upon a point of law. Let us analyze matters in the present case. Mr. *Patmore* certainly would not have raised estoppel, as the point of law adverted to by the judge, if at all forceful, would be against him. The counsel for the Municipality might have raised the point, but he did not. In the result is seems to me that one has to construe this language as meaning that there is no appeal, unless a point of law has been raised by counsel in the Court below before the judge during the hearing the appeal. It might well be a point

MCPHILLIPS, J.A.

of law being raised, it would lead to the introduction of other evidence, to be merely referred to in passing by the judge, when giving his reasons, can hardly fill the terms of the enactment; further, in the present case I do not understand the learned judge as deciding the matter on a point of law at all; the import of it is that as the assessment had been allowed to stand in other years it influenced his (the judge's) view, not meaning there was estoppel in law.

EBERTS, J.A.: I cannot see where a point of law has been raised on the hearing, which is the requirement of subsection (7) of section 223 as enacted by the Municipal Act Amendment Act, 1919, Cap. 63. I would therefore quash the appeal.

Appeal quashed.

Solicitors for appellant: *Patmore & Fulton.*
Solicitor for respondent: *E. F. Jones.*

MCDONALD, J.

1923

Feb. 3.

COURT OF APPEAL

July 9.

VINEY v. B.C. ELECTRIC RY. CO.

VINEY AND VINEY v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED.

Negligence—Street railway—Injured by car while lawfully on a street—Limitation of action—"By reason of the railway"—"Works or operations of the company"—B.C. Stats. 1896, Cap. 55, Sec. 60.

The plaintiff while lawfully upon a street in the City of Vancouver was injured by the negligent driving of the defendant's street-car. Section 60 of the Consolidated Railway Company's Act, 1896, provides that "all actions or suits for indemnity for any damage or injury sustained by reason of the tramway or railway, or the works or operations of the Company, shall be commenced within six months next after the time when such supposed damage is sustained," etc. The action was commenced after the six months had expired. It was held by the trial judge following *The North Shore Railway Company* v. *McWillie* (1890), 17 S.C.R. 511, that the six months' limitation did not apply to this action.

Held, on appeal, reversing the decision of MCDONALD, J., that the limitation prescribed applies in the case of an action brought by a person claiming indemnity for injury so sustained.

APPEAL by defendant Company from the decision of MCDONALD, J. on a point of law raised by paragraph 42 of the defendant's statement of defence. By order of the 19th of January, 1923, it was set down by the plaintiffs for hearing and disposition before the trial. Argued before the same learned judge at Vancouver on the 30th of January, 1923. The action was for damages for injury to the infant plaintiff May Viney, and for special damages to the plaintiff Harry Viney (the infant's father) occasioned by the negligent driving of the defendant or its servants. Clause 42 of the statement of defence is as follows:

Statement

"The action set out in the statement of claim is an action for damage or injury sustained by reason of the tramway or railway, or the works or operations of the defendant Company, and has not been commenced within six months next after the time when such supposed damage was sustained, as provided by section 60, chapter 55 of the Consolidated Railway Company's Act, 1896."

A. Alexander, for plaintiffs.

McPhillips, K.C., for defendant.

3rd February, 1923. MCDONALD, J.

1923

Feb. 3.

COURT OF APPEAL

July 9.

VINEY v. B.C. ELECTRIC RY. CO.

McDONALD, J.: The plaintiff, an infant, sues, by her next friend, for damages sustained by her while crossing Hastings Street in the City of Vancouver, by reason of having been knocked down and run over by a car belonging to the defendant Company, which was being negligently driven by one of the servants of the defendant Company.

The defendant relies upon section 60 of its incorporation Act, Cap. 55, B.C. Stats. 1896, which is as follows:

"All actions or suits for indemnity for any damage or injury sustained by reason of the tramway or railway, or the works or operations of the Company, shall be commenced within six months next after the time when such supposed damage is sustained, or if there is continuance of damage, within six months next after the doing or committing of such damage ceases, and not afterwards, and the defendant may plead the general issue, and give this Act and the special matter in evidence at any trial to be had thereupon, and may prove that the same was done in pursuance thereof and by authority of this Act."

The question of law so raised was set down for hearing and has been very fully argued.

The words of the above section were considered in *Sayers* v. *B.C. Electric Ry. Co.* (1906), 12 B.C. 102. That was an action brought by a passenger for damages for negligence, and it was held by DUFF, J., who was sustained by the Full Court composed of IRVING, MARTIN and MORRISON, JJ., that the section did not apply so as to bar the plaintiff's action. All of those learned judges were of opinion that the words "by reason of the tramway or railway, or the works or operations of the Company" should be read *separatim* as describing different branches of the Company's undertaking. Following that decision, which has not been overruled, I feel myself bound to hold that the defendant Company, in the present case, can gain no assistance from the words "or the works or operations of the Company." If it were not for that decision, I should have ventured to think (and I say it with the greatest deference) that the words "operations of the Company" included the negligent running of cars, as was assumed, though not decided, by their Lordships of the Judicial Committee in *British Columbia Electric Railway Company, Limited* v. *Gentile* (1914), A.C. 1034. As stated above, however, I am bound by the decision in the *Sayers* case and for the present purpose, therefore, must

MCDONALD, J.

MCDONALD, J. read the section as if the clause in question contained only the words: "By reason of the tramway or railway."

1923

Feb. 3.

COURT OF APPEAL

July 9.

VINEY v. B.C. ELECTRIC RY. CO.

The words, "by reason of the railway," were the words contained in the Dominion Railway Act until 1903, when they were amended to read, "by reason of the construction or operation of the railway." These last-mentioned words, as contained in the Manitoba Railway Act, have recently been construed by the Supreme Court of Canada in *Winnipeg Electric Railway Company* v. *Aitken* (1922), 63 S.C.R. 586, and it is contended on behalf of the defendant that the decision in that case governs the present case. It must be noted, however, that the *Aitken* case differs from the present case in at least three important particulars: (1) their Lordships were dealing with a public as distinguished from a private Act; (2) they were dealing with the case of a passenger on the railway; (3) they were dealing with the Act as amended to include the words "construction or operation."

It seems to me, therefore, that while the *Aitken* case may be very helpful in arriving at a decision in this case, still it does not entirely govern. It is indeed helpful to this extent that Mr. Justice Anglin, at pp. 615-6, after an exhaustive review of the decisions both before and after the amendment, uses these words:

> "My conclusion from this review of the leading authorities . . . . is that taken as a whole they would not have compelled us to hold that the present action would not have been within the purview of s. 116 [being the section in question] had it stood as it was prior to 1907, *i.e.*, if it still read 'by reason of the railway.'"

MCDONALD, J.

So that at least one of their Lordships felt that there was no binding decision precluding the Supreme Court of Canada from holding, even in an action brought by a passenger, and before the words "construction or operation" were added, that the statute was available as a defence.

As to the earlier cases under statutes similar to the one now under consideration (eliminating the words "or the works or operation of the Company") it may be said, speaking generally, that passengers and others in contractual relations with the Company were from time to time held to be excluded from the operation of the statute. On the other hand, there are several

decisions holding that the statute was available as a defence to an action in tort. See *Auger* v. *Ontario, Simcoe & Huron Railway Co.* (1859), 9 U.C.C.P. 164, an action brought for the destruction of a horse by running over it; *Browne* v. *Brockville and Ottawa R.W. Co.* (1860), 20 U.C.Q.B. 202, an action for damages resulting from a collision with the plaintiff's wagon at a railway crossing; *Kelly* v. *Ottawa Street R.W. Co.* (1879), 3 A.R. 616, an action for an injury sustained by plaintiff by reason of the defendant's negligent operation of its car while the plaintiff was engaged in his lawful occupation on the street; *Conger* v. *Grand Trunk R.W. Co.* (1887), 13 Ont. 160, an action by an executrix for negligently causing the death of her testator in allowing an engine of the defendant Company to collide with the Credit Valley Railway car in which the deceased was sitting on the railway track of the Credit Valley Co.; *British Columbia Electric Ry. Co.* v. *Crompton* (1910), 43 S.C.R. 1, an action brought under the statute now under discussion by an infant who was injured while residing in his mother's house, by contact with an electric wire in use there under a contract between the Company and his mother.

In so far, however, as these words "by reason of the railway" are concerned, it seems to me that there is one decision of the Supreme Court of Canada which has never been overruled, and which is a decision to the contrary—*The North Shore Railway Company* v. *McWillie* (1890), 17 S.C.R. 511. That was an action for damages for negligence in running a train too heavily laden on an up-grade whereby an unusual quantity of sparks escaped and burned the plaintiff's buildings. In the lower Courts the defendant Company pleaded prescription, relying upon a public statute containing the words "by reason of the railway." The plaintiffs succeeded on the trial and on the appeal to the Court of Queen's Bench in Quebec. The defendant Company appealed to the Supreme Court of Canada and the report states that on the argument counsel for the appellant did not insist on the plea of prescription. The judgment of the Court of Queen's Bench was unanimously affirmed but, in view of the fact that the plea of prescription had not been pressed, Mr. Justice Gwynne is the only one of their Lordships

MCDONALD, J.

MCDONALD, J.
1923
Feb. 3.
COURT OF APPEAL
July 9.
VINEY v. B.C. ELECTRIC RY. CO.

who deals with that question. Surely this much can be said regarding that judgment: the plaintiff could not have succeeded and held his verdict if the statute was a good defence. Mr. Justice Gwynne, in dealing with this question at pp. 513-4 of the report, states that, in his opinion, the statute has no reference "to an action like the present, which is for damage, not occasioned by reason of the railway, but by reason of sparks being suffered to escape from an engine running upon it, by the default and neglect of the company whose engine causes the damage which, as in the present case, may not be the company owning the railway."

The *McWillie* case is referred to by DUFF, J. in *British Columbia Electric Ry. Co.* v. *Crompton, supra,* at p. 17, but his Lordship did not find it necessary to either agree with or dissent from the view expressed by Gwynne, J. for the reason that the *Crompton* case could be decided upon the other branch of the clause, "works . . . . of the Company." The *McWillie* case is also referred to by Mr. Justice Anglin in the *Aitken* case at p. 605, but his Lordship does not dissent from the view expressed by Gwynne, J. I am unable to distinguish in principle between an action brought against a railway company for injuries caused by overloading an engine on an up-grade from an action against a railway company for injuries caused to a foot-passenger by negligently operating a car on the defendant's railway track. If, therefore, the opinion expressed by Gwynne, J. in the *McWillie* case is still good law, the defence raised in the present action is not available to the defendant.

MCDONALD, J.

Having in mind, therefore, the fact that the defendant is relying upon a private Act and noting the principle laid down in *St. Hyacinthe Gas Co.* v. *St. Hyacinthe Hydraulic Power Co.* (1895), 25 S.C.R. 168 at pp. 173-4, referred to by DUFF, J. in *Sayers* v. *B.C. Electric Ry. Co.* (1906), 12 B.C. 102 at p. 106, I am constrained, in view of the decision in the *McWillie* case, to decide the question in favour of the plaintiff; and that, notwithstanding the fact that if I were interpreting the section in question unguided by authority, I should have come to a contrary conclusion.

From this decision the defendant Company appealed. The

appeal was argued at Vancouver on the 12th and 13th of March, 1923, before MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

McPhillips, K.C., for appellant: Under the section the action must be brought within six months. This is a straight action for damages for negligence: see *Winnipeg Electric Railway Company* v. *Aitken* (1922), 63 S.C.R. 586 at pp. 595 and 602 *et seq.*; *Northern Counties* v. *Canadian Pacific Ry. Co.* (1907), 13 B.C. 130; *Ryckman* v. *Hamilton, Grimsby and Beamsville Electric R.W. Co.* (1905), 10 O.L.R. 419 at pp. 430-1; *The North Shore Railway Company* v. *McWillie* (1889), M.L.R. 5 Q.B. 122; (1890), 17 S.C.R. 511.

A. Alexander, for respondent: This is a special Act. The cases referred to have no application here. The case of *Sayers* v. *B.C. Electric Ry. Co.* (1906), 12 B.C. 102 at p. 107, applies, the only difference is that there it was a passenger and here it was a person lawfully on the road. It applies to construction and maintenance but not to operation of the road: see *Turner* v. *B.C. Electric Ry. Co.* (1914), 49 S.C.R. 470 at pp. 489 and 498; *Gentile* v. *B.C. Electric Ry. Co.* (1913), 18 B.C. 307; (1914), A.C. 1034 at p. 1039; see also *Kelly* v. *Ottawa Street R.W. Co.* (1879), 3 A.R. 616; *Reist* v. *The Grand Trunk Railway Company* (1858), 15 U.C.Q.B. 355; *Findlay* v. *Canadian Pacific R.W. Co.* (1901), 2 Can. Ry. Cas. 380; *British Columbia Electric Ry. Co.* v. *Crompton* (1910), 43 S.C.R. 1 at pp. 16 to 18; *Roberts* v. *The Great Western Railway Co.* (1856), 13 U.C.Q.B. 615; *Traill* v. *Niagara, St. Catharines and Toronto R.W. Co.* (1916), 38 O.L.R. 1; *Greer* v. *Canadian Pacific Rway. Co.* (1915), 51 S.C.R. 338. The language must be plain and unambiguous: see *Browne* v. *Brockville and Ottawa R.W. Co.* (1860), 20 U.C.Q.B. 202. Argument

McPhillips, in reply.

Cur. adv. vult.

6th July, 1923.

MARTIN, J.A.: This appeal again raises the vexed question of limitation of actions against the defendant Company under section 60 of its incorporation Act, Cap. 55 of B.C. Stats. 1896, MARTIN, J.A.

MCDONALD, J.
1923
Feb. 3.
COURT OF APPEAL
July 9.
VINEY v. B.C. ELECTRIC RY. CO.

which our old Full Court considered in certain aspects in *Sayers* v. *B.C. Electric Ry. Co.* (1906), 12 B.C. 102, wherein it was decided that in the case of an injury to one of its passengers the said section did not apply so as to bar an action for damages against the Company as it was one upon a contract to carry safely, *i.e.*, with due care, for reward. While holding that opinion, I said at the end of my judgment, p. 111: ". . . . yet the question is not at all free from doubt, and it is desirable in the public interest that it should be set at rest, either by the Legislature or the Court of last resort."

Nevertheless that judgment has for over seventeen years remained undisturbed, and as the section remains the same, I continue to take the same view of it, because I am of the same opinion as to abiding by the decisions of the present and former Appellate Courts of this Province as that which was expressed by the great lawyer, Lord Collins, in *The Burns* (1907), P. 137, wherein he said at p. 145:

"The point has been considered in this Court in a very analogous case by which we are bound, and I do not think it is desirable that we should take subtle distinctions between earlier cases decided in this Court and the case before us; but should, as far as possible, loyally carry out the principles established by the earlier cases."

In *McDonald* v. *B.C. Electric Ry. Co.* (1911), 16 B.C. 386 at p. 400, I said:

"A good deal was said during the argument, *pro* and *con*, about our being bound by the decisions of the old Full Court. Now, while as a rule I think we should follow the decisions of that Court (and invariably do in regard to practice, procedure and juridical matters on our Provincial statutes, in order to avoid confusion and uncertainty in the working of this Court), yet cases may arise where the circumstances are so exceptional as to require our independent consideration, of which the case at bar is a good example."

MARTIN, J.A.

Shewing how "exceptional" such cases are, since that time I can only recall one in which I felt justified in declining to follow a decision of the Full Court.

I do not regard the recent decision of the Supreme Court in *Winnipeg Electric Railway Company* v. *Aitken* (1922), 63 S.C.R. 586, as a disturbance of the *Sayers* case, despite some individual observations, because the section of the Manitoba Railway Act considered in the *Aitken* case is now so framed as to read: "All suits for indemnity for any damage or injury sustained by reason of the construction or operation of the rail-

way," which removes, from my mind at least, the doubt on the point I hereinbefore expressed, and which is referred to by Mr. Justice Anglin in the *Aitken* case at p. 604; and in his illuminating judgment (if I may be permitted to say so) the whole matter in its varying stages of legislation, is elaborately considered in view of the "uncertainty and confusion existing" upon the effect of the authorities, the intricacies of which I shall not attempt further to reconsider. The *Sayers* case, though cited in argument, was not referred to in the judgment of the Privy Council in *British Columbia Electric Railway Company, Limited* v. *Gentile* (1914), A.C. 1034, and the question of the construction of section 60 now before us was not considered by their Lordships, because at p. 1040 they held that the action was maintainable under the Families Compensation Act "and that section 60 has no application"; therefore their prior observation on p. 1039, that "their Lordships assume without deciding that the words 'operations of the company' include negligent driving of a car," means nothing more than the usual temporary assumption to accelerate the argument upon the application of the Families Compensation Act to the exclusion of section 60.

Applying that section, still unaltered, to the case at bar, I am of opinion that in the light of the *Sayers* case, it must be viewed as though it read "By reason of the tramway or railway" (excluding the words "works or operations"). It then remains MARTIN, J.A. to be decided what is the effect of that language upon the facts of this case, which is one of tort simply for injury done by the railway to one of the general public, not being a passenger, while crossing a public street, and it is identical in essential elements with those before the Ontario Court of Appeal in *Kelly* v. *Ottawa Street R.W. Co.* (1879), 3 A.R. 618, upon a section (p. 622) essentially the same in its effect, and that Court unanimously decided that the section barred the action because of the negligent way the tramcar was driven upon the highway, as herein; and this conclusion was come to in pursuance of prior decisions "long unchallenged," the Court feeling, p. 618, *per* Moss, C.J.A., that:

"If the rule is unsound or mischievous there has been ample opportunity for its correction by the Legislature."

MCDONALD, J.

1923

Feb. 3.

COURT OF APPEAL

July 9.

VINEY v. B.C. ELECTRIC RY. CO.

Furthermore, there is in this Province in the case of *Northern Counties* v. *Canadian Pacific Ry. Co.* (1907), 13 B.C. 130, wherein I decided, following *McCallum* v. *Grand Trunk Railway Co.* (1871), 31 U.C.Q.B. 527, that damage caused by sparks from an engine was "sustained by reason of the railway" within section 27 of the Consolidated Railway Act, 1879, and therefore dismissed the action, and though on appeal my judgment was reversed by two out of three sitting judges of the Full Court, yet it was on another aspect of the matter, *viz.*, upon the second point, as to the non-application of section 27 to the defendant's special charter and the incorporation into it of various statutes. Mr. Justice IRVING agreed with me on all the points under consideration, basing his judgment upon *Kelly* v. *Ottawa Street R.W. Co.* and the *McCallum* case.

In the *Aitken* case Mr. Justice Anglin, p. 610, quotes the *Kelly* case with approval, and I propose to continue to abide by it in the company of my late brother IRVING in the *Northern Counties* case, repeating only the observations I made therein at p. 131, as to the expressions of Mr. Justice Gwynne in *The North Shore Railway Company* v. *McWillie* (1890), 17 S.C.R. 511, being clearly *obiter dicta*, the plea of prescription under the statute having been abandoned by counsel upon the argument (pp. 512-14) and the "only question argued was one of fact," as Mr. Justice Patterson points out, as do two of the other judges, the Chief Justice saying: "The question raised in this case was a pure question of fact," and Mr. Justice Fournier saying: "There was another question raised by the pleadings, *viz.*: prescription, but on the present appeal the counsel for appellant did not rely upon that." Such being the case, the expressions of Mr. Justice Gwynne upon a question of law not before the Court (which confined itself to one of "pure fact") and not raised by counsel (who doubtless had some good reason for abandoning it which it is not for us to inquire into) must be entirely disregarded and it is, with all respect, difficult to understand why he embarked upon them, and I have only gone into the matter thus carefully because the learned judge below said in his reasons that: "I am constrained, in view of the decision in the *McWillie* case, to decide the ques-

MARTIN, J.A.

tion in favour of the plaintiff," which view counsel in supporting his judgment did not venture to advance. MCDONALD, J.

1923

Feb. 3.

COURT OF APPEAL

July 9.

VINEY v. B.C. ELECTRIC RY. CO.

The confusion and uncertainty in the authorities, almost from the outset, is explained by the following remarks of Mr. Justice Anglin in the *Aitken* case, pp. 607-8, which I respectfully adopt:

"Our Courts have too often applied to Canadian statutes decisions of the English Courts upon statutes considered to be *in pari materia* but couched in different language, intended to apply to other circumstances and indeed sometimes dealing with a different subject-matter. See the judgment of Duff, J., in *Toronto* v. *J. F. Brown Co.* (1917), 55 S.C.R. 153 at p. 181, *et seq.*"

The result is that, in my opinion, this action of tort is barred by section 60 and the appeal should be allowed and the action dismissed. MARTIN, J.A.

GALLIHER, J.A.: This case comes before us in the nature of a demurrer on an appeal from MCDONALD, J.

The point is as to whether the action is barred by section 60 of the Consolidated Railway Company's Act, 1896, Cap. 55, B.C. Stats. 1896. The section reads as follows: [already set out in the judgment of MCDONALD, J.].

The action here was not brought within the six months' time limit.

This section was dealt with by our Full Court in *Sayers* v. *B.C. Electric Ry. Co.* (1906), 12 B.C. 102. In that case the plaintiff was a passenger on the Company's tramway. The trial judge, DUFF, J., held that the words "tramway or railway, or works or operations of the Company" should be read *separatim* as describing different branches of the Company's undertaking, and that so reading it "works and operations" would properly apply to those branches of the undertaking not exclusively connected with the tramway or railway. On appeal, IRVING, MARTIN and MORRISON, JJ. confirmed this view, though MARTIN, J. expressed the opinion that the matter was not free from doubt. In the judgment of DUFF, J. and in the Full Court, the question of the contractual relations was given prominence. DUFF, J., at p. 103: GALLIHER, J.A.

"It is contended that the effect of this section is to impose upon any person having a complaint against defendants for damages caused by reason of the failure of the Company to perform its contractual obliga-

MCDONALD, J. tions to exercise due care in the carriage of passengers, a prescription of six months in respect of such complaint,"

1923

Feb. 3.

and goes on to instance various examples, all of a contractual nature.

COURT OF APPEAL

IRVING, J., at p. 109:

July 9.

"I agree with the learned trial judge . . . . the section does not apply to a case like the present, which is based on the defendants' duty to carry the plaintiff safely."

VINEY v. B.C. ELECTRIC RY. CO.

MARTIN, J., at p. 111:

"The journey being a continuous one, we are not embarrassed by the question of the exact termination of the contract on alighting from the car," etc.

MORRISON, J. concurred in the reasons for judgment of IRVING, J.

I think from all the foregoing it is not too much to say that the minds of the trial judge and the judges in the Full Court were directed to the consideration of a case of contractual relationship and as such held that it was not within the prescription.

It is true Mr. Justice DUFF and the Full Court held that the words may be read *separatim,* but assuming that to be so, we still have the words "by reason of the tramway or railway." I doubt if the learned judges who sat in the *Sayers* case had been dealing with a case such as the present, where the plaintiff who had no relations whatever with the Company but was injured by one of the Company's cars while crossing the street, they would have found it did not come within the words "by reason of the tramway or railway." At all events, in my view, the *Sayers* case does not decide the point before us in the case at bar.

GALLIHER, J.A.

The learned trial judge felt himself bound by the decision in the *Sayers* case, and the case of *The North Shore Railway Company* v. *McWillie* (1890), 17 S.C.R. 511. I have already dealt with the *Sayers* case. With regard to the *McWillie* case, I have carefully read the able and instructive judgment of Anglin, J. in *Winnipeg Electric Railway Company* v. *Aitken* (1922), 63 S.C.R. 586, in which he deals so thoroughly with the cases that it would be superfluous for me to do more than refer to it, and if I truly apprehend the learned judge's views as expressed in that case, he would hold, if necessary, that there was nothing binding upon him to conclude that even under the

words "by reason of the railway" the prescription section would not apply (in a case such as he was then considering), and I note that he makes reference to the views of Gwynne, J. in the *McWillie* case.

If I may say so with respect, I am content to follow what I understand to be the views of Mr. Justice Anglin, my own view also being along similar lines. Such being the case, I do not think I am precluded by authority from holding as I do, that the plaintiffs here are within the prescription section. I would, therefore, allow the appeal.

MCPHILLIPS, J.A.: In my opinion the appeal should succeed and the action should be dismissed.

The defendant relies upon section 60 of its incorporation Act, Cap. 55, B.C. Stats. 1896, which is as follows: [already set out in the judgment of MCDONALD, J.].

Were it not for *Sayers* v. *B.C. Electric Railway Co.* (1906), 12 B.C. 102, I would consider that it was incontrovertible that the language means what it says, *i.e.,* that all actions howsoever arising consequent upon the existence of the tramway or railway, and consequent upon the works or operations of the Company should be commenced within the stipulated time. With the greatest respect to all the learned judges who arrived at the contrary conclusion, I fail to see what other language could have been used which would more completely indicate the statutory period within which any and all actions should be commenced. The intention of the Legislature, in my opinion, has been expressed in apt words and it follows that the Court must give effect to the plain intention of Parliament in respect to a matter which is exclusively within the conferred powers granted to the Province by the British North America Act, 1867, *i.e.,* under the caption, "property and civil rights."

I venture to express the opinion that although their Lordships of the Privy Council in *British Columbia Electric Railway Company* v. *Gentile* (1914), A.C. 1034, guarded themselves from being held to have decided that the words "operations of the company" included the negligent running of cars, that the assumption come to for the purposes of that case was

MCDONALD, J.

1923

Feb. 3.

COURT OF APPEAL

July 9.

VINEY v. B.C. ELECTRIC RY. CO.

MCPHILLIPS, J.A.

based at least upon what appeared to their Lordships to be a reasonable and might well be a fair first impression of the language used by the Legislature. Since then we have *Winnipeg Electric Railway Company* v. *Aitken* (1922), 63 S.C.R. 586, and the elaborate and illuminative judgment specially dealing with the point here to be determined, by Mr. Justice Anglin. Upon a careful perusal of that judgment it cannot longer be successfully contended that "by reason of the railway" is language so confining in its nature and effect as to exclude application to an action brought by a passenger. Then it is not to be lost sight of that in the present case we have the additional words "or the works or operations of the Company." What more comprehensive words could be used passes my understanding.

I would particularly refer to pp. 595, 602, 603, 604, 611, 615, 616, in the judgment of Anglin, J. Nothing further, in my opinion, can be usefully added to exemplify the true position, *i.e.*, the action here must be held, in my opinion, to be statute-barred.

EBERTS, J.A.

EBERTS, J.A. would allow the appeal.

Appeal allowed.

Solicitors for appellant: *McPhillips, Smith & Gilmour.*
Solicitors for respondents: *Ross & Ross.*

GOULD v. THOMPSON.

COURT OF APPEAL

1923

June 19.

GOULD v. THOMPSON

Practice—Judgment of trial judge—Written after notice of appeal was given—Struck out of appeal book.

Cheque—Given to avoid a dispute as to the sale of a property—Payment stopped by maker—Action to enforce payment.

After notice of appeal was given the trial judge handed down reasons for judgment which were included in the appeal book. On preliminary objection by the appellant:—

Held, GALLIHER and EBERTS, JJ.A. dissenting, that the reasons for judgment were improperly allowed to form part of the case on appeal and they should be struck out.

The plaintiff and defendant met in a solicitor's office for final payment and delivery of deed under an agreement for sale of land. A dispute arose as to whether interest was payable, and the vendor produced a copy of the agreement (the original being in the Land Registry office) which contained a clause providing for interest. In order to avoid litigation the purchaser gave a cheque for the interest claimed and a deed of the property was handed over. The purchaser on making a search found that the original agreement did not contain any clause providing for interest and he stopped payment of the cheque at his bank. An action by the vendor to enforce payment of the cheque was dismissed.

Held, on appeal, reversing the decision of GRANT, Co. J. (MCPHILLIPS, J.A. dissenting), that as the defendant admitted on his own evidence that the payment of the cheque was not made owing to his reliance on the representation of the plaintiff he cannot succeed and the plaintiff is entitled to judgment.

APPEAL by plaintiff from the decision of GRANT, Co. J. of the 26th of January, 1923, in an action to recover $400 from the defendant a drawer of a cheque for $400, on the Bank of Montreal in favour of the plaintiff and delivered by the defendant to the plaintiff. Upon the cheque being presented for payment at the Bank the plaintiff was informed that the defendant had stopped payment and the cheque was dishonoured. The facts are that on the 30th of November, 1922, Mr. and Mrs. Gould and Mr. Thompson met in the office of J. N. Ellis, barrister, when a discussion took place as to final payment on an agreement for sale of property from Gould to Thompson. A dispute arose as to interest payable. Gould

Statement

COURT OF APPEAL

1923

June 19.

GOULD v. THOMPSON

claimed the agreement (filed in Land Registry office) contained a provision for payment of 8 per cent. interest and produced a supposed copy of the agreement shewing the provision for interest inserted therein. After discussion Thompson said that sooner than let the matter go into litigation he would pay the interest and he gave a cheque for $400 (the amount of the interest claimed) and the Goulds gave a deed for the property in question. On searching at the Land Registry office immediately afterwards Thompson found that the original agreement for sale did not provide for interest as stated by Gould. Next day on presenting the cheque for payment Gould found that Thompson had stopped payment. Gould then brought this action to recover on the cheque.

Statement

The appeal was argued at Victoria on the 19th of June, 1923, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Mayers, for appellant, raised the preliminary objection that the reasons for judgment of the trial judge having been delivered after notice of appeal was given should be struck out of the appeal book and cited *Mayhew* v. *Stone* (1896), 26 S.C.R. 58 at pp. 60-1; *The Sun Life Assurance Company of Canada* v. *Elliott* (1900), 31 S.C.R. 91 at p. 98; *Brown* v. *Gugy* (1863), 2 Moore, P.C. (N.S.) 341.

Argument

Brown, K.C., for respondent, *contra*: The judge below may, after judgment is delivered, make an explanation of his finding: see *Lowery* v. *Walker* (1911), A.C. 10.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I think the application should be allowed. Trial judges, either County Court or Supreme Court judges, have the advantage over the Court of Appeal in deciding upon the credibility of witnesses, and their findings are always treated with great respect by Courts of Appeal. It is difficult to overrule a specific finding of fact, unless it was come to upon wrong principles, or not founded upon legal evidence. So when we come to consider a question of the kind now before us, we are bound to consider the effect our decision will have on the administration of justice. I have very great respect for the learned County Court judge, and I am quite sure that he

acted in perfect good faith in his findings, and that they have not been influenced to any degree by the fact that an appeal had been taken to this Court. But at the same time, the Supreme Court of Canada, and the Courts of England, have deprecated the giving of reasons by the trial judge after an appeal has been launched.

It has been suggested that the judges of this Court very often reserve their reasons and deliver them later. I cannot see any objection to that, since while the judges in this Court may make inferences from the evidence, yet any higher Appellate Court may do the same thing. They are not bound by the inferences, and do not consider themselves bound by the inferences made by the Courts below.

MACDONALD, C.J.A.

I think it is well to adhere to what seems to have been the opinion of the Supreme Court of Canada, that the Court ought not to consider such reasons at all.

MARTIN, J.A.: The general rule is laid down by the Supreme Court of Canada in *The Sun Life Assurance Company of Canada* v. *Elliott* (1900), 31 S.C.R. 91. It is that reasons given after notice of appeal should not form part of the appeal book; and I see no reason here why we should differ from that practice, which is founded on obvious principles. Therefore I am of opinion that the motion to strike out these reasons from the appeal book should be allowed.

MARTIN, J.A.

I wish to add to my remarks, as a safeguard, that the matter would be different if all parties in the Court below had asked the judge to give his reasons on notice of appeal being given.

GALLIHER, J.A.: With every respect I cannot agree with the statements that have just been made by my learned brothers. I see absolutely no difference between the learned judge reserving the right, as I interpret it, which he did reserve, to give his reasons for judgment after pronouncing judgment. I see no difference whatever, I may say, between that and this Court of Appeal giving judgment in favour of one party or the other, and saying we will hand down written reasons later. We have done it many and many a time.

GALLIHER, J.A.

The case of *The Sun Life Assurance Company of Canada* v.

COURT OF APPEAL

1923

June 19.

GOULD v. THOMPSON

Elliott (1900), 31 S.C.R. 91, to my mind is not in point in the facts of this case at all, because here no reasons for judgment were given at all by anybody. The judgment was simply announced with the intimation that reasons would be given later on. The learned judge said if anyone required them, reasons would be given. To my mind that brought it back to simply saying, "I will give my reasons for judgment later," nothing more and nothing less.

GALLIHER, J.A.

I would refuse the motion.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: In my opinion the motion should succeed. In the circumstances of this case the reasons for judgment cannot be considered as forming part of the case on appeal. *Mayhew* v. *Stone* (1896), 26 C.S.R. 58, is a case that expressly outlines the point, and it is there held that opinions given after judgment is given and after appeal taken, were improperly allowed to form part of the case on appeal, and could not be considered by the Appellate Court. I would not like, though, in any observations I make, put any limitations upon this Court in making findings of fact, because I think its powers are very wide indeed.

EBERTS, J.A.

EBERTS, J.A.: Under the peculiar circumstances of the statement made by the learned County Court judge at that time, the motion must be dismissed.

Argument

Mayers, on the merits: The defendant gave the cheque relying on his own knowledge of the facts. He admits the plaintiff's representation did not influence him. The giving of the cheque is an independent contract to pay.

Brown: The evidence of Mr. Ellis who was present when the parties met should be accepted as to what took place. He knew all the circumstances; in fact, the cheque was given relying on the plaintiff's statement as to interest: see *Maskell* v. *Horner* (1915), 3 K.B. 106 at p. 121. The respondent is asked to pay $400 which admittedly he did not owe under the contract.

Mayers, in reply.

MACDONALD, C.J.A.: It seems unfortunate that the defendant should have parted with $400, which on the finding of the learned County Court judge was not owing by him at all. But that does not decide this case. The question is: Did he pay it voluntarily for the purpose of avoiding what he seemed to anticipate, a dispute with the plaintiff? Or, to put it perhaps more precisely still, was he induced to pay it by a misrepresentation on the part of the plaintiff? Now the evidence is perfectly plain upon the subject so far as the examination of the defendant for discovery is concerned, and after all that is, perhaps, the most reliable evidence. At all events it is so positive and clear, and reiterated so often that he cannot be credited with having made any mistake that he desired to correct on his evidence at the trial.

The dispute arose in this way. There were duplicate copies of the agreement. The defendant's copy was in the Land Registry, the plaintiff had hers in her possession. When they came to settle up there was no dispute about the principal, but the plaintiff said, "You owe interest on the principal." The defendant said, "No, the agreement contains nothing about interest and therefore there is no interest payable." The plaintiff then produced her copy of the agreement, which shewed on its face that 8 per cent. interest was to be paid. The defendant said his copy of the original was filed in the Land Registry office, and he had not it before him, but he said, "My copy had no term about interest at all." This is what the defendant himself says:

"Mr. *Brown*: He produced a document with words in it which——

"Mr. *Vaughan* (interrupting): That is what I say now.

"He produced a document with these words in it? Yes.

"You say you relied on the statement in that agreement? Which?

"That statement, you say you relied on the statement, the 8 per cent. being in the agreement? No, I did not.

"You did not? No.

"You swear you did not? No.

"Do you mean that or not? I mean what I say, that——

"You say you never relied on that statement in there? How do you mean, relied on that statement? I don't know what you mean.

"When you paid this $400 did you rely on this statement that this was correct? No."

Now there he has reiterated over and over again that he did

COURT OF APPEAL

1923

June 19.

GOULD v. THOMPSON

not rely upon the statement made by the plaintiffs that the other duplicate of the agreement contained the interest term, and in order to succeed on the ground of misrepresentation he must have done so. He tried to qualify it to some extent at the trial, but not sufficiently to entitle him to succeed.

Having failed to shew that this compromise between himself and the plaintiff by which he agreed to pay this $400 of interest was made upon a representation of the plaintiff, upon which he relied, he cannot succeed in this action. The finding of the learned trial judge does not help him, because assuming that the result of the judgment was that he believed that money was paid under misrepresentation by the plaintiff, that is in the face of the defendant's own testimony, clear and explicit, and therefore it cannot be given effect to.

MACDONALD, C.J.A.

I think the appeal must be allowed.

MARTIN, J.A.: As I view this case, the defendant according to his own admissions entered into a settlement relying upon the existence of accurate knowledge of the circumstances; and therefore the point as to any innocent misrepresentation by the plaintiff (if she did misrepresent) becomes immaterial; and so the appeal should be allowed.

MARTIN, J.A.

GALLIHER, J.A.

GALLIHER, J.A.: I agree.

MCPHILLIPS, J.A.: The appeal in my opinion should be dismissed.

In the circumstances the defendant acted upon the representations made by the plaintiff that the agreement in the Land Registry office had 8 per cent. in it. Now it is well known and trite law that if one makes a representation he cannot complain about it being taken at its full value. The defendant Thompson acted upon the statement of Gould that 8 per cent. was in that agreement in the Land Registry office and upon the faith of that representation the transaction was carried through. He never intended at the outset to pay any interest, because he brought there a cheque for $2,500 marked good by the bank, to pay the principal money, which was all he really owed. This matter of interest was a new matter brought up. The fact that

MCPHILLIPS, J.A.

one gives a cheque does not prevent one, as was done in this case, countermanding payment of the cheque; and Mr. Ellis's explanation is very complete and satisfactory. Mr. Ellis says:

"Mr. Thompson finally said that inasmuch as the agreement produced to him had interest and Mr. Gould stated the agreement in the registry office had interest in it, relying on that statement he paid it. He gave him the cheque on the statement of Mr. Gould that the agreement in the Land Registry office carried interest. Mr. Thompson felt all along that there was no interest, but under the premises of Mr. Gould's statement that the agreement in the Land Registry had interest he paid it. I subsequently made a search the next morning and found that he was correct in his view and he stopped the payment of the cheque."

Now if one gives a cheque and the immediate party to whom he gives it has it still, he is at perfect liberty to go to his banker and countermand payment of that cheque. There is no cause of action based upon that; that does not constitute a cause of action. The minute the cheque is countermanded, then the right to sue for the debt (if any) arises again. In this particular case Thompson, the defendant, was perfectly at liberty to countermand his cheque, and he did. What was the position in law? It was this, that if Thompson owed $400 for interest he could be sued for $400. I cannot see how the plaintiff could recover as claimed here, when they sued him upon the cheque alone; they have made no claim for the interest as such, and to my mind, upon that ground alone, the claim which is made fails. But I do not necessarily put it upon that ground. I put it upon the first ground that the $400 cheque was obtained from the defendant upon a representation which was false. Witnesses may make contradictory statements, and one statement may be believed and another disbelieved. The learned trial judge had the opportunity of seeing these witnesses, noting their demeanour, and as far as I can gather, the learned trial judge has held that this agreement which was produced with 8 per cent. in it had been tampered with, and a forgery had been committed. There is no right to recover the interest under the agreement, and the cheque under the circumstances gives no cause of action. A promissory note or a cheque may be *prima facie* evidence of a debt; but when you shew there is no debt the mere fact that a cheque was given to the party attempting to enforce payment, induced by a false

MCPHILLIPS, J.A.

COURT OF APPEAL

1923

June 19.

GOULD v. THOMPSON

representation made by him, the cheque is valueless and is no evidence of a debt.

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

Appeal allowed, McPhillips, J.A. dissenting.

Solicitors for appellant: *McKay, Orr & Vaughan.*
Solicitors for respondent: *Ellis & Brown.*

COURT OF APPEAL

1923

July 6.

BELMONT INVESTMENT CO. v. MOODY

BELMONT INVESTMENT COMPANY LIMITED v. MOODY *ET AL.*: IRENE HAWKINS ALDERMAN, APPLICANT.

Practice—Setting aside default judgment—Application by person not a party to the action.

M. gave a mortgage on certain property on the 8th of March, 1913, securing $15,000. He died in the following month. Action was commenced on the covenant in the mortgage in 1916, and a settlement was effected by M.'s executors giving a further mortgage on another property of the estate as collateral. Previously, in 1915, the executors, without advertising, but under an order of the Court, consented to by all parties interested, conveyed to the applicant three certain other properties of the estate. In 1917 the said mortgage was assigned to the plaintiff and in 1920 the mortgaged property was taken for taxes by the City of Victoria. The plaintiff then brought action against the executors on the covenant and on obtaining judgment by default in March, 1922, brought action against the applicant for a return to the estate of the said properties, transferred to her in 1915. She alleged in her defence that the property given as collateral security on the mortgage was sold for $14,000 and rents and profits were collected sufficient to satisfy the loan. In January, 1923, she made application to open up the judgment against the executors and to be allowed in to defend. The application was dismissed.

Held, on appeal, affirming the decision of GREGORY, J. (MCPHILLIPS, J.A. dissenting), that to grant the application would make unnecessary complication and the matter could be better disposed of in the issue raised in the action now pending where she is in no way prejudiced in her defence, the grounds raised in this application being open to her.

COURT OF APPEAL

1923

July 6.

BELMONT INVESTMENT CO. *v.* MOODY

APPEAL by applicant from the order of GREGORY, J. of the 18th of January, 1923, dismissing her application to set aside the judgment entered in this action on the 22nd of March, 1922, that she be at liberty to intervene and be added a party defendant to the action. One T. G. Moody, mortgaged the property in question on Pandora Avenue, Victoria, B.C., to S. O. Bailey on the 8th of March, 1913, for $15,000. Bailey assigned the mortgage to the Cameron Investment Company on the 11th of April, 1917, and the Cameron Investment Company assigned to the plaintiff Company. T. G. Moody died on the 11th of April, 1913, and in May, 1915, the surviving executors under an order of the Court consented to by all parties interested in the estate conveyed certain property and gave certain moneys to Mrs. Alderman to satisfy claims against the estate. Owing to arrears in interest action was brought on the mortgage in 1916, but this was settled by giving as collateral security a second mortgage on what was known as the Moody Block in Victoria to secure the advance on the first mortgage and Mrs. Alderman claims that in April, 1917, Bailey sold this block to the Cameron Investment Company for $14,000 and that they went into possession and secured the rents and profits in excess of the sums remaining due under the first mortgage. The judgment attacked was obtained in an action on a covenant in the mortgage of the 8th of March, 1913, against the executors and trustees of the late T. G. Moody. The action was not defended and on judgment being entered on the 22nd of March, 1922, the plaintiff Company brought action against the applicant to set aside the conveyance and payment made to her by the executors and trustees of T. G. Moody's estate, and that the land and moneys be applied to deceased's estate which was insufficient to pay the debts thereof. The application was dismissed by GREGORY, J. on the ground that before setting aside the judgment on such an application the right to do so must be established beyond question and that the grounds submitted in attacking the judgment were admittedly open to her in the action now pending against her.

Statement

The appeal was argued at Vancouver on the 6th of April,

COURT OF APPEAL

1923

July 6.

BELMONT INVESTMENT CO. v. MOODY

1923, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

A. H. MacNeill, K.C., for appellant: As to the right of a stranger to come in and set aside a judgment see *Jacques* v. *Harrison* (1883), 12 Q.B.D. 136; *Mehaffey* v. *Mehaffey* (1905), 2 I.R. 292; *Nixon* v. *Loundes* (1909), 2 I.R. 1; Daniell's Chancery Practice, 8th Ed., 708; Chitty's Archbold, 14th Ed., 266; Halsbury's Laws of England, Vol. 18, p. 216; *Spiers* v. *The Queen* (1896), 4 B.C. 388; *Harvey* v. *Wilde* (1872), L.R. 14 Eq. 438; *Eccles* v. *Lowry* (1876), 23 Gr. 167. The mortgagee is bound to credit moneys received: see Bullen & Leake, 3rd Ed., pp. 574 and 653; Halsbury's Laws of England, Vol. 21, p. 269; *Barker's Claim* (1894), 3 Ch. 290 at p. 293; *Muir* v. *Jenks* (1913), 2 K.B. 412; *Donnelly* v. *Dryden* (1912), 3 W.W.R. 439; *Royal Bank of Canada* v. *McLeod* (1919), 27 B.C. 376.

Mayers, for respondent: Mrs. Alderman is not claiming under the will but as an independent purchaser from the trustees. As to any person being allowed to come in and intervene see marginal rules 25 and 93; *Spiers* v. *The Queen* (1896), 4 B.C. 388; *Lee* v. *Friedman* (1909), 20 O.L.R. 49; *In re Youngs-Doggett* v. *Revett* (1885), 30 Ch. D. 421; *Moser* v. *Marsden* (1892), 1 Ch. 487; *Wilson* v. *Leonard* (1840), 3 Beav. 373 at pp. 381-2. On the question of action commenced after sale and right of attacking judgment and being allowed to intervene see *Doe dem. Foster* v. *The Earl of Derby* (1834), 1 A. & E. 783 at p. 790; *Mercantile Investment and General Trust Company* v. *River Plate Trust, Loan, and Agency Company* (1894), 1 Ch. 578 at p. 595; *In re De Burgho's Estate* (1896), 1 I.R. 274 at p. 280. It is only in case of probate and fraud and collusion in which judgments will be set aside at the instance of third parties: see Black on Judgments, 2nd Ed., p. 481, par. 317. A mortgagee is not precluded from suing: see *Twigg* v. *Greenizen* (1922), 63 S.C.R. 158; 2 W.W.R. 71; *Isman* v. *Sinnott* (1920), 61 S.C.R. 1.

Argument

MacNeill, in reply.

Cur. adv. vult.

6th July, 1923.

MACDONALD, C.J.A.: I agree with the reasons for judgment of the learned trial judge.

MARTIN, J.A.: This is an appeal from an order in Chambers dismissing an application of the appellant Mrs. Alderman, formerly Mrs. William Moody, to set "aside the judgment entered herein on the 18th of March, 1922, and to be allowed to defend the same." The action was one against the executors and trustees of the late Thomas Gage Moody to recover the amount due on a mortgage, and the defendants did not defend the action because (as the applicant's solicitor states in his affidavit) they were sued in their representative capacity only, and so "concluded that the said judgment would not affect them injuriously and that it would be of no advantage to them personally to undertake the trouble and expense of defending the action." This is noteworthy because it eliminates the important element of collusion in the obtaining of the judgment. But it is alleged by the applicant that the amount due on the mortgage had been in fact substantially, if not entirely, paid off at the time of the recovery of said judgment, and therefore it ought to be reduced at least if not discharged.

In applications of this sort "each case presents its own particular circumstances," as was said by Mr. Justice Hawkins in *Jacques* v. *Harrison* (1883), 12 Q.B.D. 136, to which "regard" must be had in exercising the jurisdiction invoked. The circumstances here are very unusual, and they are, in brief, that the applicant, who was not a beneficiary under the will of her late husband, nevertheless put forward certain claims against the estate and the actions of the trustees as recited in the Supreme Court order of the 4th of May, 1915 (made by consent) and in the agreement thereby authorized to be entered into by all concerned to the intent, as ordered, that "all the rights and claims of the said Irene Hawkins Moody be settled and satisfied upon the terms of said agreement," and in pursuance and in satisfaction of this settlement the trustees paid certain moneys and conveyed certain lands to the present applicant. The plaintiff Company since the recovery of its

MARTIN, J.A.

COURT OF APPEAL

1923

July 6.

BELMONT INVESTMENT CO. v. MOODY

said judgment against the trustees has begun an action (on 10th June, 1922) against the applicant to set aside such conveyance and payment and have the lands and moneys applied to the assets of the deceased's estate which are insufficient to pay the debts thereof. The applicant has entered a defence to that action, setting up among other defences, the said settlement under said Court order, and alleging that the mortgage debt upon which the judgment was founded "has been wholly satisfied and discharged," to the knowledge of the plaintiff and therefore in that sense it had been fraudulently obtained by the Company, but not in collusion with the defendants therein, the trustees.

It was admitted by the respondents' counsel that the applicant had the right as the defendant in the action against her to contest the plaintiff's prior judgment against the trustees, but it was objected that such being the case, no authority (apart from all other objections) could be cited to support her present application in the face of the fact that by her settlement (even assuming she had any *status* before) she had thereafter become an entire stranger to the estate and the trustees and their disposition of it.

After a careful consideration of the whole matter I am of opinion that this objection is sound and should be sustained. The *Jacques* case so much relied upon by the appellant when examined upon the "particular facts" to which the Court was careful to restrict it, has no real resemblance to this, because there, as Grove, J. points out, the applicant was an equitable mortgagee and "an action had been brought against a man whom the plaintiff himself describes as the 'nominal' lessee and had no interest in the matter." In both of the Irish cases cited the judgment was attacked as collusive, and the applicants had an interest in the estate of the deceased, or judgment debtor, respectively.

MARTIN, J.A.

In my opinion the learned judge below took the right view of the matter in dismissing the application, to grant which would only cause much additional expense and complicate the matter unnecessarily, which can be better disposed of in the

issues raised in the said action against the applicant now pending.

It is quite clear, to my mind at least, that at the time of the recovery of the default judgment herein the applicant could not have been allowed to intervene, because she had settled with the estate under the Court settlement as aforsaid and had no reason to anticipate that the plaintiff Company would proceed against her to upset that settlement and make her property acquired thereunder answerable to the creditors of the estate, and now that such an action has begun there is no good reason why it should not continue in the ordinary way because she is in no way prejudiced in her defences thereby, and I can only account for the present application on the ground of the mistaken view that she would be prejudiced.

MARTIN, J.A.

The appeal, therefore, should, I think, be dismissed.

GALLIHER, J.A.: I think I must accede to the argument of Mr. *Mayers* that this case does not fall within the class of cases in which intervention is allowed. The authorities cited by Mr. *MacNeill* when carefully read and weighed do not, as I understand them, support his contention in the circumstances of this case.

The action was brought by a creditor of the estate upon a covenant in a mortgage given by the deceased and judgment by default was signed against the executors. The judgment may be for too much, but that is not fraud, neither is collusion shewn. Action is now brought to have the defendant declared a trustee of certain lands conveyed to and accepted by her as her share of the estate of the deceased. In that action she is attacking the judgment and will have an opportunity of setting it aside or reducing it if it is for too great an amount. The task may be more onerous than if she had been let in to contest the first action, but that cannot affect the question of whether she was entitled to have the judgment by default opened up. It seems to me that at the time the judgment by default was signed it cannot be said that the time had arrived when her interests were affected. The assets were in her own hands and her own property, but would of course, be subject to any just

GALLIHER, J.A.

COURT OF APPEAL

1923

July 6.

BELMONT INVESTMENT CO. v. MOODY

debts of the estate. Plaintiff could not proceed in the ordinary way to realize on its judgment and its only course was to proceed as it has done and until such proceeding was instituted then and only then can it be said that her interests were affected. The cases referred to are *Mehaffey* v. *Mehaffey* (1905), 2 I.R. 292; *Jacques* v. *Harrison* (1883), 12 Q.B.D. 136, and *Nixon* v. *Loundes* (1909), 2 I.R. 1.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I am of the opinion that the appeal should succeed. It is quite evident upon the special circumstances of this case (*Jacques* v. *Harrison* (1883), 12 Q.B.D. 136) the trustees, the representatives of the estate were derelict in their duty and unmindful of a good defence to the action, or at least that the case was one calling for the taking of accounts, and failing in their duty allowed a default judgment to go for the full amount sued for. This may operate to the disadvantage of the appellant, and in my opinion, the appellant would have been entitled to intervene in the action, in that having taken property of the estate if there were outstanding liabilities to the extent that she took property of the estate, there would be liability—there can be no question of this. That being the situation, can it be successfully controverted that the appellant should be allowed in to defend the action and the judgment of the 18th of March, 1922, set aside? It would seem to me that to admit of this would be the exercise of a discretion upon equitable principles, otherwise, the judgment standing is destructive of natural justice as it may have the effect of delaying, hampering or otherwise defeating a complete inquiry and determination of the relevant issues which the appellant has the right to litigate, in truth, in my opinion, the appellant has made out a case for the intervention of the Court the judgment should be set aside and the appellant should be allowed to intervene and defend the action.

EBERTS, J.A.

EBERTS, J.A. would dismiss the appeal.

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitor for appellant: *W. J. Baird.*
Solicitor for respondent Company: *J. R. Green.*

McLEAN v. JOHNSTON AND McKAY.

COURT OF APPEAL

1923

July 6.

McLEAN v. JOHNSTON

Loan agreement—Shares in company given as security—Forfeited if loan not paid on certain date—Contemporaneous oral agreement as to payment—Variation from written agreement.

L. J. and K. owned all the stock in a company. L., requiring money for immediate use, entered into a written loan agreement with both J. and K. whereby he borrowed $5,000 from J. and $1,000 from K. and gave over his stock in the company to each of them proportionately to secure the advances, it being a term of the agreement that principal and interest should be paid on a certain date, that time was to be considered of the essence of the agreement and that if principal and interest were not paid on the date specified the stock after due notice of default should become the property of the lenders. About a year after the date upon which principal and interest became due J. and K. gave notice of default and that they were entitled to retain the shares. L. then brought action for an injunction to restrain J. and K. from disposing of or dealing with the shares and claimed that there was a contemporaneous agreement between them that J. and K. should be repaid the moneys loaned and interest from the dividends and profits accruing to L. in respect of his shares, and judgment was given for the plaintiff on the trial.

Held, on appeal, reversing the decision of MORRISON, J. (GALLIHER, J.A. dissenting), that the alleged independent collateral agreement by which the loan was to be repaid solely out of the dividends and profits accruing to the plaintiff from his shares is directly contrary to the covenant for repayment in the contract which fixed the due date and "declared that time shall be strictly considered as of the essence of the agreement" and that in default the defendants should become the "absolute owners" of the shares. The action should therefore be dismissed.

APPEAL by defendants from the decision of MORRISON, J. of the 24th of November, 1922, in an action to restrain the defendants from transferring or otherwise disposing of certain shares in the Pitt River Shingle Company, Limited, held by them as security for loans made to the plaintiff. The two defendants and the plaintiff were sole owners of the above company, Johnston owning one-half, McLean two-fifths, and McKay one-tenth of the total shares of the company, there being in all 10,000 shares of one dollar each. In May, 1920, McLean was ordered to pay $6,000 alimony in a divorce action and having no money

Statement

COURT OF APPEAL

1923

July 6.

MCLEAN v. JOHNSTON

Statement

he borrowed $5,000 from Johnston and $1,000 from McKay, giving Johnston 3,335 shares and McKay 665 shares in their company as security for their respective advances. McLean entered into a written agreement with each of them on the 12th of May, 1920, agreeing to repay the sums borrowed on the 15th of January, 1921, the lenders being entitled to collect the profits from the company in the meantime. Time was to be of the essence of the agreement and if the sums borrowed were not repaid as aforesaid the lenders were entitled to retain the shares. On the 18th of March, 1922, the moneys loaned not being repaid the defendants gave notice purporting to cancel the respective agreements and declaring the shares held as security forfeited for non-payment. It was held by the trial judge that by the agreement between the plaintiff and defendants the sums borrowed were to be repaid out of the dividends or profits of the Pitt River Shingle Company and that had the defendants been so disposed they could have enabled the plaintiff to repay the said loans, and he gave judgment for the plaintiff.

The appeal was argued at Vancouver on the 22nd and 23rd of March, 1923, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Argument

A. S. Johnston, for appellants: The learned judge gave effect to an oral agreement that the loans should be paid from the profits. This had the effect of varying both documents. There is not a word in the agreement about dividends, it only has reference to the stock. On discovery, Mr. McLean admits they did not agree to wait until they were paid in full from dividends. On the question of rectification of agreement see *Lewis* v. *Robson* (1871), 18 Gr. 395; *Jackson* v. *Drake, Jackson & Helmcken* (1906), 37 S.C.R. 315.

Bourne, for respondent: We do not deny the agreement or obtaining the money but we say there was a contemporaneous agreement. On the position of mortgagor and mortgagee the Court should grant relief. The oral agreement is not inconsistent and the real agreement is the oral agreement and the written agreement. On the question of admissibility of the

oral agreement see *Heseltine* v. *Simmons* (1892), 2 Q.B. 547; *Erskine* v. *Adeane* (1873), 8 Chy. App. 756. There was a collateral verbal agreement that had not been performed: *Yorkshire and Canadian Trust Ltd.* v. *Scott* (1919), 27 B.C. 5; *Eaton* v. *Crook* (1910), 12 W.L.R. 658; *Brocklebank* v. *Barter* (1914), 7 W.W.R. 775; *Wilson* v. *The Windsor Foundry Co.* (1901), 31 S.C.R. 381. They were in control and they must account for everything as mortgagee. There was not a proper distribution of profits and there was oppression. Money was taken from the treasury by Johnston without authority. As to the duties of a mortgagor and mortgagee in possession see *Mayer* v. *Murray* (1878), 8 Ch. D. 424; *Williams* v. *Price* (1824), 1 Sim. & S. 581. The written portion was only part of the real contract: see *Johnson Investments Limited* v. *Pagratide* (1923), 1 W.W.R. 1009.

Argument

Johnston, in reply, referred to *The Marquis Townshend* v. *Stangroom* (1801), 6 Ves. 328 at p. 333.

Cur. adv. vult.

6th July, 1923.

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

I agree with the learned judge to this extent: that there should be no forfeiture of the shares. On the other hand, I think no case has been made out for reformation of the agreement. The counterclaim should succeed to this extent: that judgment should be entered for the debt, and the defendants should have judgment for foreclosure subject to a reference to take the accounts, and the plaintiff should be allowed one year redemption. If necessary, I would allow an amendment to the counterclaim praying foreclosure. A new trial should be granted for the purpose of giving effect to this judgment. The appellants shall have the costs of the appeal, except those referable to the claim for an injunction. The respondent shall have the costs of the action except those referring to the claim for rectification which, together with the costs of the counterclaim, shall be to defendants.

MACDONALD, C.J.A.

MARTIN, J.A.: Upon the case set out in the statement of claim it is impossible for the plaintiff to succeed unless he can

MARTIN, J.A.

COURT OF APPEAL

1923

July 6.

McLEAN v. JOHNSTON

establish the existence of an independent collateral agreement (to the written contract of repayment dated 12th May, 1920) by which the loan was to be repaid solely out of the dividends or profits accruing to the plaintiff from the shares transferred as security to said contract. This alleged agreement is directly contrary to the covenant for repayment in the contract, which fixed the due date thereof as the 15th of January, 1921, and "declared that time shall be strictly considered as of the essence of this agreement," and also provided that upon default in punctual payment and if continued after ten days' notice in writing, the defendant would become the "absolute owner" of the shares. Such an agreement (assuming the one here set up to be of that nature) must be clearly established, and to satisfy myself upon the point I have very carefully examined the evidence in support of it, in the light of said contract, with the result that I can only arrive at the conclusion that said evidence is so very weak even on the plaintiff's own shewing, and so strong in favour of the defendants, that, with all due respect to the learned judge below, I am constrained to find that he took a view of the evidence that is "clearly wrong." I am always very reluctant to disturb a finding of fact, but this is one of the rare occasions upon which I feel it my clear duty to do so, and therefore the judgment should be reversed and the appeal allowed.

MARTIN, J.A. It may be that a case of another kind might have been set up, *viz.*, that it was contemplated by the parties that there would be "dividends or profits due or accruing due" upon the shares and that the amount thereof would be sufficient to pay off the loan before the due date thereof, or at least reduce it very substantially, and that the defendants fraudulently prevented the payment of any dividends or profits, but such a case has not in fact been set up, as a careful consideration of the claim shews: see pars. 7-7c. Of these 7b is the most important, following after par. 7, which set up that it was "a term of the said agreement" that the sum borrowed "should be repaid . . . out of the dividends or profits accruing" on the shares, but there is, in fact, no such term therein:

"7b. Further in the alternative the plaintiff says that by a separate collateral agreement made between the parties hereto prior to or at the

time the said agreements were entered into it was expressly agreed between the plaintiff and the defendants that notwithstanding that in the said agreements the said sums borrowed by the plaintiff from the said defendants were expressed to be repayable on the 15th day of January, 1921, the said sums and interest thereunder were to be payable only out of profits or dividends received by the plaintiff from the Company in respect of the said shares."

Paragraph 7c sets up an express agreement by defendants to declare dividends or distribute profits before the date of payment "in an amount sufficient to provide the plaintiff with funds to pay the said sums so borrowed together with interest."

All these allegations mean only one thing, *viz.*, that the lender was to look and resort solely to the profits from the shares to repay his loan, and it is alleged in par. 7 that "it was well known to the defendants that the plaintiff had no other means of repaying said loans."

By par. 9 it is alleged that sufficient profits were made to repay the loan, and then appears a charge of fraud in paragraph 11, thus:

"11. The defendants Johnston and McKay by virtue of their controlling interest in the said Company have fraudulently sought to so conduct the affairs of the Company as to make it impossible for the plaintiff to obtain moneys with which to repay the said loans with a view, as the plaintiff verily believes, of securing for the defendants themselves the plaintiff's said shares in the said Company, which shares are worth at least the sum of $40,000."

Obviously this only alleges that the defendants "fraudulently sought to so conduct the affairs of the Company"—there is no averment that they did in fact accomplish what they "sought" to do, and in paragraph 9 of the defence the objection is taken that "the statement of claim herein discloses no cause of action against the defendants." The strange statement, moreover, that "the plaintiff verily believes" the "view" he ascribes to the defendants is quite improper in a pleading, which is entirely distinct from an affidavit, and I have never before seen such a statement of "belief" inserted in any pleading, and it should have been struck out, because neither under the old nor the present system of pleading is the introduction of mere belief permissible in averring a cause of action (least of all in setting up charges of fraud), which can be founded only upon averments of facts, followed up by proof of them, and not of mere "belief" in their existence. Nothing is more firmly established

MARTIN, J.A.

COURT OF APPEAL

1923

July 6.

McLEAN v. JOHNSTON

in pleading than that allegations of fraud must be precisely alleged and conclusively proven (*secundum allegata et probata*): that is a rule which I have always enforced and shall continue so to do until a higher tribunal corrects me, because it is based upon a fundamental principle of justice: "there ought to [be] distinctness and precision," as Lord Herschell said in the leading case on the subject, in the House of Lords, *Lawrance* v. *Norreys* (1890), 15 App. Cas. 210 at p. 211, and Lords Watson and Macnaghten concurred with him, the former stating, p. 221:

"The ordinary rule of pleading applicable to cases of fraud, which was thus expressed by Earl Selborne in *Wallingford* v. *Mutual Society* [(1880)], 5 App. Cas. 697: 'With regard to fraud, if there be any principle which is perfectly well settled, it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice.' It is not a sufficient compliance with the rule to state facts and circumstances which merely imply that the defendant, or some one for whose action he is responsible, did commit a fraud of some kind. There must be a probable, if not necessary, connection between the fraud averred and the injurious consequences which the plaintiff attributes to it; and if that connection is not sufficiently apparent from the particulars stated, it cannot be supplied by general averments. Facts and circumstances must in that case be set forth, and in every genuine claim are capable of being stated, leading to a reasonable inference that the fraud and the injuries complained of stood to each other in the relation of cause and effect."

And Lord Hatherley said in the *Wallingford* case, p. 701:

"Now I take it to be as settled as anything well can be by repeated decisions, that the mere averment of fraud, in general terms, is not sufficient for any practical purpose in the defence of a suit. Fraud may be alleged in the largest and most sweeping terms imaginable. What you have to do is, if it be matter of account, to point out a specific error, and bring evidence of that error, and establish it by that evidence. Nobody can be expected to meet a case, and still less to dispose of a case, summarily upon mere allegations of fraud without any definite character being given to those charges by stating the facts upon which they rest."

MARTIN, J.A.

Applying this "perfectly well-settled principle" to the general incomplete and inconclusive allegations before us, it is clear that they are of such a defective nature that the defendant "could not be expected to meet" them and this Court ought not "to take notice" of them, and so I shall disregard them, as is my duty; the English rule, 202, is the same as ours and should continue to receive the same construction. At the trial evidence in support of said allegations was admitted in spite of objection based upon this ground, the learned trial judge being

presumably of the opinion that because the defendant had asked for "further and better particulars" but did not move for or obtain an order for them under rule 203, therefore the plaintiff could give what evidence he pleased in support of his indefinite and insufficient allegations of fraud. Such a view, however, is, with all respect, an entire misapprehension of the situation. It cannot, in justice, be the case that if indefinite charges of fraud are made of such a nature that a Court cannot, as the House of Lords said, "take notice of them," yet they are made sufficient merely because the party charged does not move to make them more specific. On the contrary, he is entitled from first to last to take the position (as he did here) that they are such a violation of the rules of pleading as to "disclose no cause of action against him," and, to put it briefly, if the charge against him in the pleading is defective, he does not make it effective by merely asking for its definition. Simply because he takes no steps to define a charge which he rightly thinks is already so undefined that he "cannot be expected to meet" it, that passive position does not for a moment permit the other party to actively expand his charges into something that the Court ought to take notice of, without first having applied for and obtained an amendment, if possible, as to which see my refusal in *Tanghe* v. *Morgan* (1904), 11 B.C. 76; 2 M.M.C. 178, 180, affirmed on appeal, p. 189, but no application to amend was made herein. The rule in Ireland is the same, and I refer to the judgment of that very distinguished judge, Lord Chief Baron Palles, in delivering the unanimous judgment of four judges of the King's Bench, on a motion for a new trial in a libel action, in *Hewson* v. *Cleeve* (1904), 2 I.R. 536, where he says, p. 544:

MARTIN, J.A.

"Then came our Judicature Act, and the Rules made thereunder; and, in my opinion, those Rules make the obligation of the defendant to furnish particulars with his defence much stronger than it was under the Common Law Procedure Act."

And after discussing the subject, he proceeds, p. 545:

"But I do not wish to lay down any general rule as to what ought to be done if a person simply took issue without asking for particulars, and went down to trial. It is possible that were there no notice whatsoever of particulars, either in the pleading or the notice, the judge might make an order allowing particulars to be given on the moment if he thought that the opposite party was taken by surprise, or adopt some other course

COURT OF APPEAL

1923

July 6.

MCLEAN v. JOHNSTON

which would prevent the trial becoming abortive. But I think that the strict rule is that in such a case, without an amendment, the evidence is not admissible."

I note the observation of Lord Justice Bowen, *solus,* in *Leitch* v. *Abbott* (1886), 31 Ch. D. 374 at p. 379, that rule 6 of Order XIX. (*i.e.,* 202) is "only a rule of pleading," merely to point out that his remark has no application to the present question because he was speaking, as he says, of the old rule of pleading to open a settled account in its relation to an application to obtain discovery before giving particulars of fraud in certain cases, and only gave effect to the view that

"the very fact that the pleader is unable to plead except in general terms, is in many cases the very reason why he should have discovery from the other party, so as to enable him to plead the fraud in detail. If at a particular stage of an action you are stopped by reason of your ignorance of some fact which is known only to the other party, that is the very reason why you should have discovery of that fact from him, and what difference does it make whether you are stopped at the trial or before? I say this in order to shew that rule 6 of Order XIX. is only a rule of pleading, and we ought not, I think, to scan the pleadings too narrowly upon a question of the right to discovery."

There is no similarity between those circumstances and those before us, and I only quote them because the observations of the learned Lord Justice have been, to my knowledge, more than once quite misapprehended, which is to be regretted, because they in no way conflict with the prior and later principle laid down by the House of Lords in the *Wallingford* (1880) and *Lawrance* (1890) cases, respectively, which I have quoted, and if they did they were unsound.

MARTIN, J.A.

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

Then as to the counterclaim. That asks for judgment against the plaintiff for the amount of the loan with interest, and that in default of payment the agreement should be ordered to be cancelled and the shares declared to be the absolute property of the defendants. To this there can be no objection, nor can there be, in the circumstances, I think to the allowance of a reasonable time to the plaintiff to make such payment to redeem his shares, though nothing was said by counsel on this point, doubtless leaving it to our discretion, which in my opinion would be properly exercised by allowing the plaintiff six months so to do (that being the settled time for redemption and no

request made for its extension), upon payment of debt, interest and costs of these actions.

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

The learned judge seems to have proceeded on the ground that it was a case for rectification so as to make the moneys payable only out of profits, but I hardly think the evidence is clear enough to establish that to the extent claimed. No verbal agreement has been proved to shew that the parties mutually agreed that the loan should never be repaid except out of dividends or profits of the concern. There was no mutual mistake and the written agreement is silent as to this, and provides a time certain for payment. This agreement was read over and signed by the plaintiff. The evidence, however, I think clearly establishes this: that shortly before the loan a dividend of several thousand dollars had been declared, or rather not actually declared in the proper sense, but what they term withdrawals made from profits and credited to the respective shareholders, the only ones being the plaintiff and the two defendants, who together owned all the shares of the company; that the business was in a flourishing condition, earning large profits; that it did earn such profits up to the time when payment was due; that they had cash and liquid assets to a large amount; that all parties understood at the time the money was loaned that plaintiff had no means of repaying the money within the time limited, except as the plaintiff told the defendants, out of profits, and all expected it would be so paid. I think it not unreasonable to hold that up to the time fixed for payment it was in the minds of all parties and their intention that these moneys should be paid out of profits and the time was fixed with that in view, so that if during that time profits were not such as to enable payment to be made; thereafter the payment could be enforced in the ordinary way, and not as contended by the plaintiff, that it never should be paid otherwise than out of profits. It was absolutely within the control of the defendants to have the company declare dividends or cause withdrawals to be made and this (although requested by the plaintiff several times) they neglected and refused to do.

GALLIHER, J.A.

I would find, upon the evidence, that they could and should

COURT OF APPEAL

1923

July 6.

McLEAN v. JOHNSTON

GALLIHER, J.A.

have done so under the circumstances, and when I consider their attitude towards the plaintiff, dismissing him from his position and filling it with another and leaving him off the directorate of the company for no reason, and deferring these dividends for a reason which, in my opinion, was not genuine, and was never carried out, I can only come to the conclusion that no matter how honestly they may have entered into the loan transaction, there came a time when the defendants deliberately manipulated matters so as to prevent the plaintiff making payment at the time fixed, and in the manner understood, and this in fraud of the plaintiff. In the face of this fraud, which seems to me was practised for the purpose of acquiring the plaintiff's shares and preventing his payment of the loan, I do not think this Court is powerless to say, you shall not be permitted to take advantage of your own wrong—what should have been done must now be done and your remedy is to make such withdrawals or have such dividends declared as will liquidate the loan, but with interest, however, only up to the due date for payment.

This practically brings about the same result as was arrived at by the learned trial judge.

MCPHILLIPS, J.A.

McPHILLIPS, J.A.: I am of the same opinion as my brother MARTIN. I merely wish to add that in respect to the alleged parol independent collateral agreement, I cannot come to the conclusion that it was established; further, in my opinion, the evidence of any such alleged independent collateral agreement was inadmissible and could not be admitted to affect the terms of the agreement in respect of the moneys borrowed upon the security of the shares, which moneys were expressed to be repayable on the 15th of January, 1921, not being subject in any way or repayable only out of profits or dividends in respect of the shares. Parol evidence to vary the terms of an agreement in writing is not admissible—it may be to shew that there is no agreement, but that would be idle contention here (*Pym* v. *Campbell* (1856), 25 L.J., Q.B. 277; *Pattle* v. *Hornibrook* (1897), 1 Ch. 25; 66 L.J., Ch. 144).

In any case no profits or dividends were shewn to have been received in respect of the shares, and this answer is complete

COURT OF APPEAL

1923

July 6.

McLEAN v. JOHNSTON

MCPHILLIPS, J.A.

in itself. If upon the taking of the accounts that will follow the judgment in favour of the defendants, upon their counterclaim, it can be established that profits or dividends have been received by the defendants in respect of the shares, credit will have to be given therefor.

The action should be dismissed and the counterclaim of the defendants allowed, accounts to be taken, and the time set for payment be one year in view of the special circumstances of the case.

I would, therefore, allow the appeal.

EBERTS, J.A.: I concur in the judgment of the Chief Justice. EBERTS, J.A.

Appeal allowed, Galliher, J.A. dissenting.

Solicitor for appellants: *Adam Smith Johnston.*
Solicitors for respondent: *Bourne & Des Brisay.*

REX *EX REL.* LEDOUX AND LEDOUX v. HORNBY.

COURT OF APPEAL

1923

Feb. 5.

REX v. HORNBY

Criminal law—Charge of selling beer—Dismissed by magistrate—Appeal to County Court — No return of magistrate's order on hearing — Adjournment for one day—Order produced on following day—Appeal then dismissed—B.C. Stats. 1915, Cap. 59.

A charge of selling beer was dismissed by the magistrate. When the case came up on appeal before the County Court judge it was found that the order of the magistrate had not been filed and the appeal was adjourned until the following day for further argument. On the following day the magistrate's order was produced but the learned judge dismissed the appeal as not in order.

Held, on appeal, reversing the decision of LAMPMAN, Co. J., that the requirement to file the conviction is directory only, that in fact it was filed before judgment was given, and the learned judge below did not properly exercise his discretion as to the admission of the magistrate's order and the case should be sent back for a rehearing by him.

Statement

APPEAL by plaintiffs from the order of LAMPMAN, Co. J., of the 1st of December, 1922, dismissing an appeal from the order

COURT OF APPEAL

1923

Feb. 5.

REX v. HORNBY

Statement

of the police magistrate at Victoria, dismissing a charge against T. S. Hornby, that he unlawfully sold beer at Sooke on the 8th of July, 1922. The charge was made seven weeks after the alleged offence was committed. The magistrate stated these complaints should be brought more promptly, and found there was not sufficient evidence to convict. On the appeal before LAMPMAN, Co. J., the magistrate's order was not produced so an adjournment was had for one day. On the following day the return of the magistrate was in Court but the learned judge held the appeal was out of order.

The appeal was argued at Victoria, on the 5th of February, 1923, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Lowe, for appellants.

Maclean, K.C., for accused, took the preliminary objection that there was no appeal and referred to *Rex* v. *Evans* (1916), 23 B.C. 128; *Rex* v. *Sit Quin* (1918), 25 B.C. 362 at p. 366, and *Rex* v. *Gartshore* (1919), 27 B.C. 175 at p. 182.

Per curiam: The preliminary objection is overruled.

Argument

Lowe, on the merits: The failure of the magistrate to transmit the order is not a good ground for dismissal of an appeal: see *Rex* v. *Fedder* (1920), 48 O.L.R. 341; *Rex* v. *Caskie* (1922), [31 B.C. 368]; 3 W.W.R. 1109; *Rex* v. *Gregg* (1913), 6 Alta. L.R. 234.

Maclean: When the appeal was called before the judge below there was no order of the magistrate in existence. The order must in any case be filed before the hearing or it should be dismissed: see *Harwood* v. *Williamson* (1908), 1 Sask. L.R. 58; *Re Rejer and Plows* (1881), 46 U.C.Q.B. 206 at p. 210. It is not a question of jurisdiction but of discretion and the Court will not interfere unless he has gone on a wrong principle.

Lowe, in reply.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I would allow the appeal; I think the case ought to go back to continue the appeal to the Court below. It is conceded by Mr. *Maclean* that it is a matter of discretion, that it is not a question which goes to the jurisdiction

of the Court, but was in the discretion of the learned judge whether he would admit this order which had not been filed according to statute. He has exercised that discretion in a way which does not satisfy me. In the first place the mistake was the mistake of the magistrate. The appellant had the right to rely upon the magistrate to carry out the provision of the statute; and he had a right to expect the order would be before the County Court. It was not his business to get the order from the magistrate and have it filed, although as a matter of precaution he might have done it. That is the first consideration which the learned judge seems to have overlooked.

Then, apart altogether from that, the appeal was adjourned over the night for the purpose of consulting authorities. In the meantime the order was procured, and was in Court. Even if there had been a mistake in the first place, on the part of the appellants, which, as I have just pointed out there was not, it would be a reasonable thing to say, that since the order was in Court, and the parties were ready, no harm had been done to anybody by the fact that it was not there the day before. I can hardly conceive of a judge doing otherwise, where there was no prejudice to anybody.

MACDONALD, C.J.A.

But apart altogether from that, the reasons which he gives for the exercise of his discretion I must say, with all due respect, are not very sound, in fact every one of them is unsound. It is not a matter which the learned judge ought to take into consideration on a motion of the kind, that he had heard these witnesses in some other case and did not believe them; that was not a matter on which he ought to refuse to go on and hear the case on the merits, and hear any additional evidence which the parties had a right to put in, it being a rehearing. Nor was it any ground for exercising his discretion in that way, that there was another case following in which counsel were here from Vancouver; that surely was not a sound reason.

So that taking the case altogether, it seems to me that he ought to have gone on with the appeal.

MARTIN, J.A.: I am of opinion that the appeal should be allowed, on the first ground, *viz.*, that these provisions are directory. And I adopt the decision of Mr. Justice Middleton in

MARTIN, J.A.

COURT OF APPEAL

1923

Feb. 5.

REX v. HORNBY

Rex v. *Fedder* (1920), 48 O.L.R. 341, which properly states the principle based upon *Montreal Street Railway Company* v. *Normandin* (1917), A.C. 170, which we have given effect to before in this Court. The fact is, here, that the learned judge adjourned the case for the purpose of hearing argument upon the objection, and while that argument was pending, and before its conclusion, the magistrate had complied with the provisions of the statute, section 831. The learned judge, of course, had no control over the operation of that section. And when he found as a fact that at least before he had pronounced his final judgment the statute had been complied with, then the principle of the *Normandin* case should have governed.

MARTIN, J.A.

Assuming, however, it is a matter of discretion, then I have examined the reasons given by the learned judge—he gives three—I will not recite them, but all I have to say is this: that in regard to each of them the principle that he applies is—I say it with the utmost respect—an erroneous one.

GALLIHER, J.A.

GALLIHER, J.A.: I am of the same opinion.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I am of the like opinion. This matter really was considered, I think, in all its essential features by this Court in *Plant* v. *Urquhart* (1921), 29 B.C. 488; (1922), 30 B.C. 461. There the situation was this: a conviction was on file at the time of the hearing of the appeal, but it was erroneous in form, and later the correct conviction was filed. The notice of appeal set out the true conviction and the appeal was heard on the basis of the true conviction, the attention of the Court not being directed to the erroneous conviction on file. I do not think that the facts perhaps shew the exact time at which the correct conviction was filed; but nothing really turns upon that. But dealing with it by way of analogy, I know in my own judgment I considered that the only conviction that could be considered would be the true conviction. The magistrate is to transmit the conviction to the County Court; it is not at the motion of either of the parties that the conviction is transmitted. Later in the *Plant* case an action was brought in the Supreme Court, and the question was which conviction could be looked at; and this Court in appeal,

approving the decision of Mr. Justice MURPHY, held that the true conviction was the only one that could be looked at. *Rex* v. *Fedder* (1920), 48 O.L.R. 341, being the judgment of Mr. Justice Middleton following the *Normandin* case, in the Privy Council, establishes that the requirement to file the conviction is directory only. In this particular case I see no such difficulty in the matter at all, because, before judgment was given, the conviction was upon the files. In *Kimpton* v. *McKay* (1895), 4 B.C. 196, the Divisional Court laid down that even a judgment given might be recalled, and judgment given, as it was given in that case, diametrically opposite to the way in which it had been given the day before, the judgment of the Court not having been taken out, or entered.

MCPHILLIPS, J.A.

EBERTS, J.A.: My judgment is on the question as to whether or not the duty of the magistrate was directory or imperative. I am of the opinion it was directory. Otherwise you might defeat justice altogether.

I say nothing with reference to the discretion exercised by the learned trial judge.

I would allow the appeal.

Appeal allowed.

Solicitors for appellants: *Moresby, O'Reilly & Lowe.*
Solicitors for respondent: *Elliott, Maclean & Shandley.*

COURT OF APPEAL

1923

April 12.

REX v. ZAMBAPYS AND McKAY.

Criminal law — Indictment — Two counts — Rape and seduction — Found guilty on both—Inconsistent finding—New trial.

REX v. ZAMBAPYS AND McKAY

The accused were tried under an indictment containing two counts, one of rape and the other of seduction, and both counts related to the same act alleged. The jury found them guilty on both and they were sentenced on the lesser of the two counts. On appeal by way of case stated:—

Held, reversing the decision of McDONALD, J. (MARTIN, J.A. dissenting), that the accused being found guilty under both counts was an inconsistent finding by the jury resulting in a substantial wrong and there should be a new trial.

Per MACDONALD, C.J.A.: That the two counts were properly submitted but the learned judge should have instructed the jury that if they found the accused guilty on the one count they would not do so on the other.

Per McPHILLIPS, J.A.: Under the circumstances of this case the two counts were improperly presented to the jury, it was the duty of Crown counsel to elect which count should be presented, it was error to present both.

APPEAL by way of case stated from the decision of McDONALD, J. and the verdict of a jury, both of the accused having been convicted on the lesser of the two counts set out below. The reserved case was as follows:

"The accused George Zambapys and Andrew McKay were tried before me and a jury at the City of Vancouver, British Columbia, on the 27th of March last on an indictment of two counts as follows:

Statement

"'1. The jurors of our Lord the King present that at the City of Vancouver in the County and Province aforesaid, on the 22nd of January, in the year of our Lord one thousand nine hundred and twenty-three, Andrew McKay and George Zambapys unlawfully did assault Winnie Lenfesty, a woman who was not the wife of the said Andrew McKay or of George Zambapys, and did then and there have carnal knowledge of her, without her consent, against the form of the statute in such case made and provided, and against the peace of our Lord the King His Crown and Dignity.

"'2. And the jurors aforesaid do further present that afterwards, to wit, at the place last aforesaid, and on the day and year last aforesaid, the said Andrew McKay and George Zambapys, each then being over the age of eighteen years, unlawfully did seduce the said Winnie Lenfesty, a girl of previously chaste character, then being above the age of sixteen years and under the age of eighteen years, against the form of the statute in such case made and provided and against the peace of our Lord the King His Crown and Dignity.'

"Attached hereto is a transcript of the evidence of Winnie Lenfesty

and Margaret Morrison, the two witnesses for the prosecution. The accused did not testify and the evidence of the defence went to attack the chastity of the said Winnie Lenfesty. The jury's verdict was that both were guilty on both counts of the indictment. Both counts related to the same act alleged to have been committed by the accused on the complainant Winnie Lenfesty. Counsel for the accused before sentence argued that I should disregard the verdict and direct a new trial, or in the alternative, applied that I should reserve a case under the provisions of section 1013 of the Code. Upon consideration, while I had grave doubts of the validity of the verdict, I also had doubt as to my power to order a new trial and accordingly decided to reserve a case and to sentence both accused on the lesser of the two counts. In my opinion there was evidence upon which the jury could have convicted the accused on either of the two counts or could have acquitted both the accused on both counts. The questions of law reserved for the opinion of the Court of Appeal are:

"1. Was my ruling erroneous in convicting on the said verdict?

"2. Has there been a mistrial in consequence of the said verdict?

"3. Should the verdict of the jury stand, or should the accused be acquitted or discharged, or should a new trial be directed?

"4. Am I right in my decision to sentence the accused McKay on the lesser of the two counts?

"5. Am I right in my decision to sentence the accused Zambapys on the lesser of the two counts?"

Statement

The appeal was argued at Vancouver on the 11th and 12th of April, 1923, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

J. W. deB. Farris, K.C., for appellants: There were two counts: (1) rape, and (2) seduction. The jury brought in a verdict of rape and seduction. The two girls late on a Sunday night met the two accused and another man and went with them to a blind pig where the happenings leading to the arrest of the accused took place. The verdict was both rape and seduction, but seduction involves the consent of seduced. The question is how the Court should deal with inconsistent findings. There are the following cases where an accused is found guilty of both theft and obtaining goods by false pretences: *Rex* v. *Carmichael* (1915), 22 B.C. 375 at p. 378; *Rex* v. *Lockett, Grizzard, Gutwirth, and Silverman* (1913), 83 L.J., K.B. 1193. See also *Rex* v. *Forseille* (1920), 3 W.W.R. 803; *Rex* v. *Kelly* (1916), 27 Man. L.R. 105; 54 S.C.R. 220. On the meaning of seduction see *Gibson* v. *Rabey* (1916), 9 Alta. L.R. 409 at p. 411; *Rex* v. *Frederick Moon* (1910), 1 K.B. 818;

Argument

COURT OF APPEAL

1923

April 12.

REX v. ZAMBAPYS AND MCKAY

Reg. v. *Doty* (1894), 25 Ont. 362. On the principle involved in granting a new trial see *McQuay* v. *Eastwood* (1886), 12 Ont. 402; *Rayfield* v. *B.C. Electric Ry. Co.* (1910), 15 B.C. 361 at p. 365.

D. Donaghy, for the Crown: The decisions in both the *Carmichael* and *Lockett* cases are not inconsistent with the decision in this case. No injustice has been done, as in *Rex* v. *Kelly* (1916), 27 Man. L.R. 105. There is no ground for setting aside the conviction or granting a new trial. As to being tried on different counts at the same time see *Rex* v. *Norman* (1915), 1 K.B. 341.

Farris, in reply.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I think the appeal should be allowed. On the question of sending it back, I may say that in nearly every one of the stated cases that have come before us in the thirteen years we have been in existence, there has been criticism made of the manner in which the case has been stated. It seems practically impossible and is perhaps impossible that a judge should state a case just the way each member of the Court of Appeal thinks it ought to be stated. In this case counsel appeared before the learned judge and both were satisfied with the case stated. They then came here. Now the point arises as to the form of the case, although counsel have not made any request that the case should be sent back for restatement. I am not in favour of that. I think it is not good practice. I grant that we have the power to do it, but while cases may arise in which that ought to be done, this is not one of them, and I therefore think that we should dispose of it now. The case is a very simple one after all. It simply comes down to this: the indictment contains two counts, the jury could have found the accused guilty of rape, in which case they were not guilty of seduction, or if they failed to find the accused guilty of rape, they might have found them guilty of seduction. It has been suggested that counsel for the Crown ought to have elected as to which of the counts ought to be submitted to the jury. I do not take that view. I think the two counts were properly submitted to the jury, and the learned judge should have instructed the jury (which he probably did) that if they

found the prisoners guilty on one count they could not find them guilty on the other. For instance, if in considering the count as to rape, they came to the conclusion that it was a case of seduction, then they could find the accused guilty of seduction but not of rape. Now, what they have done is to find them guilty of both, which, to my mind, was wrong. They found that the accused had connection with the girl by force. That is quite inconsistent with the other finding that they had connection with her by allurement. Now the question arises as to whether we should grant a new trial or apply the rule contained in the Code that where, in the opinion of the Court, no substantial wrong has been done the application should be dismissed. I think there has been a substantial wrong in this case. I can hardly say, I would not like to take the responsibility of saying what the verdict would have been if the jury had understood what ought to be done. If they had understood that they could only find the accused guilty on one count, it is impossible to say whether they would have found rape or have found seduction. The Crown and the accused were entitled to an implicit finding of one or the other. I think that substantial justice in this case will be done by directing a new trial.

MACDONALD, C.J.A.

MARTIN, J.A.: In the circumstances of this matter, a capital charge, I feel that the only safe course for this Court to adopt is, *ex mero motu,* to clear up the most unfortunate misunderstanding, which I think obviously exists, in the way the matter has been stated. I am not satisfied with the view taken by either counsel as to the situation or the consequences of it as it is stated to us. The consequences of accepting that statement would be that possibly this man might, by the decision of this Court, be compelled to remain in gaol, although as a matter of fact, if the matter was cleared up, he would be a free man. That is too great a responsibility for me to feel, so I think that this is a case where the Court should *ex mero motu* send the matter back to be restated. It will only take a few moments (the Court below is still sitting in this building) to have the doubt cleared up, and then I could deal with it with a free mind. I therefore think the course we should adopt

MARTIN, J.A.

COURT OF APPEAL

1923

April 12.

REX v. ZAMBAPYS AND MCKAY

is to do that, and then we could consider the questions beyond all doubt whatever as to what the learned judge's intentions were. Of course, since my view is, as I have already stated, that the proper thing for this Court to do is to send the matter back for restatement, until that is done I feel that it is impossible for me to deal adequately with the matter.

GALLIHER, J.A.: If this were a matter as to the construction to be put on what was stated by the learned trial judge and I felt it was in the same position as my brother MARTIN does, I might take the same view. As it appeals to me, it does not strike me in the same way, and therefore I would not be in favour of sending the case back.

Now, on the appeal, I have come to the conclusion that there should be a new trial. Of course, it is quite apparent that the convictions on both these counts are inconsistent, one with the other, and what impresses me is that the jury having found these inconsistent verdicts on the respective counts, cannot have fully and duly appreciated the necessity of deciding on them separately. There are ingredients and circumstances which go to make out a case where the charge is rape, which are different from that of seduction. You may rape a prostitute for instance; it has to be against the consent of a person in order to constitute rape. On the other hand, seduction is with the consent of a person. Another essential of seduction which does not enter into the question of rape, and which is exemplified by what I said, is that it must be a person of previous chaste character. I think where the injustice to those convicted in this case arises is that the jury may have so interwoven these different pieces of evidence necessary to be proved, that they really lost touch with the real issues to be decided. I think that substantial justice in this case will be done by granting the accused a new trial.

GALLIHER, J.A.

MCPHILLIPS, J.A.: I may say that I would have preferred that the matter should have been remitted to the learned trial judge for a restatement of the case, as I am in entire agreement with my brother MARTIN upon the propriety of that being done, but as it would appear that that order will not be possible

MCPHILLIPS, J.A.

of being made and as a new trial will be had, which means a hearing *de novo* with all the advantages derivable from this matter having been so carefully presented to this Court, it is inadvisable to discuss questions of evidence. I wish to add something in the way perhaps of aiding and determining what should be done on the new trial. I am distinctly (and this is said with the greatest deference to the Attorney-General and counsel representing the Attorney-General) of the view that the responsibility rested upon the Crown to elect as to what infraction of the Canada Criminal Code the Crown would proceed with when the Crown was apprized of the fact that it was in the one act that the alleged criminality took place, that is, rape or seduction; both could not be proceeded with when it was all in the one act, therefore I think, with deference to all other opinion, that when this case is presented for trial again that the Crown should elect as between rape and seduction. That is the responsibility that the law officer of the Crown has—one of the gravest responsibilities that he has; he cannot leave it to the lay jury to determine the question. Further, there was error in presenting the two charges to the jury. If the learned judge presented these two counts to the jury and instructed the jury that they were at liberty to find upon either or upon both, there was error in law that was not permissible.

MCPHILLIPS, J.A.

Now I understand from Mr. *Donaghy,* the Crown counsel, that the learned judge was of the opinion that that could not be, but there is nothing to advise us that the learned judge told the jury that. There is manifest error here, and I do not disagree with the proposed judgment of the Court that there should be a new trial.

EBERTS, J.A.: I am of opinion that the verdict is so inconsistent that there should be a new trial.

EBERTS, J.A.

New trial ordered, Martin, J.A. dissenting.

MURPHY, J. (At Chambers)

1923

May 3.

REX v. OLSEN.

Criminal law—Conviction—Appeal to County Court—Depositions, etc., forwarded by justice of the peace to the County Court—Subsequent application for certiorari—Refused.

REX v. OLSEN

O., having been convicted by a justice of the peace, appealed to the County Court, and the justice of the peace thereupon filed all papers in connection with the conviction in the County Court. Subsequently O. gave notice for *certiorari* to be directed to the justice of the peace to bring up the conviction for the purpose of quashing on the ground of want of jurisdiction.

Held, that as all papers had been forwarded to the County Court, *certiorari* does not lie.

APPLICATION for a writ of *certiorari*. The accused was convicted by A. M. Wastell, a justice of the peace, at Alert Bay on the 26th of March, 1923, for unlawfully having in his possession game, namely, a quantity of deer meat. He thereupon gave notice of appeal to the County Court of Vancouver and on the 9th of April the depositions, conviction, information and recognizance were filed by the justice of the peace in the County Court at Vancouver in compliance with the provisions of the Summary Convictions Act. On the 19th of April following accused gave notice of motion for a writ of *certiorari* to bring up the conviction for the purpose of quashing on the ground that the justice of the peace acted without jurisdiction. Heard by MURPHY, J. at Chambers in Vancouver on the 3rd of May, 1923.

Statement

Orr, for the application.

Wood, for the Crown, raised the preliminary objection that no *certiorari* lies to the justice of the peace because he had forwarded all papers to the County Court and if a writ of *certiorari* would issue at all it must be directed to the County Court at Vancouver, citing *Regina* v. *Starkey* (1890), 6 Man. L.R. 588.

Argument

MURPHY, J.: The preliminary objection raised by counsel for the Crown prevails and the application is dismissed.

Judgment

Application dismissed.

OLSEN v. PEARSON AND EVINDSEN.

MCDONALD, J. (At Chambers)

1923

Sept. 28.

OLSEN v. PEARSON

Practice—Appeal—Security for costs—Powers of judge of Court appealed from—B.C. Stats. 1913, Cap. 13, Sec. 6—Marginal rule 981.

Section 29 of the Court of Appeal Act as amended by B.C. Stats. 1913, Cap. 13, refers the whole matter of security for costs to be occasioned by an appeal to the Court appealed from and the judge may fix a time within which the security must be furnished.

APPLICATION for security for costs of appeal. A demand had been made for security for costs which was not complied with, and on the 20th of September, an order was made that the appellant forthwith furnish security for the costs of his appeal in the sum of $200. Appellant's counsel refused to approve the order as drawn and the matter was referred back to the judge in Chambers, appellant's counsel contending that there is no jurisdiction in the Supreme Court to deal with any matter in an appeal except the amount of security. Heard by MCDONALD, J. at Chambers in Vancouver on the 28th of September, 1923.

Statement

Winifred McKay, for the application: Section 29 of the Court of Appeal Act as amended by B.C. Stats. 1913, Cap. 13, remits the whole matter of costs to the Court appealed from. Order LXV., r. 6, therefore applies.

Murray, contra: Section 29 of the Court of Appeal Act merely gives the Court appealed from power to fix the amount of costs. After delivery of the notice of appeal, all other matters must be before the Court of Appeal.

Argument

MCDONALD, J.: Section 29 as amended refers the whole matter of security for costs to be occasioned by an appeal to the Court appealed from. Owing to the lapse of time since the order was made, I will order that security be furnished before 11 o'clock on Saturday, the 29th of September, 1923.

Judgment

Order accordingly.

MARTIN, J.A. (At Chambers)

1923

Sept. 29.

INSINGER v. CUNNINGHAM.

INSINGER v. CUNNINGHAM

Practice—Appeal to Supreme Court—Stay of execution—Application for—Security—Amount to satisfaction of judge—R.S.C. 1906, Cap. 139, Sec. 76(d).

In an action for damages for breach of a contract for the construction of a tunnel the judgment below which was affirmed by the Court of Appeal was in favour of the plaintiff and ordered that there be a reference to the registrar to ascertain the *quantum* of damages at the rate of $15 per foot for all work not done which was stipulated to be done. On an application under section 76(*d*) of the Supreme Court Act for a stay of execution pending an appeal, upon giving security:—

Held, that the whole section should be read together in order to give the result obviously aimed at, that notwithstanding the fact that the exact amount of damages is not as yet ascertained the subsection should be read as giving the judge power to consider the amount for which security should be given and reach an estimate of what would be reasonable.

Statement

APPLICATION by defendant to stay execution pending an appeal from a judgment of the Court of Appeal to the Supreme Court of Canada under section 76(*d*) of the Supreme Court Act. Heard by MARTIN, J.A. at Chambers in Victoria on the 28th of June, 1923.

Harold B. Robertson, K.C., for the application.
Ernest Miller, contra.

29th September, 1923.

Judgment

MARTIN, J.A.: This application (in the amended form in which it is agreed that it is to be considered) is one under 76 of the Supreme Court Act (Cameron's Supreme Court Practice, 1919, Vol. 2, pp. 82-3) to stay execution pending an appeal to the Supreme Court upon giving security for costs only, or if that be refused, then to fix the security. Subsection (*d*) of section 76 declares that:

"If the judgment appealed from directs the payment of money, either as a debt or for damages or costs, execution thereof shall not be stayed, until the appellant has given security to the satisfaction of the Court appealed from, or of a judge thereof, that if the judgment or any part thereof is affirmed, the appellant will pay the amount thereby directed to be paid, or the part thereof as to which the judgment is affirmed, if it is affirmed

only as to part, and all damages awarded against the appellant on such appeal."

The judgment below, dated 12th July, 1921, affirmed by the Court of Appeal, was in favour of the plaintiff, and the second clause of it ordered that

". . . . it be referred to the registrar of this Honourable Court . . . . to ascertain the *quantum* of damages, at the rate of $15 per foot, for all work not done which was stipulated to be done by par. 3 of Exhibit 19."

This "work not done" was to drive a tunnel, with an upraise therefrom, estimated, in all, at 1,550 feet, as detailed in par. 3.

Ex facie this judgment does "direct the payment of money . . . . for damages" for the said breach of contract; but it is submitted that until the exact amount of the damages is ascertained by the reference there is no "direction to pay" them, a submission which I am unable to give effect to, because the original "direction" cannot be nullified by any one of the subsequent and various means that might be adopted to insure, with exactitude, its enforcement.

Being of that opinion, I have then to see that the security is given to my "satisfaction" to meet these circumstances, but a difficulty arises in the conflict between the general direction for the "payment of money for damages" in the opening words of the subsection, and the later words, respecting the amount of the security, that the "appellant will pay the amount thereby directed to be paid." Here no specific "amount" has yet been directed to be paid (owing to mutual delay in holding the reference) and if the strictest construction be put upon the language, practical effect could not be given to it, with the result that execution could not be stayed because it is impossible to name an exact sum for security, which would be a very unfortunate position for the appellant. But I think that the whole section should be read together in order to effect the result obviously, to my mind, aimed at, *viz.*, to order a stay of execution upon security given to the judge's satisfaction, so as to relieve an appellant, if possible, from the disastrous consequence of an execution. I shall, therefore, take that remedial and broad view of the subsection, and read it as giving me, in general, power to consider the amount for which security should be given, trying to reach an estimate, in each case of this class,

Judgment

MARTIN, J.A. (At Chambers)

1923

Sept. 29.

INSINGER v. CUNNINGHAM

of what would be reasonable. Often, doubtless, that would be difficult to do, but in this case it is not, because in his reasons for judgment, referring to these 1,550 feet of work, the learned judge below said:

"As to the *quantum* of damages the evidence is conflicting, but I think justice will be done by allowing $15 per foot for all work not done, which was stipulated to be done . . . . *viz.*, 1,200 feet of tunnel and 350 feet of upraise."

This is very clear, so clear that it is difficult to understand why the damages were not then and there assessed and the delay and expense of a reference avoided, so it follows that the security should be for the total of the damages thus indicated, *viz.*, $23,250, for which amount the appellant will give security in the ordinary way, whereupon execution will be stayed.

Judgment

The costs of this application should, in the circumstances, be those to the respondent in any event of the appeal to the Supreme Court.

Application granted upon appellant giving security.

COURT OF APPEAL

1923

Oct. 2.

OLSEN v. PEARSON

OLSEN v. PEARSON AND EVINDSEN. (No. 2).

Practice—Appeal—Pauper—Appeal in forma pauperis—11 Henry VII., Cap. 12.

An applicant for leave to prosecute his appeal *in forma pauperis* swore that he was not worth $25, his wearing apparel, the subject-matter of this appeal and an interest in a further appeal pending, alone excepted. It further appeared from an unanswered affidavit of the respondent (a) that the applicant was a judgment creditor in an action in which there was still due $230.47; (b) that he offered the respondents' solicitors an assignment of his rights in a pending appeal as security for respondents' costs of this appeal; and (c) that an appeal was pending in which applicant claimed $600.

Held, EBERTS, J.A. dissenting, that in the circumstances he has not brought himself within the statute and he should not be allowed to prosecute his appeal *in forma pauperis*.

Statement

MOTION by appellant (plaintiff) for leave to prosecute his

appeal *in forma pauperis*. The appellant had failed to put up security for the costs of the appeal as ordered and he applied *ex parte* on the 28th of September, 1923, to a judge of the Court of Appeal for leave to prosecute his appeal *in forma pauperis*. He was then instructed to bring his application before the whole Court.

Heard at Vancouver on the 2nd of October, 1923, by MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Statement

Murray, for the motion: The application is by virtue of 11 Henry VII., Cap. 12, and by virtue of an inherent common law right. The appellant has sworn he is not worth the sum of $25 except his wearing apparel and the matters in question in the appeal, and the value (if any) of his interest in an appeal pending from a judgment of CAYLEY, Co. J. delivered in the County Court of Vancouver on June 27th, 1923.

Winifred McKay, contra: The appellant's affidavit is not in accordance with the decision in *Perry* v. *Walker* (1842), 1 Y. & C.C.C. 672, which is that an affidavit as to property ought to except nothing but wearing apparel and the matters in the case. Moreover, he has not answered the affidavit of the respondents which states (1) that the appellant is the judgment creditor in an action in the Supreme Court of British Columbia in which there is still due and owing to the appellant the sum of $230.47; (2) that the appellant offered to the respondents' solicitors an assignment of his rights in an appeal pending before this Honourable Court against some person or persons other than the respondents herein, as security for the respondents' costs of this appeal; (3) that an appeal is pending before this Honourable Court in which the appellant herein is appellant, in which the appellant claims $600, and that the solicitor for the said appellant has given his undertaking for payment of the costs of the respondent in the said appeal up to $100, in the event of the said appeal being unsuccessful. In the absence of an answer to the said affidavit the facts therein stated must be taken to be admitted. Under conditions in this country, there can be few cases in which a person is entitled to sue *in forma pauperis*. The appellant has not shewn himself to be

Argument

COURT OF APPEAL
1923
Oct. 2.
OLSEN v. PEARSON

a pauper, and is not a pauper. The appellant in this action is a young, able-bodied man. In *Wille* v. *St. John* (1910), 1 Ch. 701 at p. 705 Cozens-Hardy, M.R., distinguishes between paupers and impecunious persons. [She cited *Boddington* v. *Woodley* (1842), 5 Beav. 555 and *In re Atkin's Trusts* (1909), 1 Ch. 471.]

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I dismiss the motion.

MARTIN, J.A.

MARTIN, J.A.: I think this man has not brought himself within the Act on the circumstances that are before us.

GALLIHER, J.A.

GALLIHER, J.A.: I agree it is not a proper case.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I am of the opinion that no sufficient case has been made out. I might further say that in the abstract it is difficult, if not impossible, to make out a case of the right to sue or appeal *in forma pauperis* in this country. There might be a case where there is incurable illness and total incapacity to earn a living, but speaking generally it is a very gratifying thing to know that in this country this procedure is practically unknown or nearly so. Upon the particular facts of this case the affidavits themselves disclose that a very substantial sum is payable to this applicant. It may be that he has paid his solicitors the costs, and these moneys are payable to him. I might say with regard to the affidavit, that it has been decided by this Court, that when affidavits are filed and not answered it is too late, after the appeal is entered upon, to ask leave to answer them. I do not know that the learned counsel has asked leave here, but an observation has been made that the affidavits could have been answered; it is now too late. I would refuse the application.

EBERTS, J.A.

EBERTS, J.A.: I am of the opinion that he has complied with the statute, and that he should be allowed to appeal *in forma pauperis*. The affidavit has not been answered. He has said that he is not worth £5; and he virtually has to, in that affidavit, speak for the amount of clothes that he has. Now, there is nothing to shew that he has got anything else. He has some interest to a certain extent in some costs. Counsel who

COURT OF APPEAL

1923

Oct. 2.

OLSEN v. PEARSON

appears for him says that he has no interest whatever in these costs. He says, I have not got $25 in the world, I want to appeal this case, and my counsel says I have got a good case, therefore, I think I ought to be allowed by this Court to come in and try the appeal. With due deference to my learned brothers, I would say that he has complied with that, and he should be entitled to leave.

Motion dismissed, Eberts, J.A. dissenting.

IN RE KENT AND THE ASSESSMENT ACT.

COURT OF APPEAL

1923

Oct. 2.

IN RE KENT AND THE ASSESSMENT ACT

Taxation—Income derived from mines—Liability of non-residents—Retrospective—R.S.B.C. 1911, Cap. 222, Sec. 155—B.C. Stats. 1918, Cap. 89, Sec. 25; 1920, Cap. 89, Sec. 19.

Under section 155 of the Taxation Act as re-enacted by B.C. Stats. 1918, Cap. 89, Sec. 25, the incomes of non-residents as well as residents derived from the working of mines are made taxable.

The words "as provided in Part I." in said section have reference to the incidents of taxation and not to the persons to be taxed. The section therefore applies to every owner or operator irrespective of residence.

Section 19 of the Taxation Act Amendment Act, 1920, makes the said re-enactment of section 155 retrospective so as to make any person who earned income from mines in the years 1915 and 1917 liable to taxation under its provisions.

APPEAL by William Kent from the decision of James O'Shea of the 31st of January, 1923, sitting as a judge of the Special Court of Revision at Kaslo, to hear appeals in respect of assessment for the Slocan Assessment District on the income and output from mines assessed under the Taxation Act. This was in respect of the income tax of William Kent as per assessment roll for 1920, as on the 1917 roll based on the 1915 income and the 1919 roll based on the 1917 income. Mr. Kent was a citizen of the United States and lived in California. He had not been in British Columbia since 1915.

Statement

COURT OF APPEAL

1923

Oct. 2.

IN RE KENT AND THE ASSESSMENT ACT

Statement

The mining property from which he derived an income in 1915 and 1917 was held by him under a bond or option to purchase. Mr. Kent paid the mineral tax for 1915 and for the first quarter of 1917. The grounds of appeal were: (1) That Mr. Kent's income for these years is not assessable as he is an American citizen residing in the United States. (2) He paid the mineral tax and at the time he paid it, it was in substitution and satisfaction of any claim for income tax. (3) If any tax is due there should have been an allowance for depletion and depreciation.

The appeal was argued at Victoria on the 5th of June, 1923, before MACDONALD, C.J.A., MARTIN, GALLIHER and EBERTS, JJ.A.

Argument

Hamilton, K.C., for appellant: Under section 4 of the Taxation Act in case of non-residents only personal property and real property and not income are assessable. That section was amended by B.C. Stats. 1919, Cap. 79, Sec. 3, to include "income earned within the Province" and a subsection was added whereby, "all assessments heretofore made . . . . are . . . . validated and confirmed." This would not apply to the assessment in question as it was made in 1920 and even if it did it could not validate an unauthorized tax; it could not be an assessment unless within the Act. Nothing in the amendment goes so far as to say that a taxation can be reopened when satisfied. Mr. Kent paid the 2 per cent. provided by the Act from the profits of the mine for 1915, and the first quarter of 1917. The retrospective amendment does not affect a tax satisfied and completed. If any tax is due for these two years, allowance should be made for depreciation.

D. Donaghy, for respondent: Old Part V. was repealed in 1918. In the place of the old 2 per cent. there is substituted an income tax and if greater is charged in 1918. The question is whether the provisions are so worded as to date back to 1915 and 1917. They were made retroactive and so date back. Reading the 1920 statute the 1915 income is taxed if over the old 2 per cent. Section 103 of the Taxation Act allows this. The Taxation Act is in parts and Part V. is a code in itself and deals with minerals and taxes on income

from minerals. He relies on section 4 of the Act but it does not apply as he must look to Part V. which deals with income on minerals.

Hamilton, in reply: Part V. incorporates Part I. on the question of income.

Cur. adv. vult.

2nd October, 1923.

MACDONALD, C.J.A.: The only questions raised by the notice of appeal which I think merit consideration, are those mentioned in the first and second grounds of the notice. I think a non-resident was not, prior to the re-enactment in 1918 of section 155 of the Taxation Act, Cap. 222, R.S.B.C. 1911, liable to be assessed for income tax. The re-enactment of that section with amendment by the statute of 1918, Cap. 89, Sec. 25, for the first time made a non-resident liable to be taxed on income derived from a mine. The reference in that section to Part I. of the main Act is, I think, only to incidents of taxation and not to the person who is to be taxed, so that as I construe section 155, as so amended, it applies to every owner or operator of a mine, wherever such owner or occupier may be resident.

But that section alone does not render the appellant liable to income tax for the years 1915 and 1917. It required another statute, namely, the statute of 1920, Cap. 89, Sec. 19, to effect that purpose. That is a section which makes said section 155 retrospective. The meaning of the section in reference to the years to which said section 155 is made to apply, is not very clear to me, but I am relieved from any embarrassment in that respect by the language of the second ground of appeal, which complains of error on the part of the Court of Revision "in holding that the payment of the mineral production tax (the two per cent. tax) in 1915 and in 1917, prior to May 19th, 1917, did not relieve the appellant from all further liability for any income tax for 1915 and 1917." The complaint, therefore, is not that the section is not retrospective so as to cover those two years, but that the payment by the appellant of the mineral production tax in full for 1915, and for the first quarter of 1917, relieved him of the present claim for the

MACDONALD, C.J.A.

COURT OF APPEAL
1923
Oct. 2.

IN RE KENT AND THE ASSESSMENT ACT

difference between the said mineral production tax, which was paid for those periods, and the amount which would be payable on income derived from the mines during those years and now assessed by authority of the statute of 1920.

I notice that there is no right of election given to the Government between the two imposts, and that provision is made for applying amounts received on account of mineral production tax in reduction of the claim for income tax.

MACDONALD, C.J.A.

In these circumstances I would dismiss the appeal.

MARTIN, J.A.

MARTIN, J.A.: In my opinion the learned judge of the Court of Revision took the correct view of the question, and therefore the appeal should be dismissed.

GALLIHER, J.A.

GALLIHER, J.A.: Section 4 of Part I. of the Taxation Act, R.S.B.C. 1911, Cap. 222, as originally passed, makes the real and personal property and income of every person resident in the Province and the real and personal property (but not income) of every person not resident within the Province, subject to taxation. The appellant was, during the years in question here, 1915 and 1917, a non-resident. Part I. of the Act deals with the taxation of real and personal property and income generally, and sets out the machinery for assessing, levying and collecting same, rights of appeal, etc., but by section 7 of said Part I., subsection (*d*), mines and minerals, other than coal and coke, are to be assessed and taxed specifically under the Part governing the subject. This is to be found in Part V., section 155, and reads as follows:

"There shall be assessed, levied, and collected quarterly from every person owning, managing, leasing, or working a mine, other than a coal-mine, and paid to His Majesty, his heirs and successors, two per cent. on the assessed value of all ore or mineral-bearing substances raised, gotten, or gained from any lands in the Province, and which have been sold or removed from the premises."

This is commonly known as the two per cent. mineral tax.

By the Taxation Act Amendment Act, 1918, Cap. 89, Sec. 25, section 155 was repealed and the following substituted:

"155. (1.) Subject to subsection (2), every person owning, managing, leasing, or working a mine, other than a coal or gold mine, shall be assessed and taxed on his income from the mine as provided in Part 1., or on the output of the mine under this Part, whichever tax shall be the

greater in amount. The tax on output shall be assessed, levied, and collected quarterly, and shall consist of two per cent. on the assessed value of all ore removed from the premises of the mine. In case the tax on the income proves to be greater in amount, the quarterly payments collected shall be considered to be in part payment of the tax payable on the income earned during the corresponding period."

Prior to the passing of this latter section, it will be seen that the income of non-residents, either under the general Part (Part I.) or under the special Part (Part V.), was not subject to taxation, and were it not for the words "as provided in Part I.," which appear in the new section 155, there could not, I think, be any doubt. The question is, do these words limit persons owning, managing, leasing or working a mine to those who are resident in the Province as to taxation of their income derived from the mine? I think not. Part I. is dealing with incomes generally, and the substituted section 155 is dealing with a specific taxation of incomes derived from mines. The words are "every person," etc., and mean every person resident or non-resident, and the words "as provided in Part I.," have reference to the manner and machinery of taxation of incomes, and not the persons to be taxed. I think it was the clear intention of the Legislature to tax the incomes of non-residents derived from working of mines, and that the language is sufficiently clear to establish that. But it went no further than assessing them on incomes derived from mines, and when it was thought advisable later to extend it to all incomes earned within the Province, that was accomplished by the amendment of 1919, Cap. 79, Sec. 3, the amendment being to section 4 of Cap. 222, of the main Act, which dealt with incomes generally. The words inserted were: "and the income earned within the Province," after the word "Province" in the second line. Now these amended Acts were passed subsequent to the time when the incomes of 1915 and 1917 were earned and which are sought to be taxed here, and the next question is, Is the Act of 1918 retrospective? Section 26 of that Act made it so back to the 1st of January, 1917, and this was later followed by the Act of 1920, Cap. 89, Sec. 19, which is in these words:

"26. (1.) The re-enactment of said section 155 by section 25 of this Act shall relate back and take effect and shall be deemed to have always related back and taken effect in such a manner that every person to whom subsection (1) of said section 155, as so re-enacted, applies shall be liable

COURT OF APPEAL

1923

Oct. 2.

IN RE KENT AND THE ASSESSMENT ACT

for taxes thereunder in like manner as if he had been liable and had been lawfully assessed and taxed thereunder on the assessment roll for 1917, revised in 1916, and the assessment roll for 1918, revised in 1917, in respect of income earned during the years 1915 and 1916 respectively." This, I think, makes it clearly retrospective.

Mr. *Hamilton,* for the appellant, raises a further point to the effect that having paid the two per cent. production tax in 1915 and 1917, that was in substitution of income tax and is a defence to this claim.

In 1913, by Cap. 71, Sec. 12, the last clause of section 155 of the main Act was amended to read as follows:

"The taxes imposed by this section shall be in substitution for all taxes upon the land from which the said ore or placer gold is mined or won, so long as the said land is not used for other than mining purposes, and shall also be in substitution for all taxes upon the personal property used in, 'or the income derived from' the working of the said mines."

These words were struck out in 1917 by Cap. 62, Sec. 11.

GALLIHER, J.A.

During 1915 and 1917, when the production tax of two per cent. was paid by the appellant, he being a non-resident, there could be no taxation against him upon income derived for the working of the mines, hence no income for which such payment could be a substitution. But I think the whole question of substitution is put at rest by the effect of Cap. 89, of 1920, Sec. 19. The effect of that is, as I view it, to make any person who earned income from mines in the years 1915 and 1917, liable to taxation under the provisions of section 155 as re-enacted by Cap. 89, Sec. 25, of 1918, in the same manner as if such section had been upon the statute books in those years and that contains no provision for substitution.

I would dismiss the appeal.

EBERTS, J.A.

EBERTS, J.A. would dismiss the appeal.

Solicitors for appellant: *Hamilton & Wragge.*
Solicitors for respondent: *Nisbet & Graham.*

IN RE THE ROSEBERY-SURPRISE MINING COMPANY, LIMITED, AND THE ASSESSMENT ACT.

COURT OF APPEAL

1923

Oct. 2.

IN RE ROSEBERY-SURPRISE MINING CO.

Taxation—Income from working of mine—Exemptions—Royalties, rent of reduction plant and cost of plant additions—R.S.B.C. 1911, Cap. 222, Sec. 75—B.C. Stats. 1919, Cap. 79, Sec. 6.

By section 75 of the Taxation Act as amended by section 6 of the amending Act of 1919, an assessor is directed to allow as deductions from gross income "all expenses incurred by that person in the production of the income." The Rosebery-Surprise Mining Company obtained an option to purchase certain properties, the purchase price to be paid in instalments, the option containing a term that the purchaser could work the properties and pay a percentage of the smelter returns to the vendor which would be credited on the purchase price if the option were taken up but would be forfeited if the option were abandoned. The Company also obtained a lease for a term of years with option to purchase certain demised properties for a certain sum which included a reduction plant or mill, all moneys paid by way of rents to be credited on the purchase price if taken up. The Company also made expenditures on plant additions on one of the mines (Bosun mine) included in the option. On appeal in respect of an assessment before the Court of Revision the Company claimed: (1) That the royalties paid on the properties under option were allowable deductions from gross income in computing taxable income; (2) that rental paid on a reduction plant was a proper deduction to make; and (3) plant additions on the Bosun mine was a proper deduction. It was held by the Court of Revision that these payments were all in the nature of capital expenditure and should not be deducted in ascertaining taxable income.

Held, on appeal, *per* MACDONALD, C.J.A. and EBERTS, J.A., that sums paid as rent and by way of royalty under options to purchase which have not yet expired can properly be considered as falling within the language of the Act, and the appeal as to the Company's claims (1) and (2) should be allowed.

Per MARTIN and GALLIHER, JJ.A.: That the deductions claimed were properly disallowed and the appeal should be dismissed.

APPEAL by the Rosebery-Surprise Mining Company from the decision of James O'Shea sitting as a judge of a Special Court of Revision at Kaslo to hear appeals in respect of assessment for the Slocan Assessment District on the income and output from mines assessed under the Taxation Act. This case was in respect of income tax of the Rosebery-Surprise Mining Company, Limited, on the assessment roll of 1920 for

Statement

COURT OF APPEAL

1923

Oct. 2.

IN RE ROSEBERY-SURPRISE MINING CO.

Statement

income tax for the years 1915 and 1917. The appeal was taken on the ground that certain items should have been deducted from the gross income in order to arrive at the taxable income, namely, (a) that royalties paid on properties under option should have been deducted; (b) that rental paid on the Rosebery mill was a proper deduction; (c) that the mineral tax should have been deducted; (d) also plant additions to the Bosun mine which was under option; (e) that the minister had not exercised his discretion in regard to allowance for depletion and he should have done so.

The appeal was argued at Victoria on the 5th of June, 1923, before MACDONALD, C.J.A., MARTIN, GALLIHER and EBERTS, JJ.A.

Argument

Hamilton, K.C., for appellant: The first item is as to royalties. Royalty is not income at all, it is reserved by the owners and under the terms of the lease is paid direct to the owners from the smelter returns; in any event it is a necessary expense in producing our income. Until the option is exercised it cannot be held to be capital payment. The next item is the rental for Rosebery mill. We pay $5,000 per annum and this is not capital expenditure until the option is taken up. The minister has not exercised his discretion in relation to allowance for depletion under section 11 of the 1921 amendment. It is submitted he must do so.

D. Donaghy, for respondent: All payments made that become part of the purchase price are payments from capital account and should not be deducted. They thereby obtain an equitable interest in the property. Once he says what the gross income is the Act of 1919 applies and there is no provision for depletion.

Hamilton, in reply.

Cur. adv. vult.

2nd October, 1923.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The appellant Company claims that the assessor erred in not allowing certain sums of mining expenses by way of deductions from gross income.

The first, second and fourth grounds of appeal are those which were most strongly urged, and comprise the principal

complaints. I shall, however, first deal with the other grounds of appeal. The third ground complains that mineral production tax was not allowed as a deduction. Under the Act the mineral production tax, or alternatively, the income tax, whichever shall be the greater in amount, is that which the taxpayer must pay. Both these taxes cannot be demanded, and if this is an appeal against the exaction of both, it ought to be allowed, but I do not so understand it. If it means something else, then I think the claim was properly denied (see section 6, Cap. 79, B.C. Stats. 1919, subsection (9)).

By the fifth ground of appeal a deduction is claimed for mine depletion. This is answered by said section 6, subsection (13). The seventh ground was not argued. The eighth ground is not material, since there is no claim of the right to tax capital under pretence of taxing income. The ninth ground is also immaterial.

Returning then to the three grounds first mentioned, the appellant claims that "royalties and rents" paid to the owner of the property held by the appellant under options to purchase, should be allowed as proper deductions from gross income. By section 75 of the Taxation Act, Cap. 222, R.S.B.C. 1911, as amended by said section 6, the assessor is directed, in ascertaining the taxable income, to allow as deductions from gross income, "all expenses incurred by that person in the production of the income," subject to certain exceptions. Having then ascertained the amount of the gross income, as to which there is no dispute, the question arises, are the several sums, which appellant claims ought to have been deducted, such as fall within the language above quoted? They are sums paid for the privilege of extracting ores from the mines under option and for rents paid for the use of reduction plant, and for plant additions to the Bosun mine. Deductions were allowed in those cases in which the options had been abandoned, but were disallowed in those where the options were still subsisting. The true character of these "royalties" may be illustrated by a concrete case. An option is taken to purchase a mine; the vendor, as incidental to the option, gives the privilege to the purchaser of marketing ores extracted by him, the purchaser

COURT OF APPEAL

1923

Oct. 2.

IN RE ROSEBERY-SURPRISE MINING CO.

agreeing to pay a percentage, called royalty, of the value thereof to the vendor, with the proviso that if the option be exercised, the moneys so paid as royalties shall be credited on the purchase price. It will be of assistance to look at the documents. The facts as applicable to the first and second grounds of appeal are not very clearly stated in the case, or in the reasons for judgment of the Court of Revision. It is therefore necessary to deal rather broadly with the questions involved. Exhibit 1 is an option to purchase the several properties therein described for the sum of $150,000, payable in instalments, with the proviso that should the option not be exercised all instalments of purchase-money theretofore paid shall be forfeited to the vendor, but the purchaser is released from obligation to pay further instalments. This option contains a term entitling the purchaser to extract and market ores during the term of the option. He is to pay a percentage of the smelter returns to the vendor, but in case of abandonment of the option, he is not released from liability to pay the royalties on ore already treated and not theretofore paid to the vendor. If the option be exercised these royalties are to be applied in reduction of the purchase price, but they are not impressed with the character of purchase-money, and cannot be regarded as such unless and until the option has been exercised.

MACDONALD, C.J.A.

The next document (Exhibit 6) purports to be a lease for a term of years, with an option to the appellant to purchase the demised properties, which include a reduction plant or mill. This lease provides for rents and royalties. The lessee is given an option to purchase all the properties therein demised at any time during the term upon payment of $250,000. Unlike the option (Exhibit 1), there are no instalments of purchase-money designated as such. Upon failure to exercise the option within the time specified, the purchaser's rights are terminated. But should the purchaser exercise the option during the term, all moneys paid by way of rents and royalties are to be credited on the purchase price. The question, therefore, which we have to determine, is, whether the sums paid as rent and by way of royalty, in the circumstances above recited, under options to purchase which have not yet expired, can properly be considered

as falling within the language hereinbefore quoted? In my opinion, they are expenses which have been incurred by the appellant in the production of the income in question, namely, the income derived from the properties included in the options or leases, and ought to have been deducted from the gross income. I think there is a difference between instalments of purchase-money which were never by the parties regarded as anything else than purchase-money and were to be forfeited as above stated, and payments of rents and royalties for the privilege of extracting, treating and marketing ores, the income from which is part of the income taxed. These rents and royalties never became impressed with the character of purchase-money, they may never become so. It could be, upon the happening of a future contingency only, that they would be considered as part of the purchase-money. It must, I think, be conceded that rents paid under a lease which contains no option of purchase would be an expense incurred in the production of the income from the demised premises, and if I am right in this, then I can see no difference in the principles to be applied under the Taxation Act to cases where an option to purchase is included in the lease. I think the royalties are in the same category as the rents, if, indeed, they are not in substance the same.

MACDONALD, C.J.A.

The fourth ground of appeal is founded on the claim that the costs of plant additions to the Bosun mine should have been deducted from gross income. On the evidence before me I cannot decide this question in the appellant's favour. The character and purpose of the additions are not disclosed, and the onus is on the appellant to shew that these expenses were incurred in the production of the income, which *prima facie* is not apparent. This has not been done, and therefore the appeal on this ground cannot succeed.

The appeal should therefore be allowed to the extent above indicated.

MARTIN, J.A.: If the document of the 10th of November, 1917, between Sellon and Kent is to be regarded as merely one form of the ordinary working bond on a mine (see Glossary, 1 M.M.C. 874, Appendix 3), as is, in effect, submitted by the

MARTIN, J.A.

COURT OF APPEAL

1923

Oct. 2.

IN RE ROSEBERY-SURPRISE MINING CO.

MARTIN, J.A.

appellant, then I think that the decision of the learned judge of the Court of Revision could not be upheld. But in my opinion, after a careful examination of the document, the submission of respondent's counsel, Mr. *Donaghy,* is the correct one, *viz.*: that it is in reality the ordinary agreement for sale (accompanied by possession and development on certain terms) between "vendor and purchaser" (using those terms) with the proviso that if the purchaser later desires to escape from "completing the purchase" he may do so on specified terms, and therefore the appeal should be dismissed.

GALLIHER, J.A.

GALLIHER, J.A.: The deductions claimed and not allowed by the Court of Revision, and which are the subject of appeal herein, are as follows: (1) Royalties on properties under option. These royalties under the agreements were paid and if the option or agreement was taken up and completed, they were to be applied in payment of purchase-moneys. I think, until the option has been abandoned, these payments must be treated as capital expenditure, and were properly disallowed. (2) The same remarks apply. (3) Seventeen thousand five hundred and twelve dollars and eight cents, being for plant additions on the Bosun claim still under option. The same remarks apply as to being capital expenditure; this is not a loss until the option is given up. (4) Depletion. This, I think, is covered by section 75, subsection (13), B.C. Stats. 1919.

I would dismiss the appeal.

EBERTS, J.A.

EBERTS, J.A.: I would allow the appeal to the extent indicated in the judgment of the Chief Justice.

The Court being equally divided the appeal was dismissed.

Solicitors for appellant: *Hamilton & Wragge.*
Solicitors for respondent: *Nisbet & Graham.*

FROST AND FROST v. WELCH.

MACDONALD, J.

1923

Jan. 24.

COURT OF APPEAL

Oct. 2.

FROST v. WELCH

Sale of land—Rescission of agreement for sale—Return of payments made—Vendor's failure to register title—B.C. Stats. 1914, Cap. 43, Sec. 28(5).

Where it is found on the evidence that the purchasers under an agreement for sale of land had failed to pay or tender the last instalment of the purchase-money, in an action for rescission of the agreement and a return of the purchase-money paid on the ground of lack of title in the vendor, they cannot avail themselves of non-compliance by the vendor with subsection (5) of section 28 of the Land Registry Act Amendment Act, 1914, in failing to register his title.

APPEAL from the decision of MACDONALD, J., in an action tried by him at Vancouver on the 24th of January, 1923, to recover the instalments paid under an agreement for sale of land. The agreement, dated the 6th of July, 1912, was for the purchase of lot 28, block "B," section 25, block 4, range 7, group 1, New Westminster, for $2,100 payable $443.25 on the execution of the agreement, $720.75 on the 6th of January, 1913, and three payments of $312 each in six, twelve and 18 months. The purchasers made all the payments except the last one, which was due and payable on the 6th of July, 1914. The final payment was never made nor did it appear that it was ever tendered. This action was commenced in October, 1922. The vendor was the owner of the whole of section 25 and he held it subject to a mortgage. As lots were sold and paid for he obtained a release from the mortgagee in each case. Foreclosure proceedings were commenced in 1915 by the mortgagee on section 25 (except the lots therein that were paid for and released) and final order for foreclosure was made on the 28th of April, 1922.

Statement

R. M. Macdonald, and *Collins*, for plaintiffs.
M. A. Macdonald, K.C., for defendant.

MACDONALD, J.: By an agreement for sale, dated the 6th of July, 1912, the defendant agreed to sell, and the plaintiffs agreed to purchase, lot 28 in block B, section 25, block 4,

MACDONALD, J.

MACDONALD, J.
1923
Jan. 24.
COURT OF APPEAL
Oct. 2.
FROST v. WELCH

north range 7 west, group 1, New Westminster District, for $2,100. Now, $443.25 of the purchase price was paid upon the execution of the agreement and the balance, it was provided, should be paid in deferred payments. All such deferred payments were made except the last one, coming due on the 6th of July, 1914. This payment was never made, nor any suggestion made by the plaintiffs or anyone on their behalf, that they desired to make such payment to complete the amount required and stipulated in the agreement for sale, as the purchase price of the property. On the 6th of July, 1914, the plaintiffs were thus debtors to the defendant, and he could have called upon them to make payment of that amount.

It has been contended that the provisions of this agreement, as to the payments, were dependent upon one another. I am inclined to the contrary view; that is, that the first requirement was, that the plaintiffs should make payment of these amounts and then the defendant might be called upon to give, or cause to be given, to the plaintiffs a good and sufficient deed in fee simple to the property. In coming to this conclusion, I have referred to the case of *Clergue* v. *Vivian & Co.* (1909), 41 S.C.R. 607. In that case, the judgment of Parke, B., in *Yates* v. *Gardiner* (1851), 20 L.J., Ex. 327, is referred to. In the latter judgment, the learned judge refers to the fact, that the purchaser was bound to pay the purchase-money, without a conveyance; that he agreed to pay in advance and relied upon the plaintiffs afterwards giving him the conveyance.

MACDONALD, J.

The plaintiffs in this case not only did not make payment in full at the time and as required by the agreement, but before action commenced there was no tender made of such instalment of the purchase price, nor was a deed tendered for execution, coupled with such an offer of payment.

I think, if the facts outlined in the statement of claim had been borne out in the evidence, that plaintiffs might have a cause of action, which would entitle them to a return of the moneys paid under the agreement. The plaintiffs allege in paragraphs five, six and seven, facts which would support such an action. It is there stated that all the moneys had been paid under the agreement, and that on many occasions the

defendant has been requested to convey the land, in pursuance of his agreement to that effect, and that he had neglected and refused to comply with such request. As a matter of fact, the defendant never had an opportunity of complying with any such request, because it was never made to him. He states, and I accept his statement in that connection, that, after he had notified the plaintiffs at the address stated in the agreement for sale, calling for payment and in default cancellation, he never received any reply, nor any intimation that the plaintiffs still wished to adhere to the agreement, or carry out its terms in any way. He thus formed the reasonable conclusion that this sale of a few acres, at a very high price, was being abandoned, and that no further effort would be made on the part of his purchasers to complete the purchase. In the meantime the boom that prevailed at the time, that this agreement for sale was entered into, had subsided, and land that was sold on its crest at very high prices, had so deteriorated in value, as to entitle persons to consider it improbable that such a sale as the one in question would be completed. I think the defendant was quite justified in believing that the transaction was at an end. That forms a good reason for his not being able to produce a copy of the notice sent to plaintiffs in January, 1915, nor even having ready for production in Court the documents under which he claimed title to the property, and which warranted him in entering into the agreement for sale.

Plaintiffs now contend that, although the facts as outlined in the statement of claim, cannot be borne out in evidence, that, because the defendant had not a complete title in either July, 1914, or in January, 1915, that he should be called upon, at this late date, to return the moneys, received by him in good faith under the agreement for sale. I think that the defendant was in a position in July, 1914, and for some time subsequent thereto, if he had been called upon to do so, to have given title to the plaintiffs. In any event, he should have been afforded an opportunity of making title, and a reasonable time afforded for that purpose. Supposing that in July, 1914, the last payment under the agreement had been tendered to him, he would have been at that time even justified in asking for a

MACDONALD, J.
1923
Jan. 24.
COURT OF APPEAL
Oct. 2.
FROST v. WELCH

reasonable period in which he might complete title. In this connection I refer to the judgment of the Court of Appeal in Manitoba, in the case of *Guthrie* v. *Clark* (1886), 3 Man. L.R. 318, and I adopt a portion of the judgment at p. 321, reading as follows:

"By reference to the agreement no time was fixed for giving the conveyance other than as expressed by the words 'on payment of the money and interest.' By the true construction of this agreement the defendants would be allowed a reasonable time to make title after the last payment, and it certainly is most unreasonable that the plaintiffs should be allowed to choose their own time for making a tender and then peremptorily declaring the bargain off because the defendants had not their title then ready. The law is not so unreasonable."

That situation, however, did not arise here, because, as I have mentioned, the plaintiffs did not pay the amount due or tender it to the defendants and seek a conveyance of the property. I have not dealt with the question of cancellation, though I think it well to hold that notice was sent by the defendant in accordance with the provisions of the agreement. I am not surprised that at this late date he is not able to afford the satisfactory evidence of the sending of such notice, which was available to him, no doubt, at the time when it was sent. In my opinion, the action, as it has developed at the trial, was misconceived. In 1922, when this action was commenced, the plaintiffs could not simply bring an action and seek to recover the moneys paid under the facts existing in connection with this transaction.

MACDONALD, J.

Action dismissed with costs.

From this decision the plaintiffs appealed. The appeal was argued at Victoria on the 6th and 7th of June, 1923, before MACDONALD, C.J.A., MARTIN, GALLIHER and EBERTS, JJ.A.

R. M. Macdonald, for appellants: We say we paid in full, but assuming the last payment was not made, then we say the clause was not operative as to the necessity of payment as the vendor had no title when that payment was due and has never had it. Section 28(5) of the Land Registry Act Amendment Act, 1914, imposes an affirmative duty on the vendor. The foreclosure was after the last payment was due but laches of plaintiffs was not pleaded. The foreclosure prevents his

Argument

obtaining title. The vendor must declare any encumbrances and the purchaser can insist on their discharge before he pays: see *Townend* v. *Graham* (1899), 6 B.C. 539 at pp. 543-4; *Twigg* v. *Greenizen,* 63 S.C.R. 158; (1922), 2 W.W.R. 71. If there was no demand for payment he is not in default and the right to give notice has not arisen: see *Reeve* v. *Mullen* (1913), 14 D.L.R. 345; *Langan* v. *Newberry* (1912), 17 B.C. 88. If obligations are simultaneous then the demand is *pro forma*: see *Thompson* v. *Brunskill* (1859), 7 Gr. 542. The practice of conveyancers in England is in force here: see *Langan* v. *Newberry, supra.* That the vendor must have title see *Dock Co.* v. *Brymer* (1850), 5 Ex. 696; *Graves* v. *Mason* (1908), 2 Alta. L.R. 179; *Warren* v. *Rogers* (1914), 24 Man. L.R. 492. He is entitled to a return of the money paid: see *Laycock* v. *Fowler* (1910), 15 W.L.R. 441; *Bastin* v. *Bidwell* (1881), 18 Ch. D. 238; *Snell* v. *Brickles* (1914), 49 S.C.R. 360 at p. 376; *Carpenter* v. *Blandford* (1828), 8 B. & C. 575; *Hipwell* v. *Knight* (1835), 1 Y. & C. 401; *Keinholz* v. *Hansford* (1909), 2 Sask. L.R. 86; *Gunne* v. *Consolidated Land and Mortgage Co.* (1916), 9 Sask. L.R. 94; *Re Hucklesby and Atkinson's Contract* (1910), 102 L.T. 214; *Brewer* v. *Broadwood* (1882), 22 Ch. D. 105; *Bannerman* v. *Green* (1908), 1 Sask. L.R. 394; *Canada Law Book Co.* v. *Fieldhouse* (1909), 2 Alta. L.R. 384; *Clergue* v. *Vivian & Co.* (1909), 41 S.C.R. 607; *Yates* v. *Gardiner* (1851), 20 L.J., Ex. 327; *Guthrie* v. *Clark* (1886), 3 Man. L.R. 318; *McDonald* v. *Murray et al.* (1885), 11 A.R. 101.

Argument

A. B. Macdonald, K.C., for respondent: As to non-compliance with section 28(5) of the Land Registry Act Amendment Act, 1914, see *Thompson* v. *McDonald and Wilson* (1914), 20 B.C. 223; *McDonnell* v. *McClymont* (1915), 22 B.C. 1. When the last payment was due under the agreement the vendor was ready and willing to convey: see *Brickles* v. *Snell* (1916), 2 A.C. 599. The real cause of the trouble here was the purchasers' default and they are not now entitled to recover: see *Walsh* v. *Willaughan* (1918), 42 O.L.R. 455; *Butchart* v. *Maclean* (1911), 16 B.C. 243; *Verma* v. *Donahue* (1913), 18 B.C. 468; *Howe* v. *Smith* (1884), 27 Ch. D. 89; *Cowie*

MACDONALD, J.

1923

Jan. 24.

COURT OF APPEAL

Oct. 2.

FROST v. WELCH

v. *McDonald* (1917), 34 D.L.R. 159. It is a matter of conveyance and not title: see *Robinson* v. *Harris* (1891), 21 Ont. 43; *Clayton* v. *Leech* (1889), 41 Ch. D. 103; *Laird* v. *Pim* (1841), 7 M. & W. 474.

R. M. Macdonald, in reply, referred to Williams on Vendor and Purchaser, 3rd Ed., Vol. 1, p. 152; *Page* v. *Midland Railway Co.* (1894), 1 Ch. 11; *The Universal Land Security Co., Ltd.* v. *Jackson et al.* (1917), 11 Alta. L.R. 483.

Cur. adv. vult.

2nd October, 1923.

MACDONALD, C.J.A.: The plaintiffs rely first upon the Land Registry Act Amendment Act, 1914, Cap. 43, Sec. 28, Subsec. (5), which reads as follows:

"It shall be the duty of any person having sold or hereafter selling land, or who has heretofore entered into or hereafter enters into an agreement for sale, sub-agreement, or assignment, as in the preceding subsection mentioned, to register his own title, in order that any person so buying said land or any interest therein may be able to register his title or interest therein,"

and say that defendant has not complied therewith, and was therefore not entitled to cancel the agreement in question in this action for non-payment of the last instalment of the purchase-money, as he professed to do.

MACDONALD, C.J.A.

Conceding, for the purposes of this appeal, that this is so, I do not see how that helps the plaintiffs. They are suing for the rescission of the agreement of sale and for the return of the purchase-money which they have paid, together with taxes paid by them. They are not claiming this on the ground that the defendant had failed to register his title, but on the ground that he had no title at all. Had the defendant been suing the plaintiffs for the balance of the purchase-money, it may well be that the said subsection would furnish a good defence, but the issue here is quite a different one in form and substance. The plaintiffs under the agreement were not entitled to a conveyance of the land until they had paid all of the purchase-money. They have neither paid nor tendered the last instalment of it. They set up, after many years' delay, the claim that the defendant could not in any event shew a good title to the land. That issue has been found against the plaintiffs in

the Court below, and I am, on the evidence, unable to say it was wrongly so found.

The appeal should therefore be dismissed.

MACDONALD, J.

1923

Jan. 24.

COURT OF APPEAL

Oct. 2.

FROST v. WELCH

MARTIN, J.A.: I agree in the dismissal of this appeal, being unable to say that the learned judge below reached the wrong conclusion, though I do not adopt his reasons, at least in their entirety.

GALLIHER, J.A.: I see no reason for setting aside the judgment below. On the facts and circumstances of this case, and upon the authorities, which I have carefully read and considered, the learned judge was justified in reaching the conclusion he did.

GALLIHER, J.A.

EBERTS, J.A. would dismiss the appeal.

EBERTS, J.A.

Appeal dismissed.

Solicitors for appellants: *Bird, Macdonald & Company.*

Solicitors for respondent: *Macdonald, Macdonald & Prenter.*

COURT OF APPEAL

1923

Oct. 2.

SUFFERN v. McGIVERN.

Negligence—Pedestrian crossing street not at intersection—Run down by motor-car—Excessive speed—By-law prohibiting pedestrians crossing street except at intersection—Damages.

SUFFERN v. McGIVERN

The plaintiff crossed a well-lighted street in the evening in a diagonal direction (not at the intersection) and after passing immediately in front of a moving street-car was struck by a motor-car on the far side going in the same direction as the car at an excessive speed. It was held on the trial that the plaintiff was entitled to recover.

Held, on appeal, MACDONALD, C.J.A. dissenting, that despite the negligence of the plaintiff in crossing the street diagonally in contravention of the by-law the real cause of the accident was due to the excessive speed of the defendant's car and the appeal should be dismissed.

APPEAL by defendant from the decision of GRANT, Co. J., of the 5th of February, 1923, in an action for damages for injuries sustained by the plaintiff in being run down by the defendant's motor-car. On the evening of the 25th of October, 1922, at about 6.30 p.m., when it was raining and the pavement was slippery, but the street was well lighted, the plaintiff had purchased some bread at the Canadian New Bakery (a store on the east side of Granville Street, 60 yards south of Robson Street) and on coming out intended to go to the Globe Theatre on the opposite side of the street about 60 yards further south. She started across the street in a diagonal direction southwesterly towards the Globe Theatre. A street-car was going south on the west track and she hurried to get across in front of it. The defendant's car was going south level with the street-car on its west side. The plaintiff got past in front of the street-car and she then saw the defendant's motor-car. The motor-car turned west towards the curb to avoid her and would probably have done so (leaving sufficient space between the street-car and the motor-car for her to stand in) but she, after hesitating momentarily, rushed for the curb on the west side, and the left side of the defendant's motor-car striking her she sustained injuries. The learned trial judge found the defendant guilty of negligence and assessed the damages at $600.

Statement

The appeal was argued at Victoria on the 7th of June, 1923, before MACDONALD, C.J.A., MARTIN, GALLIHER and EBERTS, JJ.A.

R. M. Macdonald, for appellant: Where there is want of proper care on one side as much as the other the action fails: see *Cotton* v. *Wood* (1860), 8 C.B. (N.S.) 568; *Todesco* v. *Maas* (1915), 8 Alta. L.R. 187. There is a city by-law prohibiting the crossing of roads except at the crossings. This amounts to contributory negligence. As to the duty of a foot passenger to use due care see *Williams* v. *Richards* (1852), 3 Car. & K. 81; *Skidmore* v. *B.C. Electric Ry. Co.* (1922), 31 B.C. 282; *Milligan* v. *B.C. Electric Ry. Co.* (1923), 32 B.C. 161; *Grand Trunk Pacific Ry. Co.* v. *Earl* (1923), S.C.R. 397.

Argument

Wismer, for respondent: As to the statutory negligence on the part of the plaintiff see *Warburton* v. *Cooper* (1920), 46 O.L.R. 565. It is the duty of a driver to take precautions before running into a difficult situation: see *Connelly* v. *Fern* (1923), 1 W.W.R. 69. As to the case of *Grand Trunk Pacific Ry. Co.* v. *Earl* (1923), S.C.R. 397, see the judgment of Anglin, J. at p. 403.

Macdonald, in reply.

Cur. adv. vult.

2nd October, 1923.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: There is a by-law of the City of Vancouver prohibiting pedestrians from crossing the streets other than at intersections. The learned trial judge appears to have questioned the applicability of the by-law to pedestrians, but that was not urged by counsel on the appeal, so that the case comes to this: that the plaintiff was, contrary to law, crossing the street in the middle of a block and while so doing was injured by the defendant who was driving his automobile. The learned judge found that neither party could have avoided the occurrence when the danger became apparent, so that we have here a case of negligence on defendant's part so found, and, I think, contributory negligence on the plaintiff's part in disobeying the by-law and putting herself in a position of danger, which the by-law was intended to prohibit. In these

COURT OF APPEAL

1923

Oct. 2.

SUFFERN v. MCGIVERN

circumstances I think neither party can recover damages from the other.

The learned judge applied the decision of the Privy Council in *British Columbia Electric Railway Company, Limited* v. *Loach* (1916), 1 A.C. 719, to the facts, and gave judgment for the plaintiff. In this, I think, he was in error. We have not adopted the rule of comparative negligence as they have it in some of the States of the United States. It may be a good rule, but the *Loach* case does not recognize it. The plaintiff was *prima facie* guilty of negligence in crossing in defiance of the by-law. It was argued that this was not the real cause of her injury, but I think it was. The by-law was passed for the very purpose of preventing accidents of the kind, and to hold that she was not guilty of negligence in crossing in the face of it would be to practically nullify the by-law. The defendant was passing a street-car; he had no reason to anticipate that a pedestrian would be crossing at that point; he could not see her because of the street-car; he accelerated his speed very considerably for the purpose of getting past and was thereby guilty of travelling at an excessive and negligent rate of speed, but the plaintiff brought her injury upon herself by being where she had no right to be.

MACDONALD, C.J.A.

I am quite conscious of the disabilities under which pedestrians labour on our streets. A person driving a powerful and destructive engine has a decided advantage over the pedestrian. In practice it makes little difference whether the pedestrian crosses the street at an intersection or in the middle of a block. It is for the pedestrian to get out of the way if he can, and if he can and does not, no matter how negligent the driver of the car may be, the pedestrian cannot recover damages because of his own contributory negligence. The doctrine of contributory negligence is a bulwark of defence to the driver who recognizes the rights of none, except those who drive a more powerful machine than his, but Courts must interpret the laws as they find them, and therefore in this case I am driven to allow the appeal.

MARTIN, J.A.

MARTIN, J.A.: It was open for the learned judge below, in my opinion, to take the view, upon all the facts before him,

that he did take, *viz.*, that even despite the negligence of the plaintiff in crossing the street diagonally in contravention of the by-law (and assuming that act to be negligence) yet the "real cause of the accident" was due to the excessive speed of the defendant's car (see *Winch* v. *Bowell,* 31 B.C. 186; (1922), 2 W.W.R. 1031), and therefore the appeal should be dismissed.

GALLIHER, J.A.: This is one of those cases where I always feel diffident about reversing the findings of fact of the learned judge below.

The learned judge has found that the car was travelling fast just prior to the accident. He uses the words: "then rapidly approaching," and again, "owing to the great speed of defendant's auto." He must have accepted the evidence of the witness Wood, who says the car was travelling at the rate of 25 to 30 miles per hour. There is also the fact as to the distance the car ran before the impact took place after the defendant saw the plaintiff. Undoubtedly on that night, if the car was running at the speed Wood says it was, the defendant was driving to the danger of the public at a place where there was so much traffic. While it is always dangerous to cross elsewhere than at intersections, I agree with the learned judge that that does not excuse the negligence of the defendant, and in the end it really comes down to this: that it was the negligent driving of the defendant under the conditions prevailing on that night that was the real cause of the accident, and not the failure of the plaintiff to observe clause 16 of the by-law.

GALLIHER, J.A.

I would dismiss the appeal, although I have some doubt as to the rate of speed, but do not think I would be justified in setting aside the learned judge's finding on that.

EBERTS, J.A. would dismiss the appeal.

EBERTS, J.A.

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

Solicitor for appellant: *H. I. Bird.*
Solicitor for respondent: *G. S. Wismer.*

COURT OF APPEAL

1923

Oct. 2.

MURIEL EDNA FRASER AND EVELYN GLADYS HENDERSON v. THE MONTREAL TRUST COMPANY AND COLIN MACPHERSON HENDERSON.

FRASER v. MONTREAL TRUST CO.

Will—Legacies by will and by codicil—Legacies by will expressly free from succession duties—Succession duty on legacies in codicil—Construction as to payment.

A testator by his will gave one niece $20,000 and to another $10,000 and directed his trustees "to pay all succession duty or other taxes due under this my will out of my said estate my intention being that the legacies hereunder bequeathed are to be free from all succession or other duties." By codicil he ratified and confirmed the will "in every respect save in so far as any part is inconsistent with this codicil," and bequeathed to each of the said nieces $25,000. In former proceedings it had been held that the legacies were cumulative (31 B.C. 321). On the question of whether the legacies under the codicil were free of succession duty:—

Held, on appeal, affirming the decision of HUNTER, C.J.B.C., that said legacies were not to be paid free of succession duty.

Per MACDONALD, C.J.A.: Where there is a direction that legacies generally shall be paid free of duty, subsequent legacies given by a codicil will take the like benefit but the words "legacies hereunder bequeathed" indicated an intention that the legacies to be paid free of duty were confined to those bequeathed by the particular instrument, and there was nothing in the codicil that indicated an intention that the additional legacies should also be free of succession duty.

Statement

APPEAL by Muriel E. Fraser and Evelyn G. Henderson, legatees, from the decision of HUNTER, C.J.B.C., of the 21st of March, 1923, on the application of the Montreal Trust Company, executor and trustee of the last will, and codicil of Joseph Newlands Henderson, deceased, for the determination of "whether the legacies in the codicil should be paid free of succession duty, or other taxes, or duties," this question having, by order of the Court of Appeal of the 23rd of March, 1923, been referred back to the Chief Justice of British Columbia, who held that all succession duty or other taxes, or duties, payable in respect of the legacies bequeathed by the codicil are to be paid by the legatees under said codicil and not by the trustee out of the estate. On the petition of the

Montreal Trust Company on the 17th of January, 1922, it was held by HUNTER, C.J.B.C. that the legacies to the appellants in the said codicil were in substitution of their legacies in the will. On appeal it was held by the Court of Appeal that the legacies were cumulative (affirmed by the Supreme Court of Canada (1923), S.C.R. 23) and the question as above stated was referred back to the learned Chief Justice (see 31 B.C. 321).

Statement

The appeal was argued at Victoria on the 8th of June, 1923, before MACDONALD, C.J.A., MARTIN, GALLIHER and EBERTS, JJ.A.

O'Brian, for appellants: There is a general direction in the will to pay all legacies free from all succession or other duties, and we say such general direction included the legacies given by the codicil and that there is nothing disclosed in the will or codicil expressing a contrary intention. That it includes the codicil see Theobald on Wills, 7th Ed., 194. When the word "herein" is used it includes both: see *Jauncey* v. *The Attorney-General* (1861), 3 Giff. 308; *Re Sealy; Tomkins* v. *Tucker* (1901), 85 L.T. 451; *Byne* v. *Currey* (1834), 2 C. & M. 603; *Williams* v. *Hughes* (1857), 24 Beav. 474. As to the word "all" in "to pay all my succession duties" see *Re Shepherd. Mitchell* v. *Loram* (1914), 58 Sol. Jo. 304. As to words indicating that trustees are to pay duties out of the estate see *In re Champion. Dudley* v. *Champion* (1893), 1 Ch. 101 at p. 109; *In re Fraser. Lowther* v. *Fraser* (1904), 1 Ch. 726 at p. 734.

Argument

Gibson, for respondent C. M. Henderson: The general direction to pay duty is confined to the bequests in the will: see Theobald on Wills, 7th Ed., 196-7; *Early* v. *Benbow* (1846), 2 Coll. C.C. 342 at p. 354; Jarman on Wills, 6th Ed., 1132; *Re Miles* (1907), 14 O.L.R. 241; *Adams* v. *Gourlay* (1912), 26 O.L.R. 87. Although the codicil may confirm the will they are not necesarily read as the same document: see *Fuller* v. *Hooper* (1750), 2 Ves. Sen. 242; *Stilwell* v. *Mellersh* (1851), 20 L.J., Ch. 356 at p. 361; *Re Donald. Moore* v. *Somerset* (1909), 53 Sol. Jo. 673. On the question of republication see Jarman on Wills, 6th Ed., 200; *In re Park. Bott* v. *Chester*

COURT OF APPEAL

1923

Oct. 2.

FRASER v. MONTREAL TRUST CO.

(1910), 2 Ch. 322 at p. 327; *Johnstone* v. *The Earl of Harrowby* (1859), 1 De G.F. & J. 183.

O'Brian, in reply, referred to *In re Joseph. Pain* v. *Joseph* (1908), 2 Ch. 507 at p. 512.

Cur. adv. vult.

2nd October, 1923.

MACDONALD, C.J.A.: The testator having by his will given legacies, amongst others, to the appellants, and having directed his trustees "to pay all succession duty or other taxes due under this my will out of my said estate, my intention being that the legacies hereunder bequeathed are to be free from all succession or other duties," made a codicil by which he bequeathed an additional legacy of $25,000 to each of the appellants.

The Courts have held that these legacies were intended to be cumulative and not substitutional. The question now is, are these additional legacies to be paid free of succession duty? the codicil being silent on that question.

It seems to be well settled that when there is a direction that legacies generally shall be paid free of duty, subsequent legacies given by a codicil will take the like benefit, but that where in the will there are such expressions as "the legacies herein given shall be free of duty," or "shall be charged upon land," or payable out of particular fund, as the case may be, and thereafter additional legacies are given, these latter are not to be paid free of duty, or charged on land or payable out of the particular fund unless there is a clear indication of an intention to make them so.

MACDONALD, C.J.A.

It will be noted that the testator has given a definition of his meaning when he said that it was the "legacies hereunder bequeathed" that should be free of succession duty. If the first part of the direction had stood alone without the particular reference to his intention, I think it could be regarded as a declaration that all his legacies generally should be free of duty, but the latter part is the one which governs, and that, to my mind, clearly indicates what his intention was, and that it was confined to the legacies bequeathed by the particular instrument. "Hereunder" is just as indicative of that inten-

tion as the words "herein" and "thereby," and other similar expressions used in the cases to which we were referred, and which were held to indicate an intention to confine the benefit to the particular legacies mentioned in the instrument itself. *Bonner* v. *Bonner* (1807), 13 Ves. 378; *Early* v. *Benbow* (1846), 2 Coll. C.C. 342; *Henwood* v. *Overend* (1815), 1 Mer. 23 at p. 26; *Re Miles* (1907), 14 O.L.R. 241, and *Gillooly* v. *Plunkett* (1882), 9 L.R. Ir. 324.

The next question is as to whether there is anything in the codicil indicating an intention that the additional legacies should also be free of succession duty. The only thing that has been suggested, and, I think, the only thing that could be suggested, in the codicil bearing on the testator's intention, is the first clause thereof, which reads as follows:

"I hereby ratify and confirm the said will in every respect save in so far as any part is inconsistent with this codicil."

That clause has been commented upon by the judges of this Court in an appeal wherein it was contended that the additional legacies aforesaid were substitutional and not cumulative. The Court reversed the decision of the trial judge, who held that they were substitutional, and on appeal to the Supreme Court of Canada, that Court was equally divided upon the question. The principal argument in these appeals was directed to the clause above referred to, which, it was submitted, indicated an intention to make these legacies substitutional and not cumulative. As the Courts were unable to find in this clause any intention expressed, either one way or the other, on the question there litigated, I do not see that it can be relied upon in this appeal to rebut the rule which appears to be clearly enough established, that *prima facie* the giving of the additional legacies by codicil do not import that the testator intended such directions as are contained in the will with respect to succession duty to apply to them.

MACDONALD, C.J.A.

The Court, I think, should not be astute to attribute to a testator an intention to give more than he has by clear intention given. When the testator came to consider what additional gifts he would make to these two nieces, he must be presumed to have known just what he intended them to have. Did he intend them to have additional legacies of $25,000 each, or

COURT OF APPEAL

1923

Oct. 2.

FRASER v. MONTREAL TRUST CO.

$27,500 each? The gift of freedom from succession duty was, if given, a specific legacy of $2,500 to each niece. Before taking from one class of legatee for the benefit of another class, one should be quite satisfied that that is what was intended.

I would dismiss the appeal.

MARTIN, J.A.: On this question of much nicety I share the difficulty expressed by the Master of the Rolls, Sir John Romilly, in *Williams* v. *Hughes* (1857), 24 Beav. 474, where he said, p. 481:

"It seems to me difficult to reconcile all the cases on this subject, otherwise than by saying, that it is always a question of intention, to be discovered from the will itself, and that which is evidence of such intention in one will is not so in another, unless the circumstances are identically the same."

After a careful consideration of the authorities I have come to the conclusion that I cannot "discover an intention" (p. 482), to take the codicils out of the ordinary rule that I find laid down in *Early* v. *Benbow* (1846), 2 Coll. C.C. 342 at p. 355, where Vice-Chancellor Knight Bruce held in a case almost identical with this, where the expression was "herein given":

"I cannot in this case hold that the word 'herein' was meant to refer to more than the particular instrument in which it is contained."

MARTIN, J.A.

In this case the expression is "hereunder bequeathed," which I regard as the same thing.

I am somewhat fortified in this view by the following observation of Lord Justice Fletcher Moulton in *In re Boden* (1907), 1 Ch. 132 at p. 150, though they are largely *obiter dicta*:

"If the testator directs that the legacies in the body of his will shall be free of legacy duty and then at some later date adds a codicil which gives a series of pecuniary legacies *simpliciter*, without any provision as to the payment of legacy duty, there is in my opinion no presumption that if one of the beneficiaries under the codicil happens to be a beneficiary also under the will his legacy is to be paid free of legacy duty while the others are not."

Though the matter is not free from doubt, yet I feel, despite Mr. *O'Brian's* strong presentation of his case, that it would be safer not to disturb the judgment, though we have not the benefit of any reasons given by the learned judge below in support of it.

GALLIHER, J.A.

GALLIHER, J.A.: On May 16th, 1919, Joseph Newlands

Henderson made his will, by which he bequeathed to his niece Muriel Edna Henderson, wife of Donald G. Munro Fraser, the sum of $20,000, and to his niece Evelyn G. Henderson, the sum of $10,000. Subsequently, by codicil dated the 15th of January, 1920, he bequeathed to each of his said nieces the sum of $25,000, at the same time ratifying and confirming "the said will in every respect, save in so far as any part is inconsistent with this codicil."

It was held by this Court, composed of MACDONALD, C.J.A., MARTIN and MCPHILLIPS, JJ.A., reversing HUNTER, C.J.B.C., that the bequests in the codicil were in addition to the bequests in the will, and this judgment was sustained on appeal to the Supreme Court of Canada upon an equal division, so that for the purpose of considering the matter now before us, these must be taken as additional bequests of specific sums to the same legatees mentioned in the will as originally drawn. That will contained the following clause:

"And I direct my trustees to pay all succession duty or other taxes due under this my will out of my said estate, my intention being that the legacies hereunder bequeathed are to be free from all succession or other duties."

The short question that we have to determine is: Do the legatees receive the legacies bequeathed under the codicil free from duty? HUNTER, C.J.B.C., held they did not and from his judgment this appeal is taken. Nothing was said in the codicil as to this.

GALLIHER, J.A.

In *In re Joseph*: *Pain* v. *Joseph* (1908), 2 Ch. 507 at p. 510, Cozens-Hardy, M.R. says:

"On general principles it cannot be doubted that in a simple case of a substituted legacy, the substituted legacy is subject to the same conditions and incidents as the original legacy was subject to; but, so far as I am aware, that doctrine has never been applied, except to a case of a substituted legacy. I am not aware that it has ever been applied to a case where the beneficiaries in a codicil are not identical with the beneficiaries in the will."

And Farwell, L.J., at p. 512:

"Where the amount of the legacy to a legatee has been altered, added to, or diminished by a codicil, and the substituted amount is given to the same person in lieu of or in *addition to the original legacy*, the bequest made by the codicil is subject to the same conditions and incidents as the original legacy in the hands of the original legatee."

COURT OF APPEAL

1923

Oct. 2.

FRASER v. MONTREAL TRUST CO.

Farwell, L.J., seems to have gone farther than Cozens-Hardy, M.R., in the use of the words I have italicized.

It seems to me, however, that we cannot escape from the decision in *Bonner* v. *Bonner* (1807), 13 Ves. 378, which was followed in *Henwood* v. *Overend* (1815), 1 Mer. 23 at p. 26.

In *Early* v. *Benbow* (1846), 2 Coll. C.C. 342, the Vice-Chancellor held that where in the will the testator used the words "legacies by me herein given" and in the codicil bequeathing additional legacies but without direction as to legacy duty, the word "herein" was meant to refer only to the particular instrument in which it was contained.

The *ratio decidendi* of the decision in *Byne* v. *Currey* (1834), 2 C. & M. 603, seems to be that the direction there was general to pay all legacies free of duty. Here, of course, we have in the instrument itself the words "legacies hereunder bequeathed," and I cannot see that these words are less restrictive than the words "hereby and hereinafter bequeathed" in *Bonner* v. *Bonner, supra,* and the words "by this my will," in *Henwood* v. *Overend, supra* (see also *Re Miles* (1907), 14 O.L.R. 241, and *Adams* v. *Gourlay* (1912), 26 O.L.R. 87).

GALLIHER, J.A.

Though I must admit that the expressions used in some of the cases cited cause me some confusion of thought, I am, on the whole, of the view that the learned Chief Justice below came to the right conclusion, and would dismiss the appeal.

EBERTS, J.A.

EBERTS, J.A. would dismiss the appeal.

Appeal dismissed.

Solicitors for appellants: *O'Brian & McLorg.*

Solicitors for respondents Montreal Trust Co.: *McKay, Orr & Vaughan.*

Solicitors for respondent C. M. Henderson: *Reid, Wallbridge, Douglas & Gibson.*

REX v. SOMERS.

HUNTER, C.J.B.C.

1923

May 17.

COURT OF APPEAL

Oct. 2.

REX v. SOMERS

Criminal law—Intoxicating liquors—Conviction for unlawful selling—Form of warrant of commitment—Omission of names of persons to whom liquor was sold, also statute under which accused was convicted—Validity—B.C. Stats. 1915, Cap. 59; 1921, Cap. 30.

The warrant of commitment in a prosecution under the Summary Convictions Act to enforce a penalty for breach of the Government Liquor Act declared that accused was convicted for that he at a certain time and place "unlawfully did sell intoxicating liquor, to wit: two bottles of 'Perfection' Whisky," the names of the persons to whom the whisky was sold and the statute under which the accused was convicted having been omitted from the warrant.

Held, on appeal, reversing the decision of HUNTER, C.J.B.C., that the omissions above quoted did not invalidate the warrant of commitment and the conviction should be restored.

Per MACDONALD, C.J.A.: Had the word "unlawfully" been omitted the conviction could not stand in the absence of an averment that the sale was contrary to the provisions of the Act.

APPEAL from the order of HUNTER, C.J.B.C., of the 16th of May, 1923, whereby he ordered that the warrant of commitment under which the accused was held at Oakalla Prison Farm and signed by the police magistrate for the district of Burnaby be quashed and the accused be released from custody. Accused was convicted of selling two bottles of Scotch whisky and was sentenced to six months' imprisonment at Oakalla Prison Farm on the 25th of November, 1922. On return of the motion for writ of *habeas corpus* it was agreed by counsel that the application should proceed on the basis as if *habeas corpus* had been issued and a return made of the warrant of commitment on terms disclosed in the material filed and the prisoner brought into Court thereon; also that the Crown had applied to bring up the conviction and other proceedings in *certiorari*. After the motion was argued, and an adjournment had, on the adjourned hearing counsel for the Crown brought in a new warrant of commitment, but after argument its admission was refused, but was allowed to remain on the records so as to be available on appeal. The grounds taken on the motion were

Statement

HUNTER, C.J.B.C.

1923

May 17.

that the warrant of commitment herein under which the accused is held in custody discloses no offence to have been committed by him and that it does not disclose that the accused violated any statute or law on which he could be justly imprisoned.

COURT OF APPEAL

Oct. 2.

Wismer, for accused.
Wood, for the Crown.

17th May, 1923.

REX v. SOMERS

HUNTER, C.J.B.C.: I adhere to the view I expressed in *Rex* v. *Jones* (1923), 32 B.C. 160. The conviction and warrant of commitment ought to be drawn up so as to clearly identify the offence. It is not an offence at common law to sell intoxicating liquor, but the statute creates a number of offences which involve the illegal sale of liquor and all of which are penalized with imprisonment with hard labour.

It is therefore only justice to the accused to state clearly what the offence is of which he is convicted, if for no other reason in order that he may not be in jeopardy of being prosecuted again for the same offence. This is one of the fundamental principles of all British punitory laws, and I am not persuaded that the Legislature intended to abolish it, even in the case of bootleggers. Here it would have been a simple matter to state that the accused was found guilty of selling intoxicating liquor contrary to a specified section of the statute on a stated date or to have stated the offence in the terms of the particular section, but in this case there is nothing to identify the offence of which the accused was convicted. The warrant might just as well have stated that he was convicted of being a bootlegger.

HUNTER, C.J.B.C.

But Mr. *Wood* urges that the Court ought to give leave to return an amended warrant under the power conferred by r. 242 of the Crown Office Rules. Ordinarily this would be granted if the Court had the power to examine the proceedings, but the conviction is not before me and cannot be brought before me by reason of section 91(1) of the Government Liquor Act, which provides:

"No conviction or order made in any matter arising under this Act shall be removed by *certiorari* or otherwise, either at the instance of the Crown or any private person, into the Supreme Court."

It would obviously not be right, after the return has been made to the writ and the accused is before the Court, to allow a new warrant to be substituted for an invalid one, when for anything the Court can possibly know, the conviction itself may be invalid. If the conviction is drawn up in the same terms as the warrant, as it probably is, then it would be bad for uncertainty. So that by granting the leave the Court might be betrayed into sanctioning an imprisonment which was not in accordance with law. It is for the prosecuting authorities to take care that things are done according to law, especially when the common law right of the accused to have the proceedings examined by the Supreme Court by way of *certiorari* has been taken away.

There will be the usual protection order.

From this decision the Crown appealed. The appeal was argued at Victoria on the 14th and 15th of June, 1923, before MACDONALD, C.J.A., MARTIN and EBERTS, JJ.A.

Wood, for the Crown: He was convicted of selling liquor contrary to the Government Liquor Act. He was released on the ground that the warrant did not sufficiently describe the offence following the decision in *Rex* v. *Jones* (1923), 32 B.C. 160. There was the further objection that it did not state to whom the liquor was sold. On the question of the necessity of mentioning the statute see *Regina* v. *Strachan* (1869), 20 U.C.C.P. 182 at p. 185; *Rex* v. *Crisp* (1806), 7 East 389; *Rex* v. *Picton* (1802), 2 East 195; *Rex* v. *Chandler* (1700), 1 Ld. Raym. 581. As to the necessity of naming the person to whom the liquor was sold see *Rex* v. *Maliska* (1919), 27 B.C. 111 at p. 112. As to the right to amend the conviction see *Rex* v. *Leahy* (1920), 28 B.C. 151; *Tinson's Case* (1870), 22 L.T. 614; *Ex parte Smith* (1858), 27 L.J., M.C. 186; *Reg.* v. *Taylor* (1895), 4 Que. Q.B. 226; *Reg.* v. *Doyle* (1894), 2 Can. Cr. Cas. 335; *Rex* v. *Morgan* (1901), 5 Can. Cr. Cas. 63. The conviction should not be quashed for want of form. Sections 97, 98 and 102 of the Summary Convictions Act should be read together.

Argument

Wismer, for respondent: The conviction must shew under

HUNTER, C.J.B.C.

1923

May 17.

COURT OF APPEAL

Oct. 2.

REX v. SOMERS

what Act and in what way the man is charged: see *Rex* v. *Maliska* (1919), 27 B.C. 111 at p. 112. He must bring all proceedings before the Court and it has not been properly brought before the Court. It was too late when he made his application: see *Tinson's Case* (1870), 22 L.T. 614. They must shew an offence which is an offence under the Act: see *Fletcher* v. *Calthrop* (1845), 6 Q.B. 880; *Ex parte Daisy Hopkins* (1891), 61 L.J., Q.B. 240; *Smith* v. *Moody* (1903), 1 K.B. 56. There must be reasonable particularity as to the nature of the offence: see Daly's Criminal Procedure, 2nd Ed., 375. He relied on *Regina* v. *Strachan* (1869), 20 U.C.C.P. 182, but see *Regina* v. *Martin* (1838), 8 A. & E. 481; *Rex* v. *Waller* (1921), 1 W.W.R. 1138; *Regina* v. *Somers* (1893), 24 Ont. 244; *Ex parte O'Shaughnessy* (1904), 8 Can. Cr. Cas. 136. As to the necessity of the conviction having the words "contrary to the form of the statute" see 2 Hawk. P.C. 345-6; Archbold on Indictments, p. 39; *Rex* v. *McCormack* (1903), 9 B.C. 497; *Rex* v. *Code* (1908), 7 W.L.R. 814 at p. 817; *Woodlock* v. *Dickey* (1885), 6 C.L.T. 142; Daly's Criminal Procedure, 2nd Ed., 286. The three cases referred to, *Rex* v. *Morgan* (1901), 5 Can. Cr. Cas. 63; *Reg.* v. *Doyle* (1894), 2 Can. Cr. Cas. 335, and *Reg.* v. *Taylor* (1895), 4 Que. Q.B. 226, are all on common law offences. On the criminal law of England applicable in British Columbia see section 11 of the Criminal Code.

Argument

Wood, in reply.

Cur. adv. vult.

2nd October, 1923.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The warrant of commitment was attacked on two grounds: one that the persons to whom the liquor was sold were not named or indicated; and second, that the statute under which the accused was convicted was not named in the warrant.

The accused was convicted of selling liquor unlawfully, no reference being made in the warrant of commitment to the statute.

As to the first ground of attack, it is only necessary to refer

to section 74 of the Government Liquor Act, to find a complete answer to it.

On the second ground, it was argued that the warrant is invalid for not shewing that the conviction was for selling liquor contrary to the Government Liquor Act, or at least for not alleging that it was sold *contra formam statuti*. We were referred to much ancient and modern learning on the question, but it is, in my opinion, of little consequence in this case. The prosecution was not a criminal prosecution in the strict sense of that term, it was a proceeding under the Summary Convictions Act, to enforce a penalty for breach of the Government Liquor Act. The procedure of the Criminal Code is not applicable to the case, though that procedure may in some cases be useful as a guide to the construction of the Provincial statute. The Provincial Act has been held *intra vires* of the Provincial Legislature by the Privy Council, so we must look to that Act and to the Provincial statutes, if any, bearing upon the subject for the test of validity of the warrant of commitment. By neither the Summary Convictions Act, nor the Government Liquor Act is the prosecution required to specify the statute under which the defendant is charged, or convicted. That is to say, no particular form is prescribed, but it is provided that the description of any offence in the words of the Act, or any similar words, shall be sufficient. The warrant of commitment declares that the defendant was convicted for that "he unlawfully did sell intoxicating liquor, to wit: two bottles of 'Perfection' whisky." This is in words similar to those used in section 26 of the Act, and are, in my opinion, sufficient. Had the word "unlawfully" been omitted, I think the conviction could not stand in the absence of an averment that the sale was contrary to the provisions of the Act.

MACDONALD, C.J.A.

The appeal should be allowed, and the order appealed from set aside.

MARTIN, J.A.: This is an appeal from an order for *habeas corpus* discharging the respondent from imprisonment under a conviction—

MARTIN, J.A.

"for that . . . . . [he] on the 6th day of October, A.D., 1922, at Burnaby in the County aforesaid unlawfully did sell intoxicating liquor:

HUNTER, C.J.B.C.

1923

May 17.

COURT OF APPEAL

Oct. 2.

REX v. SOMERS

to wit: two bottles of 'Perfection' whisky at the premises situate at 1130 Eighth Street, Burnaby . . . . . ."

Section 26 of the Government Liquor Act, Cap. 30, 1921, provides that:

"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."

Upon the authorities cited and others, it is, in my opinion, beyond serious question (save in one respect to be noted) that this conviction is valid because it is for the precise offence prohibited by the statute, *i.e.*, the "selling" to any person "of any liquor," with the time, place and nature of the liquor specified, so that no one could reasonably be misled by any uncertainty about the particular transaction upon which the accused was charged. In fact, it gives more particulars than are required by section 62 of the Summary Convictions Act, 1915, Cap. 59, which declares that:

"(1.) No information, complaint, warrant, conviction, or other proceeding under this Act shall be deemed objectionable or insufficient on any of the following grounds, that is to say:

"(*a.*) That it does not contain the name of the person injured, or intended or attempted to be injured; or

"(*b.*) That it does not state who is the owner of any property thereinmentioned; or

"(*c.*) That it does not specify the means by which the offence was committed; or

MARTIN, J.A.

"(*d.*) That it does not name or describe with precision any person or thing.

"(2.) The justice may, if satisfied that it is necessary for a fair trial, order that a particular, further describing such means, person, place, or thing, be furnished by the prosecutor.

"(3.) The description of any offence in the words of the Act or any order, by-law, regulation, or other document creating the offence, or any similar words, shall be sufficient in law."

I quite agree with the explanation of the corresponding English section given in *Smith* v. *Moody* (1902), 67 J.P. 69; (1903), 1 K.B. 56, that this subsection (3) still requires "what is necessary as an ingredient of the offence" (as Wills, J., puts it, p. 61) to be stated, but here the ingredients are all supplied.

The "one respect" in which, at this stage in the rational development of our criminal jurisprudence, even an argument

can, in my opinion (with all respect to other views) be advanced that the conviction does not state that the offence is contrary to the section of the Government Liquor Act under which it is laid, as the learned judge below thought necessary, or that in general, that it was "contrary to the statute in such case made and provided" as the respondent's counsel finally submitted was necessary on a charge laid upon a Provincial statute. No apt authority was cited to support these propositions in the face of subsection (3), *supra,* making the description of the offence in the words of the Act (which this conviction follows) sufficient, and moreover, the form of conviction No. 33, given in the Act (and declared by section 104 to be good, valid and sufficient) conveys, as might be expected, no hint of such a requirement. And in the form given (No. 3) for the laying of the information all that is required is that the complainant should "state the offence," nothing about any allegation that it is contrary to the statute, because that now is a useless and formal averment, seeing that the whole proceedings are based upon the assumption that the statute has been contravened. That very able judge, Mr. Justice Buller, in *Rex* v. *Green*, cited in Paley on Convictions, 8th Ed., 200 (from a report not in our library), says, as to the requirements of summary convictions:

"The Court, in considering convictions, is always strict in two or three points: first, that a jurisdiction is shewn by a person convicting; secondly, that the party has been summoned; thirdly, that the case is duly made out in evidence: but the Court has not been strict in the technical words of them; and I know of no case, which says that summary convictions shall be drawn in any precise form."

MARTIN, J.A.

This view, in substance, was taken by the Court of Common Pleas, in Term, in Ontario in *Regina* v. *Strachan* (1869), 20 U.C.C.P. 182, where the Court was unanimously of the opinion that it was no sound objection to a conviction for selling liquor without licence, contrary to the Provincial Act, that it was "not shewn under what statute or law he was convicted" (p. 183), Hagarty, C.J., holding, p. 185:

"The second [objection] is also unfounded: it cannot be necessary to name any statute."

Mr. Justice Gwynne said, p. 191 (Galt, J. concurring):

"I entirely concur in the judgment of the Chief Justice, that we cannot, for any of the objections taken, quash this conviction."

HUNTER, C.J.B.C.

1923

May 17.

COURT OF APPEAL

Oct. 2.

REX v. SOMERS

MARTIN, J.A.

That decision of able judges of our own country has not been questioned for over 50 years, and we ought, I think, to follow it, because it is based upon sound law and good reason (if I may say so), and it exactly covers the point, and as there is every reason why we should not be more technical in 1923 in criminal procedure in this Province than were the Courts of Ontario in 1869, I am disposed to allow this appeal and restore the conviction.

I need only add that I think the learned judge, MACDONALD, J., in the case of *Rex* v. *Maliska* (1919), 27 B.C. 111, cited for the Crown, took the correct view of the validity of the conviction therein.

EBERTS, J.A.

EBERTS, J.A. would allow the appeal.

Appeal allowed.

Solicitors for appellant: *Lane, Wood & Company.*
Solicitor for respondent: *Gordon Wismer.*

APPENDIX.

Case reported in this volume appealed to the Supreme Court of Canada:

LINNELL v. REID *et al.* (p. 87).—Affirmed by Supreme Court of Canada, 15th June, 1923. See (1923), S.C.R. 594; (1923), 3 W.W.R. 422; (1923), 3 D.L.R. 966.

Case reported in 31 B.C. and since the issue of that volume appealed to the Judicial Committee of the Privy Council:

CLAUSEN *et al.* v. CANADA TIMBER AND LANDS LIMITED AND NORTON (p. 401).—Reversed by the Judicial Committee of the Privy Council, 18th October, 1923. See (1923), 3 W.W.R. 1072.

Case reported in 30 B.C. and since the issue of that volume appealed to the Judicial Committee of the Privy Council:

THE KING v. THE UNITED STATES FIDELITY & GUARANTY COMPANY AND QUAGLIOTTI (p. 440).—Decision of the Supreme Court of Canada, affirming the decision of the Court of Appeal, affirmed by the Judicial Committee of the Privy Council, 27th June, 1923. See (1923), A.C. 808; (1923), 3 W.W.R. 295; (1923), 3 D.L.R. 701.

Case reported in 29 B.C. and since the issue of that volume appealed to the Judicial Committee of the Privy Council:

JAPANESE TREATY ACT, 1913, *In re* THE (p. 136).—Decision of the Supreme Court of Canada, affirming the decision of the Court of Appeal, affirmed by the Judicial Committee of the Privy Council, 18th October, 1923. See 68 Sol. Jo. 79; 40 T.L.R. 7; (1923), W.N. 268; (1923), 3 W.W.R. 945.

INDEX.

8.——*Conviction—Defence of alibi—Evidence of accused—Direction to jury—That defence of alibi should be "supported by independent evidence" — Misdirection — Charge viewed as a whole—Criminal Code, Secs. 445, 446 (c), 1015 and 1019.*] The defendant, with two others, was convicted of holding up the employees and robbing a bank premises during banking hours of $2,091. While the other two men entered the bank the defendant was presumed to have been holding his automobile in waiting. There was very slim evidence as to the identity of the defendant or of the car and on the trial he endeavoured to prove an *alibi* on his own evidence. On appeal objection was taken to the judge's charge that on the defence of an *alibi* the accused's evidence must be supported by independent evidence. *Held,* affirming the decision of MACDONALD, J. (MCPHILLIPS, J.A. dissenting), that on the question of misdirection the Court must look at the charge to the jury as a whole and with regard to the circumstances under consideration, and where a trial judge has made use of expressions which it might be supposed would, if taken alone, lead the jury to believe that the evidence of the accused himself is not sufficient to prove an *alibi* unless it is corroborated, but a perusal of the whole charge shews that the alleged error is at the worst merely technical, and that no substantial wrong has been done to the accused, a new trial should be refused. *Per* MACDONALD, C.J.A.: If the Court of Appeal is satisfied from a perusal of the evidence that the accused is guilty, a new trial should not be ordered because of alleged errors in the trial judge's charge to the jury, if such errors do not seriously prejudice the accused. The Court has a duty to society as well as to the accused, and it should not shrink from exercising the powers given by section 1019 of the Criminal Code but sustain the conviction. *Per* MACDONALD, C.J.A.: Evidence given by an accused purporting to shew that he has an *alibi* is merely evidence of innocence. It is a misnomer to call it evidence of an *alibi*. A true *alibi* is proved by evidence of other persons as to accused's whereabouts at the time of the crime or by circumstances tending in the same direction. *Per* MARTIN, J.A.: There may be circumstances where the evidence of an accused person alone should satisfy a jury as to the truth of his *alibi*, because there is no reason why that defence should not be established in the same way as any other now that an accused may testify on his own behalf. *Per* GALLIHER, J.A.: A jury may believe the evidence of the accused himself and refuse to convict even if there is no corroborative evidence of the *alibi* but in such a case the term *alibi* is not a proper one to apply. REX v. MILLER. - - - - - - - **298**

9.——*Convictions for common assault—"Loss of time" in and about prosecution and conviction—Allowance by judge for—Criminal Code, Sec. 1044, Subsec. 2—Interpretation.*] "Loss of time" for which an allowance may be made under section 1044, subsection 2, of the Criminal Code is only in connection with costs and expenses incurred in and about the prosecution and conviction, and is not intended to cover compensation for loss of time through being incapacitated for work (MCPHILLIPS, J.A. dissenting). REX v. MERE SINGH *et al.* - - - - - - - - - - - - **184**

10.——*Gaming-house — Shop — Games carried on in room behind—Presumption—Criminal Code, Secs. 226, 228, 641 and 986.*] Where the keeper of a shop permits persons to play at games of chance or mixed games of chance and skill in a room behind his shop, although no proof of gain is submitted, it will be presumed that he allows games to be played in the hope of "gain" in his business and his premises is a "common gaming-house." REX v. LOUIE FONG *et al.* - - - - - - - - - **238**

11.——*Indictment — Two counts — Rape and seduction—Found guilty on both—Inconsistent finding—New trial.*] The accused were tried under an indictment containing two counts, one of rape and the other of seduction, and both counts related to the same act alleged. The jury found them guilty on both and they were sentenced on the lesser of the two counts. On appeal by way of case stated:—*Held,* reversing the decision of MCDONALD, J. (MARTIN, J.A. dissenting), that the accused being found guilty under both counts was an inconsistent finding by the jury resulting in a substantial wrong and there should be a new trial. *Per* MACDONALD, C.J.A.: That the two counts were properly submitted but the learned judge should have instructed the jury that if they found the accused guilty on the one count they would not do so on the other. *Per* MCPHILLIPS, J.A.: Under the circumstances of this case the two counts were improperly presented to the jury, it was the duty of Crown counsel to elect which count should be presented, it was error to present both. REX v. ZAMBAPYS AND MCKAY. - - - - - - **510**

12.——*Intoxicating liquors—Beer—Conviction for sale of under section 46 of Act—*

Penalty under section 7 of 1922 amendment —Application—B.C. Stats. 1921, Cap. 30, Sec. 46; 1922, Cap. 45, Sec. 7.] The sale of "liquor" is prohibited by section 26 of the Government Liquor Act (except as therein provided) and the definition of "liquor" in section 2 thereof is such as would ordinarily include "beer." Section 46, however, prohibits (except by a Government vendor) the sale of "any liquid known or described as beer or near-beer or by any name whatever commonly used to describe malt or brewed liquor." Section 62 imposes a penalty for the violation of section 26 and section 63 imposes a less severe penalty for "an offence against this Act for which no penalty has been specifically provided." In *Rex* v. *Caskie* (1922), 31 B.C. 368 (decided before the 1922 amendment to section 46) it was *held* that when the charge is for selling beer the offence must be treated as one under section 46 and the penalty imposed should be under section 63 and not under section 62. By section 7 of the 1922 amendment to the Government Liquor Act, section 46 aforesaid was amended by adding a subsection imposing a further penalty: "Where any person is convicted of an offence against this Act in respect of any violation of this section arising out of the selling . . . . any liquid which is liquor within the meaning of this Act":—*Held*, MARTIN and MCPHILLIPS, JJ.A. dissenting, that notwithstanding that the said amendment to section 46 was not happily worded, the new penalty provided thereby was effectively made applicable to the sale of beer or near-beer in violation of section 46. *Rex* v. *Caskie* (1922), 31 B.C. 368 discussed. REX *ex rel.* REILLY v. SMITH. - - **241**

13.——*Intoxicating liquors — Conviction for unlawful selling—Form of warrant of commitment—Omission of names of persons to whom liquor was sold, also statute under which accused was convicted — Validity — B.C. Stats. 1915, Cap. 59; 1921, Cap. 30.*] The warrant of commitment in a prosecution under the Summary Convictions Act to enforce a penalty for breach of the Government Liquor Act declared that accused was convicted for that he at a certain time and place "unlawfully did sell intoxicating liquor, to wit: two bottles of 'Perfection' Whisky," the names of the persons to whom the whisky was sold and the statute under which the accused was convicted having been omitted from the warrant. *Held*, on appeal, reversing the decision of HUNTER, C.J.B.C., that the omissions above quoted did not invalidate the warrant of commitment and the conviction should be restored. *Per*

MACDONALD, C.J.A.: Had the word "unlawfully" been omitted the conviction could not stand in the absence of an averment that the sale was contrary to the provisions of the Act. REX v. SOMERS. - - - **553**

14.——*Keeping common gaming-house—Shooting-machine — Mixed game of chance and skill — Criminal Code, Sec. 226.*] Accused operated a machine known as a "straight aim machine" in a poolroom. A revolver was mounted on a curved traveller and about 30 inches beyond were five diamond-shaped targets. The mouth of the revolver contained a slot into which the player inserted a ten-cent piece. The player pulled the trigger and endeavoured to shoot the ten-cent piece into one of the diamond-shaped receptacles. If he succeeded it released a number of dimes contained in a cup beneath, which he received. If he missed, the dime would either fall into one of the cups or to the bottom of the machine, in which latter event it would belong to the owner of the machine. *Held*, there was no evidence to warrant the Court in finding that the element of "chance" was present in the shooting of this revolver at a mark when in the hands of an expert. It is substantially target-shooting which is not "a mixed game of chance and skill." The accused should be discharged. REX v. GEFFLER. - - - - - - - - - **423**

15.——*Sale of intoxicating liquor—Warrant of commitment—Insufficient statement of offence—Habeas corpus—B.C. Stats. 1921, Cap. 30, Sec. 20.*] A warrant of commitment made on a conviction for an infraction of section 20 of the Government Liquor Act is bad if it does not shew on its face that the Act has been violated. A motion by the Crown to amend the warrant of commitment was refused in view of it having already been twice amended. REX v. JONES. - - - - - - - - - **160**

16.——*Murder—Charge to jury—Failure to present evidence as given in defence—New trial—Criminal Code, Sec. 1019.*] On a trial for the murder of a police officer who was shot, evidence was submitted by the defence that accused did not intend to shoot his gun. The judge charged the jury and accused's counsel then objected to its sufficiency and asked the judge to tell the jury that "If the jury believes his (the accused's) evidence that he did not point his gun at McBeath or did not point it at Quirk and he had no intent—no intention of shooting anybody and in the scuffle the gun was discharged and McBeath was unfortunately

killed, then he (the accused) is not guilty of the crime with which he is charged." The judge refused to so charge. On appeal by way of case stated:—*Held*, reversing the decision of MACDONALD, J. (MACDONALD, C.J.A. and GALLIHER, J.A. dissenting), that the charge did not present the defence fully to the jury as the facts deposed to on behalf of the accused were, if believed, open to the inference that the shots had been fired in the scuffle by misadventure in some unexplained way by one of the participants therein, and such being the case the whole aspect of the occurrence constituting, if true, a good defence to the charge of murder, should have been presented to the jury and there should therefore be a new trial. *Per* MACDONALD, C.J.A. and GALLIHER, J.A.: That in view of the law of homicide, the onus of proof and the statement of facts on which the question of law was submitted, the direction desired by counsel for accused would have been misdirection, and even if the jury had believed the facts as stated by counsel for accused, they could not properly acquit of the charge of murder; they would have to go further and ascertain the character of the scuffle, which was left unascertained by the statement of facts; and further the instruction asked for was only partially supported by accused's evidence. REX v. DEAL. - - - - - **279**

17.——*Receiving stolen goods—Evidence—Proof of theft and of knowledge that goods sold were those stolen—Admissibility of—Evidence of accomplice—Corroboration—Criminal Code, Sec. 400.*] The accused was convicted of having received stolen goods knowing them to have been stolen. Evidence of two men was submitted that they had on separate occasions received sable and fox skins from longshoremen at the dock where the ship "Alabama Maru" was moored and through a third party had sold them to the accused. The evidence of the officers of the ship was that at Vancouver they discovered that two boxes of furs had been broken open and the contents stolen. The shipping order given the officers when the boxes of furs were shipped at Yokohama was accepted as evidence of the contents of the boxes. On appeal by way of case stated:—*Held*, reversing the decision of CAYLEY, Co. J. (MARTIN and GALLIHER, JJ.A. dissenting), that it is incumbent upon the Crown to prove that the goods received by the accused were in fact stolen, and in the absence of such proof the conviction is bad even where the accused actually believed that he was receiving goods which had been stolen. *Held*, further, that although shipping orders are

admissible in evidence as between a person shipping goods and the owners of the vessel to prove the contents of the boxes in which the goods were alleged to have been placed, such orders are not admissible for that purpose in criminal proceedings for receiving stolen goods, and where with this evidence excluded there is no evidence of theft a conviction in such proceedings is bad. *Held*, further, that the Crown must prove that the cases contained the goods which it is alleged they contained and that these goods were of the same description as those found in possession of the accused. That the cases were found open and empty does not prove that they ever contained the goods, or, if they did, that they were those stolen. REX v. FITZPATRICK. - - - - - - **289**

18.——*Sale of beer—"Distributing"—Whether included in word "sale"—B.C. Stats. 1921 (Second Session), Cap. 28, Sec. 2.*] The members of a club on purchasing beer from a Government vendor may store it at the club and the club is entitled to charge a fee for storage and service. When the member of a club receives a token from the secretary for which there is no evidence of his having paid anything, and on presentation of the token to a servant of the club he receives a bottle of beer:—*Held*, that the servant is not "distributing" beer within the meaning of section 2 of the Government Liquor Act Amendment Act, 1921. REX v. ROCK. - - - - - **67**

19.——*Sale of beer—"Liquor"—B.C. Stats. 1921, Cap. 30, Secs. 26, 46 and 62; 1922, Cap. 45, Sec. 7.*] The accused was convicted of selling beer in contravention of section 46 of the Government Liquor Act as amended in 1922. On appeal by way of case stated as to whether the beer or liquid sold was "liquor" within the meaning of the statute and whether accused was properly sentenced to imprisonment for one month with hard labour under subsection (2) of section 7 of the Government Liquor Act Amendment Act, 1922:—*Held*, affirming the conviction, that there is nothing inconsistent or embarrassing in the Legislature passing enactments containing what might be termed compartments, section 26 of the Act of 1921 with its penal clause 62 forming one, and section 46, with its penal clause as amended in 1922, forming the other. REX v. SMITH. - - - - **172**

20.——*Sale of liquor—Constables given money by police inspector to make purchase—Charge of unlawful selling—B.C. Stats. 1915, Cap. 59, Sec. 87; 1921, Cap. 30, Secs.*

tory negligence.] Shortly after the noon hour the plaintiff in his automobile approached a street on which was a street-car line. As he neared the intersection he heard nothing and when about 15 feet from the track he looked to the left and saw nothing. He then proceeded to cross the intersection and when his front wheels were within two feet of the track he again looked to his left and saw a street-car about 40 feet away coming at an excessive rate of speed. It was then too late to avoid a collision. The automobile was smashed and the driver and passengers injured. The jury brought in a verdict for the plaintiff for which judgment was entered. *Held,* on appeal, reversing the decision of LAMPMAN, Co. J. (MARTIN and GALLIHER, JJ.A. dissenting), that the jury's finding of absence of contributory negligence was perverse as in not exercising reasonable care by slowing down his car and looking when entering into the street to be crossed to see if there was danger before proceeding he was guilty of contributory negligence. MILLIGAN v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY LIMITED. **161**

3.——*Motor-truck in collision with motor-car — Going in same direction — Motor attempting to pass—Truck swerves to left to make straight turn—Drives motor into curb—Damages.*] A jitney was about to pass on the left side of a truck going in the same direction when the truck swerved sharply to the left in order to make a straight turn into a driveway on the right side of the road upon which they were driving and in so swerving to the left the truck drove the jitney into the curb on the left and the plaintiff, who was a passenger on the jitney, was severely injured. An action for damages was dismissed. *Held,* on appeal, reversing the decision of MCINTOSH, Co. J., that there was negligence on the part of the driver of the truck in crossing the line of traffic without having regard to those coming behind and in failing to give warning of his intention to do so. BLOOMFIELD v. T. ALEXANDER AND SONS AND CHESTER ALEXANDER. - - - **110**

4.——*Nuisance—Excavation on property to border line of adjoining property—Person on adjoining property falls into excavation —Right of protection to person moving on his own land.*] The owner of one or two adjoining lots let a contract for the construction of a building on his lot. The contractor made an excavation six feet deep up to the boundary line between the lots. The plaintiff who was part lessee of the adjoining lot, fell into the excavation after dark and was injured. In an action for

damages complaining of the failure to safeguard the excavation and of non-support of his land he obtained judgment before MORRISON, J. and a jury. *Held,* on appeal, *per* MARTIN and MCPHILLIPS, JJ.A., that the defendants owed no duty in law to the plaintiff to protect him from the injury sustained. He had the right only to lateral support to his land in its "natural state" and not such as to sustain artificial weight, even his own, unless he had acquired a right thereto by an easement or otherwise. *Per* GALLIHER, J.A. (EBERTS, J.A. agreeing that the appeal be dismissed): That the principle of lateral support should not deprive an owner of the right to walk over his property without incurring danger; he has the right to the full enjoyment of his property, and there was a duty incumbent on the owners and contractors to light and guard the excavation. The Court being equally divided the appeal was dismissed. [Affirmed by the Supreme Court of Canada.] LINNELL v. REID *et al.* - - - - - **87**

5.——*Onus of proof.* - - - - **37**
See CARRIERS.

6.——*Pedestrian crossing street not at intersection—Run down by motor-car—Excessive speed — By-law prohibiting pedestrians crossing street except at intersection —Damages.*] The plaintiff crossed a well-lighted street in the evening in a diagonal direction (not at the intersection) and after passing immediately in front of a moving street-car was struck by a motor-car on the far side going in the same direction as the car at an excessive speed. It was held on the trial that the plaintiff was entitled to recover. *Held,* on appeal, MACDONALD, C.J.A. dissenting, that despite the negligence of the plaintiff in crossing the street diagonally in contravention of the by-law the real cause of the accident was due to the excessive speed of the defendant's car and the appeal should be dismissed. SUFFERN v. MCGIVERN. - - - - - **542**

7.——*Street railway — Collision with motor-car — Damages — Excessive speed of street-car — Contributory negligence — Verdict.*] The plaintiff, when driving a motor-car easterly on 19th Avenue in Vancouver in the evening when it was nearly dark, entered Main Street intending to cross the street-car tracks and turn north on Main. On reaching the easterly track he was struck by a street-car going north on Main Street at an excessive speed. The motor-car was carried 100 feet and the plaintiff was badly injured. The jury found the

TAXATION — *Dominion and Provincial — Income and personal property — Bonds pledged to Bank — Priority — B.C. Stats. 1917, Cap. 62, Sec. 13.*] Certain bonds of the defendant Company were pledged to the Royal Bank of Canada in 1915. The Bank acted as the Company's bankers continuously from that time, but the indebtedness for which the Bank claimed a first charge against the bonds began in October, 1919. The Province claimed priority for taxes that