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 XXXIII.

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. 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.

MEMORANDA.

On the 20th of May, 1924, the Honourable David MacEwan Eberts, a Justice of the Court of Appeal, died at the City of Victoria.

On the 27th of May, 1924, Malcolm Archibald Macdonald, one of His Majesty's Counsel learned in the law, was appointed a Justice of the Court of Appeal in the room and stead of the Honourable David MacEwan Eberts, deceased.

TABLE OF CASES REPORTED

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REPORTS OF CASES

DECIDED IN THE

COURT OF APPEAL, SUPREME AND COUNTY COURTS

OF

BRITISH COLUMBIA,

TOGETHER WITH SOME

CASES IN ADMIRALTY

GOW v. MACINNES & ARNOLD.

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1923

Oct. 2.

GOW v. MACINNES & ARNOLD

Barrister and solicitor—Costs—Retainer—Barrister undertaking professional work in Alberta for a British Columbia legal firm—Liability for costs.

The personal liability of a British Columbia firm of barristers and solicitors at whose instance an Alberta barrister and solicitor undertakes professional work in Alberta for a British Columbia client, depends in each case upon whether there is a contract express or implied that the Alberta barrister shall be entitled to recover his costs from the British Columbia firm.

M. and A., British Columbia barristers and solicitors, having recovered judgment in British Columbia for a Vancouver client instructed G., an Alberta barrister and solicitor, to bring action on the British Columbia judgment against F. one of the defendants in that Province. G. obtained judgment and issued execution, seizing the wheat on F.'s farm: Interpleader proceedings arose in which G. was successful but only realizing a small amount M. and A. instructed G. to bring an action to set aside a transfer of F.'s property to his wife. G. failed in this action. In an action by G. against M. and A. to recover the balance due for professional services:—

Held, on appeal, affirming the decision of RUGGLES, Co. J. (MARTIN, J.A. dissenting), that the facts as appear from the correspondence between the parties sustain the finding that M. and A. were the persons to whom G. was invited to look for his costs and disbursements.

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GOW v. MACINNES & ARNOLD

Per MACDONALD, C.J.A.: It is not necessary that there should be an express contract by defendants to pay the plaintiff's costs. It is enough that there are circumstances from which a contract may be inferred.

APPEAL by defendants from the decision of RUGGLES, Co. J., of the 7th of March, 1923, in an action to recover $973.10 balance due for professional services as barrister and solicitor and disbursements paid for the defendants at their request. The plaintiff is a barrister and solicitor at Calgary, Alberta, and the defendants are a firm of barristers and solicitors in Vancouver, B.C. The defendants had conducted an action for a Mrs. Arnold in which one of the defendants, a Mr. Fleming, lived in Alberta. The defendants instructed the plaintiff to examine Fleming for discovery. The plaintiff examined Fleming and the costs for this work were paid. The defendants recovered judgment for Mrs. Arnold and then instructed Gow to bring action on the British Columbia judgment in Alberta against Fleming. Gow obtained judgment and on execution the sheriff seized the wheat on Fleming's farm. Fleming's wife claimed the wheat and interpleader proceedings arose in which Gow was successful but owing to delays resulting in additional expense the net amount received from the sale of the wheat was $163. Gow was then instructed to bring action to set aside a sale of the debtor's property to his wife. He failed in this action.

Statement

The appeal was argued at Victoria on the 19th and 20th of June, 1923, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Mayers, for appellants: These costs were for Alberta actions. Mrs. Arnold was the principal: see *Ross* v. *Fitch* (1880), 6 A.R. 7; *Underwood, Son, & Piper* v. *Lewis* (1894), 2 Q.B. 306 at p. 310; *Hett* v. *Pun Pong* (1890), 18 S.C.R. 290 at p. 295.

G. L. Fraser, for respondent: When one solicitor employs another he is primarily liable; secondly, there is an express contract to pay by their conduct; and thirdly, they are the real principals or if not they have a direct interest in the fruits of this litigation. On the second point, there is an express

Argument

contract: see Leake on Contracts, 7th Ed., 347; Bowstead on Agency, 6th Ed., 388. On the first point that there was an implied contract see *Scrace* v. *Whittington* (1823), 2 B. & C. 11 at p. 13; *Porter* v. *Kirtlan* (1917), 2 I.R. 138 at p. 146; *Armour et al.* v. *Dinner et al.* (1899), 4 Terr. L.R. 30. The case of *Ross* v. *Fitch* (1880), 6 A.R. 7 can be distinguished on the facts: see also *Robbins* v. *Heath* (1848), 11 Q.B. 257. On privity of contract see Halsbury's Laws of England, Vol. 1, p. 171, par. 373; *Armour* v. *Kilmer* (1897), 28 Ont. 618; Story on Agency, 7th Ed., p. 456, par. 387. If an agent has to employ a sub-agent the relation is not changed: see *Mackersy* v. *Ramsays* (1843), 9 Cl. & F. 818. On the contention that the action is premature see *Millar* v. *Kanady* (1903), 5 O.L.R. 412 at p. 418. This is not a common law action: see *In re Hall & Barker* (1878), 9 Ch. D. 538 at p. 542. When proceedings are protracted see *In re Romer & Haslam* (1893), 2 Q.B. 286. The costs were reasonable. Argument

Mayers, in reply, referred to *Hyndman* v. *Ward* (1899), 15 T.L.R. 182; *Wallace* v. *Burkner* (1883), Cassels's Supreme Court Digest, 1893, p. 669; Halsbury's Laws of England, Vol. 1, p. 209; *Lee* v. *Everest* (1857), 2 H. & N. 285; *Robins* v. *Bridge* (1837), 3 M. & W. 114 at p. 118; *Wakefield* v. *Duckworth & Co.* (1915), 1 K.B. 218; *Lewis* v. *Nicholson* (1852), 18 Q.B. 503.

Cur. adv. vult.

2nd October, 1923.

MACDONALD, C.J.A.: The defendants, the solicitors for Mrs. Arnold, had recovered for her in British Columbia, a judgment against one Fleming, for costs, which were taxed at $1,219.38. They instructed the plaintiff, an Alberta solicitor, to proceed on the judgment against Fleming in Alberta. The defendants wrote their client advising her of what they had done, and said: MACDONALD, C.J.A.

"We sent the judgment to Calgary to our agents with instructions to collect,"

thus indicating that they acted on their own will in the matter without troubling to obtain instructions from their client. They looked upon these costs as theirs, and they were proceeding to collect them for their own benefit.

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In response to a letter of plaintiff, asking for money, the defendants promised to send some in a few days, and in a later letter they authorized the plaintiff to retain moneys of their own to apply on fees and disbursements. In their letters the defendants direct the plaintiff as to what steps he should take and quote authorities to assist him in the proceedings directed to be taken. They say:

"If settlement is not made you have our instructions to proceed with an action to sell the lands."

In March, 1921, the defendants wrote to their client and said:

"There will be no money coming to you from the amount we eventually receive from Fleming. We obtained judgment against Fleming for the costs of the action and we have been endeavouring to get these out of Fleming instead of asking you to pay them, and when these costs are paid, Fleming will be clear and so will you."

In November, 1921, they wrote the plaintiff saying:

"With reference to your request for $150 on account of costs, we are rather short of money, but will forward you some within the course of the next couple of weeks."

Later they sent the $150.

In March, 1922, they wrote the plaintiff saying:

"Why should we undertake to produce Mrs. Arnold for examination at Calgary, or any other place?"

MACDONALD, C.J.A.

These facts, I think, amply sustain the finding that defendants were the persons to whom the plaintiff was invited to look for his costs and disbursements. Throughout the correspondence they refer to the plaintiff as "our agent."

It is not necessary that there should be an express contract by defendants to pay the plaintiff's costs. It is enough that there are circumstances from which a contract may be inferred. It is a question for a jury.

I have examined all the cases cited by Mr. *Mayers* in his very able and exhaustive argument, and I think not one of them an obstacle in the way of the plaintiff, if it can be said that the evidence is such as that a jury might find that the contract was with the solicitors and not with the client. In *Robins* v. *Bridge* (1837), 3 M. & W. 114, Sir W. Follett, counsel for the solicitor resisting payment, conceded that (p. 116) "the question in all the cases has been, whether he [the solicitor] actually

intended to undertake personally," and this is in effect the decision of the Court in that case.

In the recent case in the Irish Court of Appeal, *Porter* v. *Kirtlan* (1917), 2 I.R. 138, the subject was gone into extensively. The circumstances there were nearly akin to those we have here, and practically all the difficulties and objections raised by Mr. *Mayers* were there answered by the majority of the Court in a way which favours plaintiff's contention.

There is nothing in the submission that the action was not sustainable because of the alleged non-completion of the work by the plaintiff.

MACDONALD, C.J.A.

The bill should be taxed in Alberta and judgment entered for the amount found due after crediting the one-third commission which the plaintiff concedes. With this variation, which was not contested, the appeal should be dismissed with costs.

MARTIN, J.A.: This case should, I think, be approached bearing in mind the judgment of the Court of Exchequer delivered on behalf of the Court by Baron Bramwell in *Lee* v. *Everest* (1857), 2 H. & N. 285; 115 R.R. 536, in which it was said, p. 291:

> "It is a clear rule that where a person is professedly acting as agent for another the principal is bound and not the agent. Now an attorney is in that position. He is the agent of his client, and is acting for him."

Many cases were cited to us but, in my opinion, the two leading and most apt ones are *Ross* v. *Fitch* (1880), 6 A.R. 7; a unanimous judgment of three judges of the Ontario Court of Appeal, and *Porter* v. *Kirtlan* (1917), 2 I.R. 138, a judgment of two judges of the Irish Court of Appeal, Lord Justice Molony dissenting. The former case is a decision based on the circumstances of our own country and lays down clear principles which, in my opinion, are sound, and I adopt the reasoning therein set out, feeling that it cannot be improved upon by me, the judgment of Burton, J.A., in particular.

MARTIN, J.A.

One of the two concurring judges in the Irish case was largely affected by an element which is entirely absent in this case, *viz.*, he took judicial notice of the custom between Irish and English solicitors—Lord Justice Ronan on pp. 155, 157;

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but the Lord Chancellor rejected any consideration of custom and placed the matter entirely upon a written contract, p. 147, thus:

"Now, the whole question—apart from the important matters discussed as to the legality of the contract—so far as it is based on the existence of a contract between the plaintiff and the defendant, is contained in a series of letters which leave no doubt on my mind as to the true relation of the parties."

This reporter's note follows (p. 148):

"His Lordship read a voluminous correspondence between the plaintiff and defendant, and held that the defendant had employed the plaintiff to do the work in question, and proceeded."

Having regard to these differences in reasoning and circumstances, I have no hesitation in adopting the decision of the Ontario Court of Appeal for my guidance herein, concluding with the following observations by Patterson, J.A., on p. 15:

"In my judgment these observations point out a clear distinction which, alike upon reason and authority, exists between the position of the defendant and that of a town agent. Nothing that has been shewn to us, either in argument or as resulting from any decided case, has led me to perceive that the circumstance that Mr. Walker was an attorney of the Courts of Quebec, placed the matter on any footing different from that on which it would have rested if he had been merely a broker or accountant entrusted with the collection of debts for the plaintiff."

MARTIN, J.A.

I need only add that I regard the other transactions between the parties herein, such as the payment for the examination for discovery by special instructions and arrangement, as apart from the main question.

The appeal, I think, should be allowed.

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

GALLIHER, J.A.

I think the facts in this case are well within the decision of *Porter* v. *Kirtlan* (1917), 2 I.R. 138. Once we come to the conclusion that there was agency between the plaintiff and defendants, that is, in my opinion, an end to the case.

MCPHILLIPS, J.A.: In my opinion the appeal fails. The case to me is a very clear one indeed. Solicitors in British Columbia retain a solicitor in Alberta to conduct certain legal proceedings, all directed to the enforcement of a judgment recovered in the Supreme Court of British Columbia. The question is, are the solicitors liable for the costs incurred personally, or is it a liability only enforceable against their client?

MCPHILLIPS, J.A.

I have no hesitation in coming to the conclusion that in the abstract the legal position is that the solicitors in retaining the services of a solicitor abroad (as even in the case of a sister Province it must be so looked at), the solicitors, as in this case, are to be deemed principals, not agents. The fact that they are acting as solicitors for their client does not affect the question. Long years of practice, custom and usage have well established this, and it is so well known Courts will take judicial notice of it. How unreasonable it would be, how inconvenient and embarrassing it would be for the solicitor abroad to have to make inquiries or otherwise advise himself of the solvency of the client of the solicitors instructing him. It is only necessary to give this point of view momentary consideration, and any contrary contention carries its own refutation.

Further, the particular facts of the present case amply support the appellants' liability as principals, the retainer and instructions given to the respondent being given in the names of the appellants as principals (*Fairlie* v. *Fenton* (1870), L.R. 5 Ex. 169; 39 L.J., Ex. 107; *Paice* v. *Walker* (1870), L.R. 5 Ex. 173; 39 L.J., Ex. 109) not as agents; the letters shew this. Then the judgment which was being enforced, in amount $1,219.38, was really the judgment of the appellants, being costs to which they were entitled, *i.e.*, the appellants were the sole beneficiaries of the judgment if the moneys were realized (*Robinson* v. *Rutter* (1855), 4 El. & Bl. 954). It is idle, upon these facts, to rely upon cases that deal with the question in the abstract of principal and agent, and that the case is one of a disclosed principal. In my opinion, with deference to the very able argument put forward by Mr. *Mayers,* the appellants' counsel, the contention of non-liability is without force. The intention of the parties cannot be ignored, and can it be for a moment doubted that the respondent gave credit to the appellants, not the appellants' client? And it is to be noted here that some considerable disbursements were made by the respondent during the time the professional services were being rendered (Story on Agency, pp. 88 and 357; *Thomson* v. *Davenport* (1829), 9 B. & C. 78; 32 R.R. 578; *Calder* v. *Dobell* (1871), L.R. 6 C.P. 486; 40 L.J., C.P. 224; *Paterson* v.

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Gandasequi (1812), 15 East 62; 2 Sm. L.C., 12th Ed., 341; 13 R.R. 368; *Addison* v. *Gandassequi* (1812), 4 Taunt. 574; 2 Sm. L.C., 12th Ed., p. 348; 13 R.R. 689).

It was said in the House of Lords, "A party cannot have an agreement with the whole world; he must have some person with whom the contract is made": *Squire* v. *Whitton* (1848), 1 H.L. Cas. 333 at p. 358. Can there be any doubt here but that the respondent contracted with the appellants, not their client? It would seem to me that no other conclusion can be come to. The learned trial judge has found in favour of the respondent and held the appellants liable, and in my opinion he had ample evidence upon which to so find. This being the case, and the onus being on the appellants, it must be established that the judgment is wholly wrong to entitle it being disturbed. It is not to be forgotten that the question after all is really a question of fact as to where the liability falls, the circumstance that we have solicitors in British Columbia instructing a solicitor in Alberta, is not to be lost sight of in the determination of the question of liability.

MCPHILLIPS, J.A.

The conduct of the parties offers some guide in arriving at a conclusion in the matter, and this no doubt had weight with the learned trial judge, and he arrived at the conclusion that the appellants are liable. I cannot come to a contrary conclusion (*Green* v. *Kopke* (1856), 25 L.J., C.P. 297; *Armstrong* v. *Stokes* (1872), L.R. 7 Q.B. 598; 41 L.J., Q.B. 253; *Elbinger Actien-Gesellschaft* v. *Claye* (1873), L.R. 8 Q.B. 313; 42 L.J., Q.B. 151; *Hutton* v. *Bulloch* (1874), L.R. 9 Q.B. 572). The Irish case, *Porter* v. *Kirtlan* (1917), 2 I.R. 138 at pp. 146, 156, 158, well illustrates, and I think correctly, the situation and where the liability rests in the present case, and that is upon the appellants, the solicitors in British Columbia, who retained and instructed the respondent, the solicitor in Alberta. This view of the law comports with sound reasoning and is in alliance with the custom and usage which has obtained in British Columbia during a long course of years. Solicitors retaining and instructing solicitors abroad have always acted upon the belief that they incurred the obligation of payment for the services rendered, not the client, the client, of course,

being liable to recoup them for the moneys so laid out. With respect to the action being premature, I cannot agree that the facts warrant this contention. The respondent in the present case has done all that can be required upon his part, and there is nothing to shew that any further steps will, with any likelihood, be productive of results, and bring about the realization of the judgment.

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Then as to the taxation of the bill of costs. That was a matter for the appellants. They could have had a taxation by application to the Court in Alberta, proceedings were not taken to enforce payment until after the lapse of six months, the forum of taxation was Alberta not British Columbia, and that course not being adopted the whole question is, is the amount sued for reasonable? The Court below must be assumed to have found that, and I cannot see any ground upon which to disturb that holding. It, therefore, follows, in my opinion, that the judgment under appeal should be affirmed and the appeal dismissed.

MCPHILLIPS, J.A.

EBERTS, J.A. would dismiss the appeal.

EBERTS, J.A.

Appeal dismissed, Martin, J.A. dissenting.

Solicitors for appellants: *MacInnes & Arnold.*
Solicitor for respondent: *G. L. Fraser.*

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REX v. MULHOLLAND.

REX v. MULHOLLAND

Criminal law—Gaming—Office used for betting—Advertising offer to guess or foretell result of football games—Construction—Criminal Code, Secs. 227(b)(i), 228, and 235(1)(g)—Can. Stats. 1922, Cap. 16, Sec. 12.

Section 227, subsection (*b*)(i) as amended in 1922, and section 228 of the Criminal Code makes a person liable for an offence who "keeps a place for the purpose of money being received by such person all or any part of which . . . . is to be paid or given to any other person on any event or contingency, of, or relating to any . . . . . game or sport," and section 235, subsection (1)(*g*) makes a person so liable who "advertises . . . . . any offer, invitation or inducement to bet on, or guess or foretell the result of any contest."

Accused published a newspaper in Vancouver in which prizes were offered to persons subscribing to the paper and paying the subscription and sending in on coupons printed in the paper guesses as to certain football games. On a certain date games were to be played between certain sets of teams each two of which playing against each other on that day had also played against each other in a similar series a year before. The subscriber was asked to guess or foretell whether the home team in each set would score more, less or the same number of goals in the game to be played than it did in the corresponding game in the previous year. The accused was charged under sections 227(*b*)(i) and 228; also section 235(1)(*g*) and found guilty on both counts.

Held, on appeal, as to the first count, affirming the decision of CAYLEY, Co. J. (MARTIN, J.A. dissenting), that the acts of the defendant as set forth in the case stated come within the section as amended in 1922.

Held, further, as to the second count, affirming the decision of CAYLEY, Co. J. (MACDONALD, C.J.A. dissenting), that the "competition" advertised comes within the expression "any contest" in subsection (*g*) of section 235(1) and the accused was properly convicted.

APPEAL by way of case stated from the decision of CAYLEY, Co. J., of the 10th of May, 1923, the accused having been found guilty under both counts set out in the case stated, one count being under sections 227(*b*)(i) and 228; and the other under section 235(1)(*g*) of the Criminal Code. The case stated was as follows:

Statement

"The accused was charged before me under sections 227(*b*)(i) and 228, and 235(1)(*g*) of the Criminal Code as follows:

"(a) For that Spencer W. Mulholland did at Bowen Island in the County of Vancouver, Province of British Columbia, between the 10th and 15th days of April, 1923, unlawfully keep a disorderly house, to wit:

a common gaming house, having then and there kept or used a place for the purpose of money being received by or on behalf of the B.C. Veterans Weekly Limited, an incorporated Company who were conducting the business thereof, all or some part of which money or its equivalent was to be paid or given to some other person or persons on certain events or contingencies of or relating to certain games, to wit: football games to be played thereafter, contrary to the provisions of section 227(*b*)(i) and section 228 of the Criminal Code.

"(b) For that Spencer W. Mulholland did at Bowen Island in the County of Vancouver, in the Province of British Columbia, between the 10th and 15th of April, 1923, unlawfully advertise or otherwise give notice of an offer, invitation, or inducement to guess or foretell the result of certain contests, to wit: whether certain football games would result in the teams mentioned scoring more or less than, or the same number of goals as were scored by them in similar games during the previous year, contrary to the provisions of section 235, subsection (1)(*g*), of the Criminal Code.

"I find the following facts:

"(1) The above-named Company published in the City of Vancouver, a certain newspaper, 'The B.C. Veterans Weekly,' which contained an advertisement of a football competition.

"The material points of the advertisement setting out the football competition, which appeared in the defendant newspaper, are as follow:

" 'B.C. Veterans Weekly Ltd.

" 'P.O. Drawer 938, Vancouver, B.C.

" 'Football

" 'Competition

" 'Games to Be Played April 21st

" 'Competition No. 28 (New Series) Closes Friday Midnight, April 20, at the office of the B.C. Veterans Weekly Ltd., Carter-Cotton Bldg., corner Hastings and Cambie Streets, Vancouver, B.C.

" 'Ten Estimates with $1.00 Subscription.

" '$6000 First Prize; $3500 Second Prize; $2500 Third Prize. Statement

" 'How to Fill in Coupons

" 'You simply indicate whether the Home Team will score More, Less, or the Same Number of Goals than they scored in the corresponding game of last year, by placing an 'X' in the column provided. Column headed with the letter 'M' is More; letter 'L' is Less; and letter 'S' is the Same.

" 'No Limit to Number of Coupons.

" 'There is no limit to the length of subscription and the number of coupons which may be sent in by any one person in one week. 25c entitles you to five weeks' subscription and one coupon; 50c entitles you to ten weeks' subscription and two coupons; 75c entitles you to fifteen weeks' subscription and five coupons; $1 entitles you to twenty-five weeks' subscription and ten coupons.

" 'Mail your coupons to B.C. Veterans Weekly, Ltd., P.O. Drawer 938; or drop coupons in the B.C. Veterans Weekly, Ltd., window boxes, corner Hastings and Cambie Streets; or in boxes at authorized agents listed on page 3.

" 'Rules

" '(1) All entries must be made on coupons provided for that purpose.

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"'(2) Any coupon which has been altered or mutilated will be disqualified.

"'(3) In the event of a tie, or ties, prizes will be divided equally between those tieing, but should the necessity arise, the Auditor reserves the right to rearrange prize money, so that the first prize winners will receive more than the second, and the second prize winners receive more than the third.

"'(4) Latest date for receiving coupons for this (No. 28) competition will be Friday, April 20th, at midnight.

"'(5) Matches on coupons incorrectly scheduled or not commenced, same will be struck off the coupon. In the event of a game being started, and then discontinued for any reason whatsoever, the score as registered at the time the game is terminated, will be accepted as being the same as a full game. As far as possible the correct scores in last season's games will be given, but should an incorrect score appear, through a misinformed source of information, the score which appears on the coupon will be allowed to stand.

"'(6) The Auditor reserves the right to disqualify any coupon for what, in his opinion, is a good and sufficient reason, and it is a distinct condition of entry that the Auditor's decision shall be accepted as final and legally binding in all matters concerning this competition. No correspondence will be entered into or interviews granted.

"'(7) In marking coupons, place cross in column provided; denote whether you think the Home team will score More Goals, Less Goals, or the Same Number of Goals as in the corresponding game of last year.

"'(8) Each subscriber is entitled to forecast for all moneys received; all moneys so received will be credited to the subscription account on the basis of 3 months, $1.25; 6 months, $2.50.

"'(9) No two capital prizes will be paid out in any one week to any one subscriber.

"'(10) Employees of the B.C. Veterans Weekly, Ltd., cannot compete.

Statement

"'(11) Prizes are awarded on the results received by cable in Vancouver on or before 9 a.m. Monday following date of matches.

"'(12) No responsibility will be accepted by the B.C. Veterans Weekly, Ltd., for the loss or non-delivery of any coupon. Proof of posting will not be accepted as proof of delivery or receipt.

"'(13) Coupons received without name or address will be disqualified.

"'(14) In case of capital prize winners when the address is given as 'General Delivery' only, proof of identification will be required before mailing of capital prizes.'

"Prize winners will be announced in the daily press, as also in this paper.

"(2) I find that the contest was conducted in accordance with this advertisement.

"(3) I further find as facts, the facts as admitted by counsel for the defence in the following admissions:

"'Mr. *Farris*: I admit that Spencer W. Mulholland did, at Bowen Island, in the County of Vancouver, between the 10th and 15th of April, keep and use a place for the purpose of money being received by and on behalf of the B.C. Veterans Weekly Limited, an incorporated Company, and

was conducting a business thereon. I admit he received that money in that way in accordance with an advertisement appearing in a copy of the B.C. Veterans Weekly which is now produced and can be admitted as Exhibit 1. At the same time and place he received $1 from the informant, who filled out one of the forms similar to that in Exhibit 1, which $1 and form so filled out were received by the accused and duly forwarded to the Company in question. Now my friend wishes a further admission which I make in this form: We admit that a fund sufficient to meet the prizes awarded was kept in reserve by the Company. The following admission I make without prejudice to arguing it is not material evidence or a material admission, that is this: That any given week this contest or a contest of a similar nature taking place from week to week, that in any given week in which the reserve fund was exhausted by the payment of the prizes, such reserve fund for a subsequent week would or might be replenished from the subscriptions that came in from a previous week.

"'Now, on the second count I admit there that the accused published the advertisement in question.

"'THE COURT: You admit he publishes the advertisement which is on file?

"'Mr. *Farris*: Yes, at the date in question.

"'Mr. *Wood*: That is, he gave notice of an offer.

"'THE COURT: Whatever the publication says. He admits the publication of that notice.

"'Mr. *Wood*: As contained in the newspaper.

"'THE COURT: Publication of the notice contained in Exhibit 1.'

"I found the accused guilty on both counts, and on request of counsel for the defence I reserved the following questions for the Court of Appeal:

"(1) Was I right upon the facts as herein set out, in finding the accused guilty upon the first count in the charge?

"(2) Was I right upon the facts as herein set out, in finding the accused guilty upon the second count in the charge?"

Statement

The appeal was argued at Victoria on the 14th of June, 1923, before MACDONALD, C.J.A., MARTIN and EBERTS, JJ.A.

McPhillips, K.C., for appellant: On the second count there is a case of the Full Court of Alberta decided on the 7th of June last quashing a conviction substantially the same: see *Rex* v. *Proverbs* (1923), [19 Alta. L.R. 440]; 2 W.W.R. 622; see also Halsbury's Laws of England, Vol. 27, p. 177, par. 339.

W. B. Farris, K.C., on the same side: Under section 227 they must keep a betting-house, but this is not a betting-house as there is no betting. There must be a winner or loser: see *Carlill* v. *Carbolic Smoke Ball Co.* (1892), 61 L.J., Q.B. 696 at p. 700; 62 L.J., Q.B. 257. There is no element of betting in this case, it is a form of advertising. The word "betting"

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may mean either lawful betting or unlawful betting but section 227 only contemplates unlawful betting: see *Downes* v. *Johnson* (1895), 2 Q.B. 203 at p. 207.

Wood, for the Crown: His contention that what is complained of is not betting is answered by the case of *Reg.* v. *Stoddart* (1901), 1 K.B. 177; see also *Rex* v. *Woodward and Willcocks* (1922), [32 W.L.R. 148]; 2 W.W.R. 818. There was an amendment by reason of the decision of the police magistrate in Winnipeg: see Can. Stats. 1922, Cap. 16, Sec. 12; see also *Rex* v. *Rodgers* (1923), 32 B.C. 199.

Argument

Farris, in reply: The foundation of a charge here is the establishment of a bet. The *Woodward* decision was on a straight case of betting. The Alberta case (*Rex* v. *Proverbs* (1923), [19 Alta. L.R. 440]; 2 W.W.R. 622) should be followed as it is on a Dominion statute, and he has failed to distinguish it.

Cur. adv. vult.

2nd October, 1923.

MACDONALD, C.J.A.: I would answer the first question in the affirmative and the second in the negative.

The section under which the second count, being the one referred to in the second question, was laid was construed by the Appellate Division of the Supreme Court of Alberta, in *Rex* v. *Proverbs* (1923), [19 Alta. L.R. 440]; 2 W.W.R. 622, against the Crown's contention, which was the same as in this case. I would follow that case.

MACDONALD, C.J.A.

As regards the first count, the section on which it was founded was passed last year, and so far as I know has not yet been passed upon by an Appellate Court. The count is laid under section 227 of the Criminal Code, as amended in 1922 by Cap. 16, Sec. 12. The language of the section as amended is, in my opinion, quite wide enough to make criminal the acts of the defendant set forth in the case stated. I do not doubt that Parliament intended to put a stop to such dishonest schemes as those in question here. The only contention made by counsel for the accused was, that the scheme did not fall within the strict letter of the section, although he did not venture to argue that it did not fall within the spirit thereof. In my opinion such acts fall within the strict letter of the statute.

MARTIN, J.A.: With respect to the first question reserved upon the conviction under section 227, I feel that there is so much to be said in favour of the submission of Mr. *Farris*, as to the meaning of "any such person as aforesaid" in subsection (*b*)(i) that the grave doubt should be resolved in favour of the appellant and therefore the conviction upon the first count should be quashed.

As to the second question upon the conviction on the second count under section 235, I have come to the conclusion that the "competition" advertised here comes within the expression "any contest" in subsection (*g*). In view of the recent decision of the Appellate Division of Alberta in *Rex* v. *Proverbs* (1923), [19 Alta. L.R. 440]; 2 W.W.R. 622, holding a contrary view, I have hesitated long, out of respect for the three learned judges who gave that decision, before I felt myself impelled to this conclusion. They view the "contest" as being a physical one upon the football ground between opposing teams and restrict the "result" to that event, but the more I consider the matter the more I am convinced that the real contest is that one (styled "competition") which is got up by the promoters in their office and in which the "subscribers" by sending in their guessing coupons with their subscriptions (10 guesses for each $1 subscription), compete against one another for the prizes offered as the result of their successful guesses, styled "estimates." Moreover, there is an important misquotation on p. 624 of the judgment, which cites the statute as referring to "the result of the (*sic*) contest," whereas it says "the result of any contest": I cannot help feeling that this oversight must have influenced the Court materially.

MARTIN, J.A.

I would answer the second question in the affirmative, and so the conviction upon the second count should be affirmed.

EBERTS, J.A. would dismiss the appeal.

EBERTS, J.A.

Appeal dismissed, Macdonald C.J.A., and Martin, J.A. dissenting in part.

Solicitor for appellant: *R. L. Maitland.*
Solicitors for respondent: *Lane & Wood.*

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REX v. RODGERS

Criminal law—Intoxicating liquors—Summary conviction—Prosecution to be within six months—Time of offence not disclosed in warrant of commitment—B.C. Stats. 1915, Cap. 59, Sec. 7; 1921, Cap. 30.

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On the summary conviction of a person charged with an infraction of the Government Liquor Act the warrant of commitment did not comply with the provisions of the Summary Convictions Act in not fixing the time when the offence was committed.

Held, on appeal, affirming the decision of HUNTER, C.J.B.C. (MARTIN, J.A. dissenting), that as the commitment did not comply with said Act in an essential particular the conviction was properly quashed.

APPEAL by the Crown from the order of HUNTER, C.J.B.C., of the 30th of May, 1923, ordering the discharge of accused from the custody of the keeper of Oakalla Prison Farm, he having been convicted and sentenced to six months' imprisonment for the unlawful sale of liquor. The warrant of commitment, which was dated the 2nd of May, 1923, recited that Leo Rodgers

Statement

"was this day at . . . . Vancouver duly convicted before . . . . the . . . . police magistrate, for that he, the said Leo Rodgers of the said City of Vancouver, within the space of one month last past, to wit: on the 16th of September, 1922, at the said City of Vancouver, did unlawfully sell intoxicating liquor, contrary to section 26 of the Government Liquor Act, and amending Acts thereto, contrary to the form of the statute in such case made and provided."

The grounds of appeal were that the Chief Justice erred in holding that the warrant of commitment was bad and that it was void for uncertainty.

The appeal was argued at Victoria on the 15th of June, 1923, before MACDONALD, C.J.A., MARTIN and EBERTS, JJ.A.

Wood, for the Crown: The words "within the space of one month last past" are merely surplusage: see *Rex* v. *Picton* (1802), 2 East 195. On the question of dates generally see

Argument

Rex v. *Parkin* (1922), 1 W.W.R. 732 at p. 745.

Wismer, for respondent: It must be an impossible date for his argument to apply. Here there were two charges "that he did within one month," etc.: see *Regina* v. *Hoggard* (1870), 30 U.C.Q.B. 152; *Rex* v. *Salomons* (1786), 1 Term Rep. 249;

Regina v. *Gravelle* (1886), 10 Ont. 735. That a conviction for two offences is bad see Daly's Criminal Procedure, 2nd Ed., 279; Halsbury's Laws of England, Vol. 9, p. 340, par. 663.

Wood, in reply.

Cur. adv. vult.

2nd October, 1923.

MACDONALD, C.J.A.: I would dismiss the appeal. The commitment does not comply with the provisions of the Summary Convictions Act in an essential particular, namely, that it does not fix the time when the offence was committed. It is said in Paley on Convictions, 8th Ed., p. 192, that an impossible date is not necessarily fatal to the commitment, and the author refers for authority for this statement to *Rex* v. *Picton* (1802), 2 East 195. In that case the date of the offence and the date of conviction were stated in the warrant of commitment and therefore the date on which the justice set his hand and seal to it were held immaterial. That is quite a different case from this. Here the warrant of commitment declares that the conviction was made "this day," and is signed on the 2nd of May, 1923, while in another place in the warrant it is declared that the offence was committed "within one month last past, to wit, on the 16th of September, 1922." The date of the information is not given, and as the information to be good must have been laid within six months of the offence (see section 7, Summary Convictions Act, B.C. Stats. 1915, Cap. 59) it is impossible to determine from the warrant of commitment whether the prosecution was in time or not.

MACDONALD, C.J.A.

MARTIN, J.A.: It is stated in the conviction that Leo Rodgers "was this day . . . . duly convicted . . . . for that he . . . . within the space of one month last past, to wit: on the 16th of September, 1922, at the said City of Vancouver, did unlawfully sell intoxicating liquor . . . ." The conviction is dated the 2nd of May, 1923, so the words "within the space of one month last past" are *ex facie* an error as to time and are obviously carried into the conviction from the original information. In such case I am clearly of the opinion that the general and incongruous averment as to the one month period

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must be restricted by the words "to wit," *i.e.*, the *videlicet*, meaning "to know, that is to say, namely": Wharton's Law Lexicon, 11th Ed., 911. We were referred to the statement in Paley on Convictions, 8th Ed., 192:

> "An impossible or incongruous date, if the conviction be complete without it, may be rejected as surplusage."

The authority cited, *Rex* v. *Picton* (1802), 2 East 197, supports the proposition. The error in the date of the conviction there, if not disregarded, would have made the conviction occur before the offence was committed; a very serious objection, if the conviction must be read literally. This view is supported by *Wilson* v. *Mount* (1796), 3 Ves. 192, wherein the Master of the Rolls said, p. 194:

> "If a *videlicet* is repugnant to what has gone before, it shall be rejected; but if it can be reconciled and made restrictive, it shall be so."

In the true sense of the word there cannot be a repugnancy in the case of an obvious slip or error, and furthermore, the particular averment of the date "can be reconciled and made restrictive" in the circumstances without any apprehension of prejudice or injustice to the offender. See also *Eccard* v. *Brooke* (1790), 2 Cox 213, where a restrictive effect was given to the *videlicet*. In *Smith* v. *Walton* (1832), 8 Bing. 235, the *videlicet* as to the date of Old Martinmas was rejected, but because the Court was "bound to take notice" that its averment was contrary to the Act of Parliament changing the date of New Martinmas to the 11th of November "so that it cannot fall on any other day," therefore the "*videlicet* which is inconsistent with and contrary to such enactment must be rejected."

MARTIN, J.A.

There is here no Legislature obstacle of that kind to prevent the application of the general rule, and therefore I think the appeal should be allowed, and the order discharging the accused from custody set aside.

EBERTS, J.A.

EBERTS, J.A. would dismiss the appeal.

Appeal dismissed, Martin, J.A. dissenting.

Solicitors for appellant: *Lane, Wood & Company.*
Solicitor for respondent: *Gordon Wismer.*

THE HERALD PRINTING AND PUBLISHING COMPANY LIMITED *ET AL.* v. RYALL *ET AL.*

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THE HERALD PRINTING CO. *v.* RYALL

Pleadings—Action for libel—Plea of fair comment—Particulars.

In an action for damages for libel in which the defendants have entered a plea of fair comment, the plaintiff is not entitled to particulars setting out specifically the facts relied on as a basis for fair comment, unless specifically demanded, and even if he were, he is not entitled to specific instances of the truth of such facts.

Where the alleged libel is "flagrant defiance of the law as interpreted in other Provinces" the plea must set out specific instances of the alleged interpretation of the law in other Provinces.

APPEAL by defendants from the decision of MURPHY, J. (reported (1923), 32 B.C. 265), ordering the defendants to give particulars of the allegations of fact alleged in paragraph 11 of the defence to be true in substance and in fact, distinguishing between that part of the alleged libel set out in paragraph 4 of the statement of claim which the defendants allege to be facts and that part of the said article which the defendants allege to be comment and also particulars of specific instances of the truth of such allegations of fact so alleged to be true in substance and in fact; particulars of the facts upon which is based the comment referred to in paragraph 11 of the defence; particulars of the facts relied on by the defendants to sustain the allegation of common interest contained in paragraph 12 of the defence and particulars of the facts relied upon by the defendants to sustain the allegation in paragraph 16 of the defence that the words complained of were published in self-vindication or in self-defence. Paragraphs 11, 12 and 16 of the defence are as follow:

Statement

"11. In so far as the said words consist of allegations of fact they are true in substance and in fact and in so far as they are expressions of opinion the words complained of are a fair and *bona fide* comment upon matters of public interest, *viz.*: the enforcement of the Lord's Day Act, the observance of Sunday or the Sabbath Day, and the question whether the Daily Herald was justified in its attacks upon the Ministerial Association for its attitude thereon and if the said words were published by the defendants, which defendants deny, then they were published without malice and the publication thereof was for the public benefit.

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"12. The defendants say if they or any of them published the said words to any of the defendants or to any of the official boards or committees of their churches, which the defendants deny, then this was done in consequence of a common interest in upholding the doctrine of said churches as to the observance of Sunday or the Sabbath Day and the enforcement of the law relating thereto, and under a sense of duty and without malice towards the plaintiffs or either of them and in the honest belief that the charges therein made were true.

"16. If the said words were published by the defendants or any of them, which defendants deny, they were published in self-vindication or in self-defence and without malice."

The libel complained of was a long article published by the defendants in the Daily Herald of Nanaimo stating that the Ministerial Association of Nanaimo has been vindictively attacked by the Daily Herald because in the discharge of its duty and acting within its province it has counselled the churches to register their protest in a practical way against that paper's attitude on the question of Sunday observance, "religious bigotry," "reckless fanaticism," "cruel unreasoning bigotry," and "blighting pettiness" being some of the choice epithets which have come to the Herald's aid in endeavouring to escape from the moral stigma under which it lies as a result of its campaign on behalf of Sunday observance. The article then proceeded to severely criticize the paper on its attitude on Sunday observance.

Statement

The appeal was argued at Victoria on the 27th of June, 1923, before MACDONALD, C.J.A., GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

A. D. Crease, for appellants: The learned judge referred to *Digby* v. *Financial News, Lim.* (1906), 76 L.J., K.B. 321; see also Bullen & Leake's Precedents of Pleadings, 7th Ed., 768, note (*k*). We have not gone outside of the columns of the Herald itself. As to critic dealing with matters of public interest see *Lyons* v. *Financial News (Lim.) and Others* (1909), 53 Sol. Jo. 671; *Peter Walker & Son, Limited* v. *Hodgson* (1909), 1 K.B. 239 at p. 250.

Argument

Mayers, for respondents: A plea of fair comment involves a plea of justification: see Odgers on Libel and Slander, 5th Ed., 634; *Penrhyn* v. *The "Licensed Victuallers' Mirror"* (1890), 7 T.L.R. 1; *Hunt* v. *Star Newspaper Company,*

Limited (1908), 2 K.B. 309 at p. 311. Much supposed comment is direct allegation of fact: see *Hennessy* v. *Wright* (1888), 57 L.J., Q.B. 594. This is really a confused plea of fair comment and justification: see *Wilson* v. *Deane* (1910), 3 Alta. L.R. 186 at p. 192; *The Manitoba Free Press Company* v. *Martin* (1892), 21 S.C.R. 518 at p. 528. They must shew what is fact and what is fiction: see Odgers on Libel and Slander, 5th Ed., 280.

Crease, in reply.

Cur. adv. vult.

2nd October, 1923.

MACDONALD, C.J.A.: The action is for libel contained in a letter written by defendants to the plaintiffs and published by the latter. The defendants set up the defence of fair comment, *i.e.,* that such of the statements in the letter as are statements of fact are true, and such as are comment are fair comment.

The order complained of directs the defendants to give:

"(1) Particulars of the allegations of fact alleged in paragraph 11 of the defence to be true in substance and in fact, distinguishing between that part of the alleged libel set out in paragraph 4 of the statement of claim which the defendants allege to be facts and that part of the said article which the defendants allege to be comment, and also particulars of specific instances of the truth of such allegations of fact so alleged to be true in substance and in fact.

"(2) Particulars of the facts upon which is based the comment referred to in paragraph 11 of the defence."

MACDONALD, C.J.A.

Paragraph 1 orders, first, the segregation of facts from the comments, and secondly, particulars of all facts without exception so segregated, and without reference to whether all of the facts are immaterial or not. No doubt the defendants could be ordered to give particulars of relevant facts, but it seems to me that the proper and convenient practice is to order particulars when they have been specifically demanded. The plaintiffs are as competent to distinguish facts from comment as are the defendants, and if they needed particulars of any facts contained in the letter, they ought to have been required to ask for them specifically. In *Digby* v. *Financial News, Limited* (1907), 1 K.B. 502, it would appear that particulars were ordered by a judge in a case which he thought was similar to this one, but the Court of Appeal reversed him, distinguishing

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it from a case like the one at bar. But assuming that an order in the form of paragraph 2 is a proper one to make, I am of opinion that paragraph 1 cannot be sustained. The defendants are ordered to give not only the particulars of all facts in the alleged libel, but specific instances of the truth of the facts upon which they rely. This is carrying the practice of ordering particulars to a length which I venture to think has in the past been unheard of. There is, I think, no warrant for it, but on the contrary, it is opposed to the spirit of all the authorities upon the question of particulars.

MACDONALD, C.J.A.

Paragraph 1 of the order should be set aside. The other particulars ordered are not so objectionable as to call for interference.

The appellants should have the costs of the appeal, except those which relate to the issues on which the appeal fails; these costs will go to the respondents.

GALLIHER, J.A.

GALLIHER, J.A.: I agree with the views expressed by the Chief Justice, and would allow the appeal in part.

MCPHILLIPS, J.A.

EBERTS, J.A.

MCPHILLIPS and EBERTS, JJ.A. agreed in allowing the appeal in part.

Appeal allowed in part.

Solicitors for appellants: *Crease & Crease.*

Solicitor for respondent: *F. S. Cunliffe.*

AIKMAN v. BURDICK BROTHERS, LIMITED, AND AIKMAN.

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AIKMAN v. BURDICK BROS., LTD.

Husband and wife—Agency—Authority to buy not including authority to sell.

Stock-broker—Custom—Broker dealing with agent of purchaser—Selling on agent's order—Payment of proceeds of sale to agent.

Plaintiff Aikman and defendant Aikman were husband and wife. In consequence of a disagreement, they separated, and during the separation the wife sold the household furniture and effects which she alleged were her separate property, purchased by her previously to the marriage. A reconciliation took place, and on the husband's advice she purchased through the defendant Burdick Brothers, Limited, certain C.P.R. shares, on margin. The husband received her cheque for the purchase, paid it to Burdick Brothers, Limited, who entered the sale in their books and carried the account in her name. Later the couple again separated, the husband taking proceedings for divorce. During these proceedings he procured the change of the account of the shares in the books of the stock-brokers from the plaintiff's name to his, then ordered the sale of the shares, and received the proceeds. Plaintiff brought an action against him and the stock-brokers.

The husband set up (1) That the money was his in that the household effects sold were his property, and (2) the purchase of the shares was a gambling transaction and therefore illegal. The defendant Burdick Brothers, Limited, set up that the husband dealt with them as the agent of the wife, with authority to buy, and also to sell.

The trial judge gave judgment for the plaintiff against defendant Aikman for the amount received by him on the sale of the shares, with interest; directed a reference, if required, as to the ownership of the household effects, and dismissed the action against the defendant Burdick Brothers, Limited, their costs to be paid by the defendant Aikman.

Held, on appeal, affirming the decision of MORRISON, J. on this point, that the transaction was not an illegal one; but

Held, further, and reversing MORRISON, J., that if defendant Aikman was an agent to purchase, he had no authority to sell, nor to receive the proceeds of the sale.

Held, further, on the cross-appeal, reversing the judgment of MORRISON, J., that the defendant Burdick Brothers, Limited, were wrong in selling, and paying the proceeds of the sale to defendant Aikman.

APPEAL by defendant Aikman, and cross-appeal by plaintiff, from the decision of MORRISON, J. (reported in 31 B.C. 478), in an action arising out of the sale by stock-brokers of Canadian

Statement

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Pacific shares. The facts on which the judgment is founded are set out in the head-note.

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

W. J. Taylor, K.C., for appellant: The question is whether buying shares on margin is a criminal offence under section 231 of the Criminal Code. We submit it is, because here we have no evidence of delivery or intention of delivery: see *B.C. Stock Exchange* v. *Irving* (1901), 8 B.C. 186; *Pearson* v. *Carpenter* (1904), 35 S.C.R. 380 at p. 386; *Holman* v. *Johnson* (1775), 1 Cowp. 341; *Beamish* v. *Richardson & Sons* (1914), 49 S.C.R. 595.

Bass, for respondent: The cases cited for the appellant are not applicable, and are transactions in grain buying and selling, with the exception possibly of *B.C. Stock Exchange* v. *Irving.* Grain cases on the Exchange are notably speculative, because they frequently refer to grain crops not yet even sown. Here the shares purchased are tangible entities, and purchaser is bound by the contract to accept delivery when fully paid for, and the broker is bound to deliver. It was a clear case of purchase and sale by agreement, just as in the purchase and sale of land by agreement the vendor is bound by his covenant to convey and give title, and the purchaser is bound to complete his payments: see *Bridger* v. *Savage* (1885), 15 Q.B.D. 363; *Hyams* v. *Stuart King* (1908), 2 K.B. 696 at pp. 706-7.

Argument

Taylor, in reply.

Bass, on the cross-appeal, was stopped.

Ernest Miller, for respondents (by cross-appeal), cited Caspersz on Estoppel, 4th Ed., 90. It is the custom of the stock exchange that the person who orders the purchase has the right to order a sale. It was merely a matter of form that the account was opened in the name of the plaintiff. The broker looks solely to the person ordering for all matters in connection with the transaction. The plaintiff, moreover, was aware that defendant Aikman dealt with the brokers, as her agent, and when the marital relations ceased, it was her duty to inform the brokers by cancelling the agency of the defendant Aikman. She took

no such step, and therefore the brokers, it is submitted, were justified in dealing with him.

Bass, in reply, referred to Halsbury's Laws of England, Vol. 27, pp. 243-4, paragraphs 505 and 506, and cases therein cited.

Cur. adv. vult.

2nd October, 1923.

MACDONALD, C.J.A.: I would dismiss the defendant Aikman's appeal, since I cannot infer from the evidence that the transaction was an illegal one. That is the only point in that appeal.

But the plaintiff appeals from that part of the judgment which dismissed her action against the other defendant, namely, Burdick Brothers, Limited. I would allow this appeal.

Mr. Aikman bought the 50 C.P.R. shares acting as agent for his wife, the plaintiff. They were bought in her name and so entered in the books of Burdick Brothers. One Roe, their employee, who professed to have a knowledge of the rules of the stock exchange, was called, but under cross-examination his answers proved nothing which takes this case out of the ordinary principles applicable to transactions by an agent for a disclosed principal contracting with another person.

It is conceded that Mr. Aikman was the agent for his wife to purchase the stock, but not that he had authority to direct a sale of it. Nor are any circumstances proved from which an implied authority could be inferred. Even if it be assumed that the brokers in selling were, by the rules of the stock exchange, entitled to act on the instructions of the agent still knowing that the proceeds belonged to the plaintiff, the brokers were not entitled to a discharge by shewing that they had paid them to the agent, unless they could also prove the agent's authority, either express or implied, to receive the money. Halsbury's Laws of England, Vol. 27, pp. 243-4:

MACDONALD, C.J.A.

"A broker who receives the price of securities sold must account for the price to the owner of the securities, or pay it to some agent authorized by him to receive payment on his behalf; and a custom, if one were proved to exist, that a broker need only recognize the person instructing him would be unreasonable and would not bind anyone who was ignorant of it."

Proof of such authority has not even been attempted here.

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We are asked to infer it from the mere fact that the agent was entrusted with the plaintiff's cheque, payable to the brokers, and with authority to name the price at which the shares should be purchased.

GALLIHER, J.A.: Aikman's appeal, in my opinion, should be dismissed.

Assuming, which I do not decide, that the transaction between Burdick Brothers and Mrs. Aikman comes within the provisions of section 231 of the Criminal Code, that cannot affect the question as between Aikman and Mrs. Aikman. The stock transaction was closed and whatever might be said as to Mrs. Aikman not being able to recover the money from Burdick Brothers, the fact is, that the proceeds of the sale were paid over to Aikman and he cannot appropriate the moneys to his own use. The taint, if taint there was, would not attach to the moneys as between Aikman and Mrs. Aikman. As Lord Justice Lindley puts it, in *Thacker* v. *Hardy* (1878), 4 Q.B.D. 685:

> "If gaming and wagering were illegal, I should be of opinion that the illegality of the transactions in which the plaintiff and the defendant were engaged would have tainted, as between themselves, whatever the plaintiff had done in furtherance of their illegal designs."

GALLIHER, J.A.

A fair test, I think, would be, assuming the transaction illegal and that when the money was realized, Mrs. Aikman instructed Burdick Brothers to pay it into her credit in the bank, and they had done so, could the bank refuse to honour her cheque on that fund? It was her money in the hands of Aikman just as much as it would be in the bank.

With regard to the cross-appeal by the plaintiff against the judgment in favour of Burdick Brothers, it comes down to a very small point. It is conceded that Aikman had authority to instruct Burdick Brothers to buy the stock for Mrs. Aikman, and assuming that the rules of the New York Stock Exchange, subject to which the order was placed, would confer on Aikman authority to instruct them to sell and the sale as here took place, and the proceeds were in the hands of Burdick Brothers, on what principle are we to decide whether Aikman had authority to receive that money? It seems to me on the

ordinary principles of law governing principal and agent. When the transaction as to buying and selling was completed and the proceeds in the hands of the brokers here, the necessity for quick action or advice as to what to do had ceased, and that was the reason given in the defendant's evidence why they looked to Aikman for instructions.

Then there is another circumstance in the facts of this case which, I think, merits consideration. There is no doubt in my mind that Burdick Brothers were aware that these orders were being placed for Mrs. Aikman and with her money. Her first cheque for $500 was received and the order for 50 shares of C.P.R. stock entered in her name. Shortly afterwards her cheque for another $500 was received and for some reason (certainly not with Mrs. Aikman's knowledge) this stock purchase was entered in the name of J. A. Aikman, the husband, and at a subsequent date, again without the knowledge or consent of Mrs. Aikman, the first order in Mrs. Aikman's name was changed in the books of Burdick Brothers and blended with the second order in her husband's name. In law they would have no authority to do so, and if there was any rule of the stock exchange, which I am not satisfied was shewn in the evidence, to permit of this without the knowledge or consent of Mrs. Aikman, I should consider such rule unreasonable and give no effect to it. I only mention this because it seems an unusual transaction and, while it is only an incident, I have considered it in so far as it may apply to the ownership of all the moneys in the brokers' hands arising out of the transaction, and this I find in favour of Mrs. Aikman. But Mr. *Miller* says, assuming that these are Mrs. Aikman's moneys, Burdick Brothers have discharged their obligation by paying them over to Aikman, who had authority to receive them.

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Some question was raised as to whether the payment by cheque, drawn to the order of Aikman and cashed, was a sufficient payment, but if Aikman was duly authorized to receive the moneys, the authorities are clear that such a payment would discharge Burdick Brothers. Then, was he in law authorized to receive this money on Mrs. Aikman's behalf? Where do we find any authority in Aikman to receive these moneys? He

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had authority to buy the stock; he had no authority from Mrs. Aikman, according to the evidence, to sell, but assuming, as I do, that the custom would establish that authority, there is then first an authority to buy, and second, authority to sell. It cannot be said that Mrs. Aikman sent her husband to get these moneys, or that she had at any time given him direct authority. She was even unaware that the stock had been sold, hence most of the cases cited on this point are differentiated from the present, and we are down to this bald point, *viz.*, does the authority to sell unaccompanied by anything that would indicate authority to receive payment warrant payment to Aikman? The point seems to be covered by the references given us by Mr. *Bass* in Halsbury's Laws of England, Vol. 27, pp. 243-4, pars. 505 and 506.

GALLIHER, J.A.

In that view the cross-appeal should be allowed.

MCPHILLIPS, J.A.

EBERTS, J.A.

MCPHILLIPS and EBERTS, JJ.A. agreed in the result.

Appeal dismissed, cross-appeal allowed.

Solicitor for appellant: *F. L. Shaw.*

Solicitors for respondent Aikman: *Bass & Bullock-Webster.*

Solicitors for respondent Burdick Brothers, Limited: *Mackay, Miller & Green.*

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MINISTER OF FINANCE v. CALEDONIAN INSURANCE COMPANY.

IN RE LAND REGISTRY ACT AND HIGGINSON.

Succession duty—Agreement for sale of land by testator—Balance of purchase price due at his death—Estate valued and bond accepted by Crown for duty—Right of purchaser or his assigns to registration free of lien for duty—R.S.B.C. 1911, Cap. 217, Secs. 16 and 28.

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H. sold a property under agreement for sale and died before the final payment was made on the purchase price. Shortly after his death the balance due was paid to the executor who conveyed to the purchaser. After *mesne* conveyances a certificate of indefeasible title was issued to A. He mortgaged to the petitioner who subsequently took foreclosure proceedings and obtained final order for foreclosure. The Minister of Finance then registered a caution claiming succession duty in respect of the lot. It was held by the trial judge that the balance due on the property at the time of deceased's death was subject to a lien in favour of the Crown in respect of the interest according to the rate payable under the Act.

Held, on appeal, reversing the decision of McDONALD, J. (MARTIN and GALLIHER, JJ.A. dissenting), that when the valuation of a deceased person's estate is settled and a surety bond in favour of the Crown for payment of the succession duty is obtained and accepted by the Crown the estate is freed from any claim by the Crown in respect of duty.

APPEAL by the Minister of Finance from the order of McDONALD, J., of the 12th of January, 1923, on the petition of the Caledonian Insurance Company for an order directing the registrar of titles to register the title to lot 16, block 390, subdivision 526, group 1, New Westminster District, according to the terms of an application made on the 5th of June, 1922, clear of encumbrances and particularly clear of a lien claimed by the Crown. One T. S. Higginson purchased the above lot on the 18th of April, 1911, and registration of the conveyance was completed on the 8th of March, 1912. Higginson died on the 15th of September, 1911. Succession duties payable on the estate were fixed at $1,864.55 and on the 11th of November, 1911, W. D. Burdis, the surviving executor and the United States Fidelity and Guaranty Company entered into a bond

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with the district registrar of the Supreme Court in the penal sum of $10,000 to secure payment of succession duties. Prior to his death Higginson sold the said lot under agreement for sale for $6,000 and at the time of his death there was still owing $1,167 and interest. In November, 1911, the balance due on the lot was paid to the executor who conveyed to the purchaser. After *mesne* conveyances a certificate of indefeasible title to the lot was issued to one G. A. Arbuthnot who mortgaged the property to the petitioner on the 3rd of August, 1912, to secure the sum of $8,000. On a foreclosure action by the petitioner an order for foreclosure was made on the 29th of May, 1922, and on the 5th of June, 1922, the Minister of Finance registered a caution against the property stating that succession duty was claimed in respect of the lot. It was held by the trial judge that deceased's interest in the property at the time of his death was of the value of $1,207.84 and that said interest was subject to a lien in favour of the Crown for succession duties in respect only of said interest according to the rate payable pursuant to the provisions of the Succession Duty Act. The Crown appealed claiming that the interest of deceased in the property was subject to a lien for all the succession duties payable in respect of the whole estate, as the lien given by the Act is against the whole estate for all duties payable by the estate. The respondent Company cross-appealed on the grounds: (a) That as the property was sold before Higginson's death it was not subject to succession duty; (b) that a certificate of indefeasible title having been issued to G. A. Arbuthnot a predecessor in title to petitioner, section 37 of the Land Registry Act applied as against His Majesty; (c) that the lien referred to in section 20 of the Succession Duty Act does not apply where the Crown has accepted a bond for the payment of duties.

The appeal was argued at Victoria on the 25th of June, 1923, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Argument

D. Donaghy, for appellant: This is a Provincial tax and does not require registration. A solicitor in passing title when he sees a conveyance by executors it is his duty to find out

whether there is a charge against the land for succession duty. Section 60 of the Land Registry Act is referred to but that does not apply to a Provincial tax. Under section 37 the whole estate is liable. It is a liability to the Crown of a high order: see *In re Jones and the Succession Duty Act* (1920), 28 B.C. 481. It was held below that the property is only liable for its proportionate amount in respect of the whole estate but under sections 5, 21, 22 and 23 we have a lien against this lot for the whole amount due.

Alfred Bull, for respondent: A caution was filed in the Land Registry office under section 50 of the Act but not until after a mortgage to us from Arbuthnot was registered. Section 50 was passed to protect innocent purchasers. Under section 16 this property was never dutiable as it was sold before Higginson's death: see *The Canadian Bank of Commerce* v. *The Royal Bank of Canada* (1921), 29 B.C. 407; *Lysaght* v. *Edwards* (1876), 2 Ch. D. 499; *Rose and Others* v. *Watson* (1864), 10 H.L. Cas. 672; *Shaw* v. *Foster* (1872), L.R. 5 H.L. 321. It is not the land but the chose in action that is subject to the tax, *i.e.,* the balance due on the sale. We must look at sections 8 and 10 of the Land Registry Act Amendment Act, 1913, Cap. 36. We have an indefeasible title in 1912 only subject to what the Act there sets out. The 1914 amendment does not concern us. All portions of the estate are liable in proportion. Sections 7 and 9 shew the Legislature taxed against each property what is due and it is the executor's duty to deduct the proper amount according to relationship. We say (a) there was a transfer under section 16; (b) the Crown has no greater rights than are set out in the indefeasible title; (c) the taking of a bond is tantamount to payment; (d) the property in any case is only liable for its proportion.

Argument

Donaghy, in reply, referred to *In re Church* (1922), 3 W.W.R. 1207; *Attorney-General* v. *Newman* (1901), 1 O.L.R. 511 at pp. 515-6.

Cur. adv. vult.

2nd October, 1923.

MACDONALD, C.J.A.: The registrar of titles has refused to register the petitioner's title to the land referred to in these

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proceedings, on the ground that the Crown is entitled to succession duty which has not been paid, and which is a charge upon the land.

It may be that that ground is not tenable, since the certificate of indefeasible title might not preclude the Crown from claiming the duty as a "tax, rate or assessment," under the exceptions to the conclusiveness of a certificate of indefeasible title. But I need not decide that question. I find no difficulty in deciding this appeal on what I think is a proper construction of the Succession Duty Act, Cap. 217, R.S.B.C. 1911.

The executor of the deceased applied for letters probate. He complied with the provisions of the Act by furnishing proofs of valuation and relationship. The Crown accepted the valuation put upon the estate by the executor, and fixed the amount of the duty payable on the whole estate at $1,864.55, and accepted the bond of the executor and a guarantee company securing the whole duty. In the absence of fraud or mistake or other fact which would invalidate the security, which was not suggested here, I think, that so far as the Crown's claim to duty is concerned it should be fully satisfied by the bond, and that the executor might distribute the estate to the several persons entitled thereto free of any claim for duty by the Crown, though as between the executor and such persons, the executor would have a right to deduct the duty before paying over the share. That, as I understand it, is the contention of the petitioner, who is respondent in the Crown's appeal, and who also appeals from that part of the judgment which he deems erroneous.

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The Crown claims that the property, which was sold by the deceased, but not fully paid for nor conveyed in his life-time, was, notwithstanding the bond, subject to the Crown's claim for duty, and not only for the amount of the duty which would be applicable to this portion of the estate, but to the duty payable in respect of the testator's whole estate.

The learned judge found that the Crown was entitled to look to this property only for the duty applicable to it, namely, the duty which would be payable on the purchase-money unpaid at the time of death. The Crown is not satisfied with that

judgment, but contends that as it has not been paid any part of its claim against the estate, it is entitled to look to this property for the whole, to the extent that the said purchase-money will satisfy that claim.

At the time of the testator's death, there were $1,207 remaining due on the purchase price. The Crown claims that sum in full, notwithstanding that the purchaser has paid it to the executor. Shortly after the testator's death, the purchaser paid the balance of the purchase-money, took a conveyance, re-sold the land and by *mesne* conveyances, it finally became vested in one Arbuthnot, who mortgaged it to the petitioner, who foreclosed the mortgage and obtained a final order. He thereupon applied for registration of his title, which the registrar has refused on the ground already mentioned, *viz.*, that the succession duty is a lien on the land for the amount of $1,207 and had not been paid.

I would dismiss the Crown's appeal, and allow the petitioner's appeal.

There are many sections of the Succession Duty Act which are troublesome of interpretation, but I think much of the confusion in them disappears when the objects of them are closely scrutinized. It must be borne in mind that there may be estates as to which no letters probate or letters of administration have been applied for or granted. In such cases the Crown may proceed to enforce its claim for duty by any of the methods provided for in the Act. Such a state of circumstances would account for the several remedies open to the Crown which would not be necessary where a bond had been taken, or when the duty had been paid in cash by the executors. Moreover, many of the provisions of the Act, such as provisions enabling the executors to deduct duty from each legacy and which give them powers of sale, have their legitimate places in the Act. These sections so construed are not inconsistent with the notion that when once the valuation is settled upon and the bond given for the duty, that that frees the estate from any claim by the Crown and leaves the executors free to distribute the estate. Section 28 of the Act strongly supports this view. There foreign executors are prohibited from transferring stocks,

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debentures or shares within the Province, which are liable to duty, until such duty has been paid "or security given as required by the last five preceding sections," namely, the sections as to valuation and the giving of the bond. What is contemplated there is, that when the bond has been given, stock, debentures and shares, the property of the deceased in the Province, may be sold free from liability to the Crown for succession duty. If this be so, it is, I think, the fair interpretation to put upon the Act, that other portions of the estate are likewise released from claims by the Crown for duty when the bond has been given and accepted, there being no sound reason why the particular classes of property mentioned in that section should be freed while other property of the estate should be held bound by the Crown's lien.

MARTIN, J.A.: This is an appeal from the order of Mr. Justice MCDONALD, made upon the petition of the respondent Company, declaring that succession duty is payable only upon the balance due, $1,207, under an agreement for sale of the property for $6,000, entered into by the late registered owner. We have not the benefit of any reasons which guided the learned judge in taking this view, but after a careful consideration of the statutes in point, I am unable, with all respect, to accept the conclusion. Briefly, there is a lien under the Succession Duty Act, R.S.B.C. 1911, Cap. 217, upon the estate in gross,

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and it is not liable to be segregated between the various succeeding interests. Much reliance was placed upon section 16, thus:

> "Nothing herein contained shall render liable for duty any property *bona fide* transferred for a consideration that is of a value substantially equivalent to the property transferred."

But I do not think that property subject to an agreement for sale upon instalments can be deemed to be "property . . . . transferred" within the meaning of the Act, whatever the reciprocal equitable interests and liens of vendor and purchaser may be, which I lately considered in *The Canadian Bank of Commerce* v. *The Royal Bank of Canada* (1921), 29 B.C. 407, and see *In re Church* (1922), 3 W.W.R. 1207. I am not prepared to go the length of holding that the first payment of, *e.g.,* $100 on a ten-year agreement for sale for $10,000 "trans-

ferred" the whole property contracted for out of the scope of the Act. It would doubtless be different in the case of a contract for immediate sale, the difference between which and the final transfer upon completion of an executory contract is pointed out in the *Church* case, at p. 1208. As Moss, J.A. pointed out in *Attorney-General* v. *Newman* (1901), 1 O.L.R. 511 at p. 515, this tax is an estate duty, not a "debt," and the Land Registry Act does not apply. I think *In re Crawford Estate* (1918), 25 B.C. 178, was rightly decided.

The appeal should, in my opinion, be allowed, and the cross-appeal dismissed.

MARTIN, J.A.

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

In *In re Crawford Estate* (1918), 25 B.C. 178, was, in my opinion, rightly decided by MURPHY, J.

GALLIHER, J.A.

MCPHILLIPS and EBERTS, JJ.A. agreed in dismissing the appeal and allowing the cross-appeal.

MCPHILLIPS, J.A.

EBERTS, J.A.

Appeal dismissed; cross-appeal allowed, Martin and Galliher, JJ.A. dissenting.

Solicitor for appellant: *Dugald Donaghy.*
Solicitor for respondent: *Alfred Bull.*

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MOUNT PLEASANT UNDERTAKING CO. v. McDUFFEE

MOUNT PLEASANT UNDERTAKING COMPANY v. McDUFFEE.

Executors and administrators—Funeral expenses—First charge on assets—Same degree—Executor's preference.

An undertaking establishment brought action against an executor to recover the cost of undertaking services ordered by deceased's widow. The only assets of deceased that came into the executor's hands were some oil stock of very little value and $77.20 cash which he paid to his solicitor for the cost of proving the will.

Held, on appeal, affirming the decision of GRANT, Co. J., that the action was properly dismissed.

Per MACDONALD, C.J.A.: Funeral expenses and expenses of proving the will are of the same degree and a first charge on the assets and when they are of the same degree the executor is within his right in paying one in preference to the other.

APPEAL by plaintiff from the decision of GRANT, Co. J., of the 18th of May, 1923, dismissing the plaintiff's action to recover from R. H. McDuffee, executor of the estate of Angus Murdoch Ross, deceased, the sum of $292.50 being funeral expenses of the said A. M. Ross. The defence was that no assets came into his hands out of which he could pay the plaintiff; that he fully administered the said estate according to law and there came into his possession as executor the sum of $77.20 (moneys in the Royal Bank) and 100 shares of stock in the Pitt Meadows Oil Co. (of problematic value) which were paid to the late A. M. Ross's solicitors for testamentary expenses; that he received no other sums nor had he any knowledge of any other assets of the estate although diligent search and inquiry had been made to ascertain if any existed.

Statement

The appeal was argued at Victoria on the 26th of June, 1923, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Cosgrove, for appellant: The defendant did not order the funeral but he afterwards ratified it. He received $77.20 and paid it to the solicitor. The funeral is a first charge: see *Sharp* v. *Lush* (1879), 10 Ch. D. 468 at p. 472. He must

Argument

pay even without an order on his part. The evidence shews if he had done his work he would have paid for the funeral: see *Tebbs* v. *Carpenter* (1816), 1 Madd. 290 at p. 297; *In re Brogden. Billing* v. *Brogden* (1888), 38 Ch. D. 546 at p. 563; *In re Hyatt. Bowles* v. *Hyatt, ib.* 609. As to executor's duty to collect assets see *Wightwick* v. *Lord* (1857), 6 H.L. Cas. 217 at pp. 234-5; *Northrup et al.* v. *Cunningham* (1890), 24 N.S. R. 188 at p. 195. On the question of priority, funeral expenses rank first.

Mayers, for respondent: The executor knew nothing of his being executor until after the funeral. He did not know of this liability. The executor can only be charged with funeral expenses when they are not paid by anyone else and when no one else is liable: see Williams on Executors, 11th Ed., 1409-10; *Tugwell* v. *Heyman* (1812), 3 Camp. 298; *Rogers* v. *Price* (1829), 3 Y. & J. 28 at pp. 34-5; *Lucy* v. *Walrond* (1837), 3 Bing. (N.C.) 841 at p. 843; *Brice* v. *Wilson* (1834), 3 N. & M. 512. They are not held personally liable unless there is culpability: see *Job* v. *Job* (1877), 6 Ch. D. 562; *In re Grindey. Clews* v. *Grindey* (1898), 2 Ch. 593. The pleading is wrong: see *Corner* v. *Shew* (1838), 3 M. & W. 350. In fact the credit was given the mother of the deceased. They must shew (a) that he gave credit for the expense; and (b) that he had assets. The plaintiff gave credit to another person and acted so as to make the defendant believe he was not responsible. He had no notice of the claim when he gave the $77.20 to the solicitor: see Williams on Executors, 11th Ed., 791; *Harman* v. *Harman* (1685), 2 Shower 492; *In re Samson. Robbins* v. *Alexander* (1906), 2 Ch. 584. It must be shewn he had assets sufficient to meet the funeral expenses.

Argument

Cosgrove, in reply, referred to *Re Joyce & Scarry* (1889), 6 Man. L.R. 281, and *Banbury* v. *Bank of Montreal* (1918), A.C. 626.

Cur. adv. vult.

2nd October, 1923.

MACDONALD, C.J.A.: It is well to bear in mind the frame of the action. It is one to recover from the executor a debt

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to the plaintiff incurred by the wife of the deceased, for undertaking services in the burial of her husband.

The defence is *plene administravit,* and the evidence discloses that the only property of the deceased which came into the defendant's hands was the sum of $77.20, which was paid by him to his solicitor for the costs and disbursements of proving the will. The insurance moneys belonged to the children. They were therefore not available for the payment of the claims of creditors. The "home property" was the property of the widow. This was declared by a judgment of the Supreme Court which is not now disputed. The only property, therefore, other than the said $77.20, which might be considered assets, consists of furniture and a piano, claimed by the widow and a son. Whatever may be the merits of their claims, the fact is that this property never came to the defendant's hands. It is still in existence and in the possession of the claimants. It has not been lost. If it were the duty of the defendant to have got in this property, he has at most been guilty of delay in or refusal to perform his duty, and plaintiff's remedy is administration. This action does not make that an issue, so that the only question left is the disposal of the $77.20.

It was argued that funeral expenses come first in order of distribution, and that if money in hand were paid to satisfy a debt of lower degree, the plaintiff is entitled to that extent to be paid by the executor. In other words, that as to that sum, the defence of *plene administravit* has not been sustained, and the plaintiff is entitled to succeed for $77.20.

MACDONALD, C.J.A.

Funeral expenses and expenses of proving the will are mentioned by Blackstone, and in all authoritative text-books, as being the first charge on the assets; they are of the same degree. When debts are of the same degree, the executor may prefer one to the other, and therefore when the defendant paid the expenses of proving the will in preference to the funeral expenses, he was within his right.

I have treated the case as if the executor had incurred the funeral expenses himself. The evidence shews that plaintiff made no claim upon him until a year after the death of the testator, and then only to complain that the widow who ordered

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the funeral and to whom the expenses thereof had been charged in their books, had not paid them.

The appeal should be dismissed.

MARTIN, J.A.: I agree that this appeal should be dismissed. In my opinion, upon the evidence, the plaintiff did not give credit to the defendant but to Mrs. Ross.

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

MCPHILLIPS, J.A.

EBERTS, J.A.

MCPHILLIPS and EBERTS, JJ.A. agreed in dismissing the appeal.

Appeal dismissed.

Solicitors for appellant: *Phipps & Cosgrove.*
Solicitors for respondent: *McLellan & White.*

REX v. PROTEAU.

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REX v. PROTEAU

Criminal law—Charge of incest—Evidence—Complaint made by girl to step-mother—Lapse of six days—Evidence of further complaint to a sister two days later—Corroboration—Admissibility—Criminal Code, Sec. 204.

On a charge of incest there was evidence of the prosecutrix having complained to her stepmother six days after the alleged crime was committed, and further evidence of the prosecutrix and her sister was allowed in that two days later she had complained to her sister of the said crime.

Held, on appeal, that evidence of the statements made by the prosecutrix to her sister eight days after the occurrence when she had had ample opportunity to complain before, was inadmissible, that by its admission a substantial wrong was done the accused and there should be a new trial.

APPEAL by accused from the conviction by MURPHY, J. and the verdict of a jury on the 31st of May, 1923, at Kamloops on a charge of incest. The accused who was 70 years old was

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married a second time, his first wife having died in 1920. A son and daughter by the first wife, and his second wife's son lived with the parents. The daughter, aged 15, went to a party on the evening of the 8th of October, 1922, but came home early, her stepmother being away from home that night. Her story was that she went to bed and was awakened at about one o'clock in the morning by her father getting into her bed. He told her if she called out that the two boys in the adjoining room would hear and they would both go to gaol. He frightened her into keeping quiet and he then had connection with her. She went to school on the following day without saying anything. On the 14th of the month she left home and stayed with her teacher for three days waiting for the stage that was to take her to her older married sister who lived at Louis Creek about 33 miles away. On the 15th (the day after she left home) she saw her stepmother and then told her of her father's act and on reaching her sister's on the 17th she immediately told her of the crime. The accused appealed from the conviction mainly on the ground that the evidence of the daughter and her married sister of the statements made by the girl to the sister, should have been rejected and that its reception materially affected the accused's case.

Statement

The appeal was argued at Vancouver on the 5th of October, 1923, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

A. D. Macintyre, for appellant: This man is 70 years old. The girl must complain within a reasonable time; she must complain at the first opportunity, otherwise it should not be allowed in. She did not complain for seven days and she had ample opportunity to complain before: see *Rex* v. *McGivney* (1914), 19 B.C. 22. After having spoken to her stepmother evidence of the statement to her older sister was inadmissible and allowing it in materially affected the jury.

Argument

Wood, for the Crown: The complainant's statement to her stepmother was in sufficient time and should be accepted as corroboration. Evidence of her having later spoken to her

sister being allowed in does not materially affect the case. The conviction should be upheld.

Macintyre, in reply.

MACDONALD, C.J.A.: I think there should be a new trial because of the wrongful admission of the statements made by the prosecutrix to her sister, which statements were made eight days after the occurrence and after she had had ample opportunity to make complaint to half a dozen or more other people. That, in my opinion, would have been sufficient for its rejection in the case, but we have something further here. We have the fact that she did make a complaint of this very occurrence to her stepmother on the 15th, namely, seven days after this occurrence, and two days or one day before the complaint made to the sister. Under these circumstances it is impossible to say that that evidence was not wrongly admitted, and the question then arises, was any substantial wrong done, because if no substantial wrong was done the statute enables us to say we will not interfere. Now the evidence goes to the very gist of the case. Her statement to her sister was a statement of what took place when this crime was alleged to have been committed. The jury listening to that would, of course, pay a good deal of attention to it. They might think it was corroboration, as it would be, if admissible, corroboration of her own story, at all events it would strengthen her story, render her story reasonable and consistent; that being so it must, I think, be held that the admission of that evidence prejudiced the prisoner's case, and therefore substantial wrong was done to him.

It is unnecessary, because of the view we have come to, to pass upon the other question which was reserved.

There will be a new trial.

MARTIN, J.A.: In *Rex* v. *McGivney* (1914), 19 B.C. 22 at p. 27 this Court adopted the rule that to be admitted in evidence the complaint must be made "at the first opportunity after the offence which reasonably offers itself." Whatever may be said in this case as to the earliest period within which the first opportunity occurred, it did at least occur six days

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afterward, namely, on the 15th (the offence having been committed on the 9th), when the girl complained to her mother. But the learned judge refused to admit that complaint because it was made after an unreasonable delay and hence was not the first opportunity. That decision ended the matter finally, because after that first rejected opportunity there were in law no later opportunities which were open to the learned judge to consider. He, so to speak, exhausted himself and became *functus officio* upon the question of reasonable opportunity after he had ruled against it once and for all, and when later on he gave another ruling on the same question, in which he admitted a complaint which was made two days after the first rejected one, he, speaking with all respect, in my opinion, had no jurisdiction to entertain it at all in view of the fact that he had already adjudicated finally upon the first and only opportunity in the legal sense.

MARTIN, J.A.

I agree with what my brother the Chief Justice has said as to a substantial wrong having been occasioned to the accused.

GALLIHER, J.A.: Even if there is some uncertainty as to when the complaint was made, we should come to the conclusion that it might be against the prisoner because we cannot tell what effect that might have on the minds of the jury. Now, the object of giving this evidence, as I take it, was to render reasonable the story the young girl told, and anything that is admissible would in that sense be corroborative not of the thing itself but of the consistency of the girl's evidence. We could hardly be safe in saying that such evidence presented for such purpose would not leave a strong impression on the minds of the jury and might be the turning point. Where we find it might be the turning point in the minds of the jury in deciding the case, then a substantial wrong is done.

GALLIHER, J.A.

MCPHILLIPS, J.A.: I am in agreement that the case is a proper one in which to direct a new trial. My opinion is, illegal evidence was admitted at the trial, and as to what effect that may have had upon the accused, I content myself by merely referring to what Sir Charles Fitzpatrick, then Chief Justice of

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Canada, said in *Allen* v. *Regem* (1911), 44 S.C.R. 331 at p. 335. He said:

"My difficulty is to say to what extent the jury, or any 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."

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."

MCPHILLIPS, J.A.

EBERTS, J.A.: I agree with my brothers in granting a new trial.

New trial ordered.

Solicitor for appellant: *R. M. Chalmers.*
Solicitor for respondent: *Cornwall & Archibald.*

DARRALL v. THE CEDAR CREEK MINING COMPANY LIMITED.

Practice—Appeal—Failure to enter in time—Application to extend time for setting down—Mistake of solicitor as to registry in which appeal book should be approved—Costs.

On a motion to extend the time for setting down an appeal, it appeared that judgment was given on the 30th of August, 1923. Notice of appeal was filed on the 13th of September and served on the 18th of September. The appeal books were ready on the 25th of September but appellant's solicitor erred in thinking the books could be approved in Vancouver. Discovering his error on the 29th of September, he immediately forwarded a book for approval to the registry at Williams Lake. The book was never submitted to respondent's solicitor for approval. September the 28th was the last day for setting down the appeal in Vancouver.

Held, MARTIN and MCPHILLIPS, JJ.A. dissenting, that although in not

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setting down the appeal in time there was gross negligence on the part of the appellant's solicitor the application should be acceded to where it can be done without prejudice to the respondent, but the appellant should pay the costs of the motion.

MOTION to the Court of Appeal for an extension of time for setting down the appeal. The appeal was from an order of CALDER, Co. J., of the 30th of August, 1923, made at Williams Lake in the County of Cariboo where the proceedings are filed, refusing an application of the plaintiff to bring an action in the Supreme Court to recover possession of certain mining leases and for an injunction. Notice of appeal was filed on the 13th of September and served on the 18th of September. The appeal books were ready on the 25th of September but the appellant's solicitor thinking the appeal books could be approved in Vancouver discovered his mistake on the 29th of September when he sent a copy to the Williams Lake registry for approval. The appeal books should have been filed, duly approved in the Court of Appeal at Vancouver on or before the 28th of September, 1923.

Statement

The motion was heard at Vancouver on the 4th of October, 1923, by MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

A. H. MacNeill, K.C., for appellant: This is a case where the solicitor has made an error as to the registry and did not discover his mistake until it was too late. No substantial wrong has been done, so *Gold* v. *Evans* (1920), 29 B.C. 81 applies: see also *B.C. Independent Undertakers, Ltd.* v. *Maritime Motor Car Co.* (1917), 24 B.C. 300.

Argument

F. A. McDiarmid, contra: The appeal book was not even sent to me for approval. He must know this is necessary before the registrar can approve. This case is more in fault than *Bouch* v. *Rath* (1918), 26 B.C. 320.

MacNeill, in reply.

Cur. adv. vult.

8th October, 1923.

MACDONALD, C.J.A.

MACDONALD, C.J.A. (oral): I would allow the motion and extend the time for setting the case down. I have not anything

to add to what I said in *Gold* v. *Evans* (1920), 29 B.C. 81. That was a case where admittedly there was no excuse. It was there said that:

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

In this case there is no suggestion of prejudice. The notice of appeal was given in ample time. The appeal books were prepared but by reason of misapprehension on the part of the solicitor the appeal was not set down in time. Where an indulgence is asked for in cases of this kind the applicant must pay the costs.

MACDONALD, C.J.A.

MARTIN, J.A. (oral): In my opinion this application is exactly the same as that in which this question was decided in *Bouch* v. *Rath* (1918), 26 B.C. 320. I find that clause 10 of the affidavit upon which the application is made states "that the delay in having the appeal books filed in due time herein is owing to the mistake of myself, as solicitor, in believing that the said books could be approved by the registrar of the Appeal Court in Vancouver, and could be set down in the usual way," the exact ground on which the application was made in *Bouch* v. *Rath*.

MARTIN, J.A.

I recognize that the decisions in England on this point are very conflicting, examining them again this morning, and it is impossible to extract any general principle from them. *Gold* v. *Evans* (1920), 29 B.C. 81, on which applicant's counsel relies, does not reverse the decision in *Bouch* v. *Rath,* as our ruling therein was not brought before the Court and it felt that the application should be allowed on the particular circumstances. The particular circumstances here are precisely the same as in *Bouch* v. *Rath,* therefore I consider it my duty to adhere to my decision; and there is less reason to give relief here than in *Bouch* v. *Rath,* because the present applicant had warning while the applicant in *Bouch* v. *Rath* had none.

GALLIHER, J.A. (oral): I would allow the application. In

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GALLIHER, J.A.

Bouch v. *Rath* (1918), 26 B.C. 320, there was an element which affected my decision. I did not, unfortunately, state it in my reasons but my best recollection is that it was more a case of real neglect than of mistake. This seems to me a case of mistake entirely. I feel at all events, under the circumstance of this case, that we should not adhere to the rule too strictly. We certainly ought to be as uniform as possible, but when we do find in applications of this kind, as in other matters, a difference in the facts, the extent to which you can attribute mistake or negligence may vary in each case. Therefore I take the view in this case we should grant the application.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A. (oral): I am of like view to that expressed by my brother MARTIN. A decision has been given on this point, and as my brother MARTIN indicated, the solicitor must have known or should have known of the decision of this Court, otherwise it just means that a solicitor may make mistakes, disregard the rules, and nevertheless there will be an appeal. That is hardly our jurisprudence. Where a judgment is recovered the presumption is that it is right unless set aside on appeal. It is true there is a substantive right where notice of appeal is given, but always subject to the governing and controlling rules; I have a distinct recollection of many cases, unreported, before this Court where I felt that strict conformity with the rules seemed unduly harsh, yet without rules it would be chaos and work injustice; there must be some settled rule. This case does not afford good ground for any exception being made, in truth to allow the application is to disregard well-considered precedents.

EBERTS, J.A.

EBERTS, J.A. (oral): I am in favour of allowing the motion. The general rule in *Gold* v. *Evans* (1920), 29 B.C. 81 should obtain, which is a case where they were asking for relief against an estate, and on the facts it was shewn no substantial wrong would be done. I think leave should be given to allow the setting of the case down.

Motion granted,
Martin and McPhillips, JJ.A. dissenting.

IN RE IMMIGRATION ACT AND PONG FOOK WING.

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Statute, construction of—Immigration—Habeas corpus—Inmate of prison—Order for his detention for deportation—Form of—Order for release—Appeal—Jurisdiction—Can. Stats. 1910, Cap. 27, Secs. 40 and 43; 1922, Cap. 36, Sec. 5—B.C. Stats. 1920, Cap. 21, Sec. 2.

An accused was convicted of smoking opium and sentenced to pay a fine or in default of payment, imprisonment for one month with hard labour. He failed to pay his fine and while serving his sentence in prison an order was made by the minister of justice under section 43 of The Immigration Act directing the warden of the gaol that on the expiration of accused's sentence he be handed over to an officer authorized by the warrant of the deputy minister of immigration for his deportation. While in custody under the warrant awaiting his delivery to the transportation company for deportation he was released by an order of HUNTER, C.J.B.C. in *habeas corpus* proceedings.

Held, on appeal, that the order below be set aside, that there is the right of appeal, this being a civil proceeding and within section 2 of the Court of Appeal Act Amendment Act, 1920, giving the Court jurisdiction over appeals in *habeas corpus* proceedings in civil matters.

In re Wong Shee (1922), 31 B.C. 145 followed.

In re Mah Shin Shong (1923), 32 B.C. 176 distinguished.

Held, further, that the order for detention having recited that a written complaint was made under section 40 of The Immigration Act it was not necessary to specify the particular person making the complaint.

Held, further, that accused was "an inmate of a prison" within section 43 of The Immigration Act notwithstanding that he was a prisoner on a sentence imposing imprisonment in default of payment of a fine.

APPEAL by the Crown from the order of HUNTER, C.J.B.C., of the 23rd of May, 1923, discharging Pong Fook Wing from the custody of the controller of Chinese immigration at Vancouver. The said Pong Fook Wing was convicted by the stipendiary magistrate at Vancouver on the 6th of April, 1923, pursuant to section 727 of the Criminal Code for that he did on the 5th of April, 1923, in the City of Vancouver smoke opium, and was fined $35 and costs and in default of payment to be imprisoned in Oakalla Prison Farm for one month. He did not pay the fine and served the said sentence at the expiration of which he was delivered by the warden of the gaol to the said controller of Chinese immigration by virtue of a warrant

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of the minister of justice for deportation to China in accordance with an order therefor of the deputy minister of immigration and colonization of Canada.

The appeal was argued at Victoria on the 4th of July, 1923, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

E. Meredith, for appellant.

Bray, for respondent, raised the preliminary objection that there was no jurisdiction (a) as the appeal is from an order in a criminal matter and (b) in a matter within the exclusive legislative jurisdiction of the Dominion of Canada. In this case accused suffered imprisonment in default of payment of fine and then he was held by the immigration authorities for deportation. They are proceeding under sections 40-43 of The Immigration Act: see *In re Mah Shin Shong* (1923), 32 B.C. 176. That it is a criminal matter see Annual Practice, 1921, p. 2084. There is no appeal: see section 47 of the Judicature Act (1873); *McColl* v. *Canadian Pacific Ry. Co.* (1923), A.C. 126. If the Dominion passes an Act it is the duty of the Province to enforce it: see *Russell* v. *Reginam* (1882), 7 App. Cas. 829; *Valin* v. *Langlois* (1879), 5 App. Cas. 115. That there is no jurisdiction to hear the appeal see *Regina* v. *Eli* (1886), 13 A.R. 526 at p. 532; *Regina* v. *Corporation of London* (1888), 15 A.R. 414. The Dominion can increase the power of the Provincial Courts within the ambit of its authority but this is outside its ambit: see *In re Vancini* (1904), 34 S.C.R. 621. He is in prison under a Dominion jurisdiction.

Argument

Meredith, contra: That there is the right of appeal see *In re Wong Shee* (1922), 31 B.C. 145. In this case it depends entirely on section 43 of The Immigration Act, whereas *In re Mah Shin Shong* (1923), 32 B.C. 176 comes under section 10B of The Opium and Narcotic Drug Act, as enacted by Cap. 36, Sec. 5, of 1922.

Bray, in reply: The right of appeal is a substantive right and not a matter of procedure.

Meredith, on the merits: The question argued below was as to the word "inmate" and it was held that one imprisoned in

default of payment of a fine did not come within that word. [He referred to *In re Tiderington* (1912), 17 B.C. 81; *In re Rahim, ib.* 276; *Cox* v. *Hakes* (1890), 15 App. Cas. 506.] Section 23 of The Immigration Act precludes the Court below from making this order.

Bray: When the man is in gaol the Board cannot act on its own motion; they must get a warrant from the minister. The minister must receive a complaint and request the minister of justice to issue an order for delivery of the prisoner, the procedure being in sections 40 to 43 of The Immigration Act. The acting minister signed the order. There is no provision for this. The sections should be followed strictly. The prisoner was not an "inmate," he was detained until his fine was paid: see *Rex* v. *Knowles* (1913), 25 W.L.R. 294.

Argument

Meredith, in reply.

Cur. adv. vult.

15th October, 1923.

MACDONALD, C.J.A.: This is an appeal from an order in *habeas corpus* proceedings releasing the defendant from detention by the immigration authorities.

Objection was taken that the order of detention was bad for not shewing that the complaint was made by a person authorized under section 40 of The Immigration Act to make it. That objection is, I think unsound. The said order recites that the complaint was made under section 40, which, I think, clearly implies that it was made regularly under that section, that is to say, by a person entitled to make it under that section.

MACDONALD, C.J.A.

As to the contention that the deportee was not an inmate of a prison within the meaning of the Act, I need only say that he was in fact such an inmate, and I think was there being properly detained. Whether he was being detained in a prison because of default in paying his fine, or was imprisoned without the option of a fine, does not appear to me to be a factor in the case. The thing that made him liable to deportation was the fact that he was an inmate of a prison.

This case differs essentially from that of *In re Mah Shin Shong* (1923), 32 B.C. 176, which was decided under section 10B of The Opium and Narcotic Drug Act as enacted by Cap.

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36, Sec. 5, of 1922, and in which it was said that section 33 of The Immigration Act furnished only the procedure for deportation. In that case I held that the Provincial legislation giving an appeal from an order of discharge in *habeas corpus* was inapplicable since the proceedings were, in my opinion, criminal. In the case at bar the proceedings are under The Immigration Act itself as in an ordinary case of deportation of an undesirable, and are not part and parcel of criminal proceedings. Such proceedings as these have been held to be civil and hence the local statute is applicable.

I would allow the appeal.

MARTIN, J.A.: It is objected, first, that this Court has no jurisdiction to entertain this appeal, because it is a criminal proceeding. But we have decided in *In re Wong Shee* (1922), [31 B.C. 145]; 2 W.W.R. 156, that these proceedings under the Federal Immigration Act are not of a criminal nature, and so the amendment introduced by the Court of Appeal Amendment Act, 1920, Cap. 21, Sec. 2, applies, giving us jurisdiction over appeals in *habeas corpus* proceedings in civil matters. In *In re Mah Shin Shong* (1923), [32 B.C. 176]; 1 W.W.R. 1365, a majority of this Court held that the particular proceedings therein were of a criminal nature, hence no appeal lay to us.

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But it is further objected that our jurisdiction is just as much excluded from those civil proceedings affecting the liberty of the subject which are founded upon Federal statutes as it is in criminal (Federal) proceedings. Whatever may be said about this view as to certain classes of statutes, it does not, in accordance with the reasoning in *Wong Shee's* case, apply to these immigration proceedings, the Chief Justice saying at p. 158:

> "The power to legislate in relation to civil rights was assigned to the Province, the right to liberty where a person is detained not for a crime or supposed crime, but as in this case, to test whether or not the person has fulfilled the conditions necessary to her admission into Canada, is a civil right. The right to the writ of *habeas corpus* is not given by Dominion statute but is part of the common and statutory law of England introduced into and made part of the law of this Province."

Hence, I think, in testing this Provincial civil right an

appeal lies to us, so the objection to our jurisdiction should be overruled.

Then as to the merits: The respondent had been convicted of smoking opium on the 6th of April, 1923, and sentenced to pay a certain fine and costs, in default of which he was to be imprisoned for one month, at hard labour, and while he was "an inmate of the gaol" an order was made on the 17th of April, by the minister of justice in the exercise of his discretion (as I regard it) conferred upon him by section 43 of The Immigration Act, Cap. 27, 1910 (and 1919, Cap. 25), directing the warden of the gaol that after expiry of his sentence the inmate should be handed over to an officer authorized by the warrant of the deputy minister of immigration "with a view to the deportation of such person [inmate]." This order of the minister of justice and warrant of the deputy minister thereunder, dated 23rd April, 1923, comply with forms E and EE, and at the time of the return (by the acting commissioner of immigration at Vancouver) to the *habeas corpus* the respondent was in his custody under said warrant awaiting his delivery to the transportation company which brought (him) into Canada with "a view to deportation as herein provided": section 43 (2). This return, under this warrant, is, in my opinion, a justification of the lawful custody and detention of the respondent, and that custody should not have been interfered with. The proceedings by the minister of justice under section 43 are entirely distinct from other proceedings authorized by the Act, and as they comply with all the requirements of the section they are valid, whatever may be said of the other distinct order of deportation made by the board of inquiry officer on the 16th of April, 1923 (under which the detention is also justified) as to which I express no opinion since I think the deputy minister's warrant, as aforesaid, is sufficient of itself alone.

MARTIN, J.A.

GALLIHER, J.A.: Pong Fook Wing, not being a Canadian citizen, or having Canadian domicil, having become an inmate of a prison in British Columbia, under a conviction for smoking opium, was, under section 42 of The Immigration Act of Canada, ordered to be deported. HUNTER, C.J.B.C., under *habeas corpus* proceedings had before him, ordered his release,

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on the ground that the order of the acting minister of immigration does not state the name and designation of the person from whom the information was received, as provided for in section 40 of The Immigration Act, and that section not being complied with, the order of the board of inquiry, acting on such order, was bad. The Crown appealed.

Mr. *Bray* for Pong Fook Wing objected that we had no jurisdiction to hear the appeal. This point was decided by this Court in *In re Wong Shee* (1922), [31 B.C. 145]; 2 W.W.R. 156, adverse to Mr. *Bray's* contention.

On the merits, section 40 of The Immigration Act imposes a duty on any officer cognizant thereof, and the clerk, secretary, or other official of any municipality in Canada, to send a written complaint to the minister regarding undesirable immigrants, under which class Pong Fook Wing falls by virtue of said section 40.

Now, the preamble to the order complained of is in the following words:

"Whereas under the provisions of section 40 of The Immigration Act, a written complaint has been received to the effect that Pong Fook Wing has become an inmate of a gaol."

Now, section 40 having imposed a duty on certain officials to make a written complaint to the minister, and the minister having recited in his order that a written complaint was made to him under the provisions of said section, it seems to me that it is not necessary to specify the particular person making the complaint, because it could not be under the provisions of the section unless it was made by some one upon whom the duty was cast in that section, and section 42 says:

GALLIHER, J.A.

"Upon receiving a complaint from any officer or from any clerk, secretary or other official of a municipality . . . . the minister may order," etc.,

as in this case done.

With the greatest respect, my view is that the order below was wrong upon that ground.

Mr. *Bray* further contended that Pong Fook Wing was not an inmate of a prison, because he was detained there on a sentence imposing imprisonment in default of payment of fine. I cannot accede to this argument. The order below should be set aside.

McPHILLIPS, J.A.: The Crown (Dominion) is the appellant and is appealing from the order of HUNTER, C.J.B.C., discharging Pong Fook Wing from the custody of the acting controller of Chinese immigration, he being previous thereto held for deportation. The objection which was particularly pressed and relied upon was that Pong Fook Wing was an inmate of a prison within the meaning of section 43 of The Immigration Act (Cap. 27, Can. Stats. 1910, as amended by section 17 of Cap. 25, Can. Stats. 1919) by reason of his incurring imprisonment in default of payment of a fine. The section, as amended, reads as follows:

"43. Whenever any person other than a Canadian citizen or a person having Canadian domicile, has become an inmate of a penitentiary, jail, reformatory or prison, the minister of justice may, upon the request of the minister of the interior, issue an order to the warden or governor of such penitentiary, jail, reformatory or prison, which order may be in the form E in the schedule to this Act, commanding him after the sentence or term of imprisonment of such person has expired to detain such person for, and deliver him to, the officer named in the warrant issued by the superintendent of immigration, which warrant may be in the form EE in the schedule to this Act, with a view to the deportation of such person.

"2. Such order of the minister of justice shall be sufficient authority to the warden or governor of the penitentiary, jail, reformatory or prison, as the case may be, to detain and deliver such person to the officer named in the warrant of the superintendent of immigration as aforesaid, and such warden or governor shall obey such order, and such warrant of the superintendent of immigration shall be sufficient authority to the officer named therein to detain such person in his custody, or in custody at any immigrant station, until such person is delivered to the authorized agent of the transportation company which brought such person into Canada, with a view to deportation as herein provided."

The conviction of Pong Fook Wing was in the words and figures following: [The learned judge set out the conviction and proceeded].

The order for deportation reads as follows: [after setting out the order the learned judge continued].

It cannot be questioned that Pong Fook Wing is "an inmate of a penitentiary, jail, reformatory or prison" (section 43 of Cap. 27, The Immigration Act, 1910). The deportation order is based upon a conviction of a criminal offence and he is an inmate of a prison, *i.e.*, "at present an inmate of Oakalla Prison Farm, B.C." I have already set forth the order for

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deportation of the immigration officer in charge shewing the ground for deportation and the order of the minister of justice is in the words and figures following: [The learned judge set out the order in the form E in the schedule to The Immigration Act and continued].

It will be seen that the minister of justice, in his order, says: "Whereas Pong Fook Wing of . . . . has within three years of landing in Canada become an inmate of the Prison Farm, Oakalla, B.C., having been convicted of the crime of smoking opium."

In *Rex* v. *Nat Bell Liquors, Ld.* (1922), 2 A.C. 128, section 39 (*c*) of the Supreme Court Act (Cap. 139, R.S.C. 1906) was under consideration, reading as follows:

"39. Except as hereinafter otherwise provided, an appeal shall lie to the Supreme Court,—

"(*c*) from the judgment in any case of proceedings for or upon a writ of *habeas corpus, certiorari* or prohibition not arising out of a criminal charge."

Lord Sumner said, at p. 168:

"Their Lordships are of opinion that the word 'criminal' in the section and in the context in question is used in contradistinction to 'civil,' and 'connotes a proceeding which is not civil in its character.'"

Can it be said that the proceedings in the present case are other than civil in character? That the deportation is based upon a conviction of the crime of smoking opium and his being an inmate of a prison cannot be the determining question. The test is, is the deportation order (in effect the statutory order of the board of inquiry) in its nature a criminal or civil proceeding, because it was under that order Pong Fook Wing was in custody? It seems to me the answer must be that being a proceeding under The Immigration Act, it cannot be said to be other than a civil proceeding. It would seem to me to be idle argument in the face of the proceedings taken and all that is spread upon the documents to say that the proceedings for and upon the writ of *habeas corpus* in the present case were not civil in their nature. In this connection it is instructive to note what Mr. Justice Anglin said in *Rex* v. *Jew Jang How* (1919), 3 W.W.R. 1115 at p. 1119:

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"I am satisfied that the proceedings for the writ of *habeas corpus* do not arise out of a criminal charge. The respondent could not have been convicted on the proceeding before the board of inquiry of any criminal offence."

The deportation is a statutory sequel following upon it being

shewn that the person ordered to be deported has become an inmate of a prison, and that was all the board of inquiry had to determine. All is based on this and confined to this. If I am right in this, then *Cox* v. *Hakes* (1890), 15 App. Cas. 506 is inapplicable, and an appeal is permissible to this Court even where the person detained has been discharged from custody, which is this case, *i.e.*, within the purview of the Court of Appeal Act Amendment Act, 1920, Cap. 21, Sec. 2, amending section 6 of the Court of Appeal Act, Cap. 51, R.S.B.C. 1911, admitting of an appeal, as the proceeding of the board of inquiry is a proceeding "civil" in its character (Lord Sumner (1922), 2 A.C. at p. 168).

It, therefore, follows, in my opinion, that as Pong Fook Wing was held in custody by the board of inquiry under The Immigration Act and the proceedings relative thereto being of a civil character, that the *habeas corpus* proceedings are subject to review and an appeal lies to this Court. The final question then is, was Pong Fook Wing in lawful custody at the time he was released by the order under appeal? In my opinion there can be but the one answer to this question, and it must be in the affirmative. The statute authorizes the deportation and the board of inquiry and the immigration officer in charge detaining Pong Fook Wing for deportation were acting in rightful conformity with the statutory mandate calling for deportation.

MCPHILLIPS, J.A.

EBERTS, J.A. would allow the appeal.

EBERTS, J.A.

Appeal allowed.

Solicitors for appellant: *Congdon, Campbell & Meredith.*
Solicitor for respondent: *H. R. Bray.*

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TURNER MEAKIN & CO. v. FIELD.

Principal and agent—Sale of lot—Fixed price—Lot shewn to prospective purchaser—Subsequent listing to another broker at lower price—Purchaser closes with second broker—Commission.

TURNER MEAKIN & CO. *v.* FIELD

The defendant listed a property with the plaintiffs, real estate brokers, with instructions to find a purchaser at the price of $5,000. The plaintiffs advertised the sale and interested prospective purchasers to whom they shewed the property. A month later the defendant listed the property with a rival broker at $4,750, the second broker having his offices across the hall from the plaintiffs' offices in the same building. The plaintiffs interested S. in the property and brought her to view it. Shortly after S. went to the plaintiffs' offices with a view to purchasing and when about to enter the offices saw a picture of the property in the window across the hall marked for sale at $4,750. She went into the plaintiffs' offices, discussed the sale but went out without making the purchase, crossed the hall and purchased the property from the second broker at $4,750. An action for a commission as having procured the purchaser in accordance with the listing was dismissed.

Held, on appeal, reversing the decision of GRANT, Co. J., that there was a general authority to obtain a purchaser, that the plaintiffs obtained the purchaser whose offer the owner accepted at a lower price, and they were entitled to their commission.

Statement

APPEAL by plaintiffs from the decision of GRANT, Co. J., of the 19th of June, 1923, in an action for commission for the sale of a lot in the Municipality of Point Grey. On the 13th of March, 1923, the defendant listed the property in question with the plaintiffs, real estate agents, in the usual way, fixing the purchase price at $5,000. The plaintiffs advertised the property, interested prospective purchasers, and shewed a number of them the property. On the 15th of April following, the defendant listed the same property with another real estate agent who had an office across the hallway from the plaintiffs' office in the same building. On the 18th of April the plaintiffs shewed the property to a Mrs. Sullivan. She seemed pleased with it and later came to the plaintiffs' office with a view to purchasing the property. As she was about to enter the plaintiffs' office she saw a picture of the property she was about to purchase in the window of the rival real estate firm's office

across the hall, the purchase price marked on the picture being $4,750. Mrs. Sullivan then went into the plaintiffs' office, discussed the sale but without making any bargain left the office and crossing the hall to the rival firm's office entered and after discussion closed a sale with the rival agent at $4,750. The trial judge dismissed the action.

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

McTaggart, for appellants: There was the usual listing of the property with the plaintiffs who advertised and interested prospective buyers, Mrs. Sullivan being one of them, and she eventually purchased. This case comes within *Prentice* v. *Merrick* (1917), 24 B.C. 432; see also *Burchell* v. *Gowrie and Blockhouse Collieries, Limited* (1910), A.C. 614; *Toulmin* v. *Millar* (1887), 58 L.T. 96; *Osler* v. *Moore* (1901), 8 B.C. 115. Argument

J. A. McGeer, for respondent: The plaintiff was employed to find a buyer at a certain figure and in this he failed: see *Bridgman* v. *Hepburn* (1908), 13 B.C. 389; 42 S.C.R. 228. There was not a general authority to find a purchaser here: see *Mackenzie* v. *Champion* (1885), 12 S.C.R. 649; *Holmes* v. *Lee Ho* (1911), 16 B.C. 66.

MACDONALD, C.J.A.: I would allow the appeal. The case is a very simple one and falls expressly within our decision in *Prentice* v. *Merrick* (1917), 24 B.C. 432. There, an owner had listed a property with an agent at a price named and, after the agent had done considerable work and introduced a purchaser, the owner sold for a less price to the purchaser to whom he had been introduced. The only question involved in that case was: Could we regard the listing as a general authority to obtain a purchaser so that if he got one whose terms the owner was willing to accept, though less than the named price, then he had earned the commission? Or, on the other hand, was it, as contended in this case, a listing at a specified price, a commission to be paid only if that price were procured? Now we held in the circumstances of that case, and the circum- MACDONALD, C.J.A.

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stances are no different in this case, that it was a general authority to obtain a purchaser and that, having obtained a purchaser whose offer the owner accepted, though at a less price, he was entitled to his commission.

Now that is the principle that underlies this case, except that it is sought to make a distinction in this way: It is said that after this general listing, the owner made a special listing, or exclusive listing, with another agent at a lower price and that he therefore bound himself to accept that price, if that agent should obtain it. As his counsel has put it, he had no option in the matter but to accept the second agent's price when it was obtained. The answer to that is obvious, having put the property in the hands of one agent on a general listing, he should have cancelled that before he put it exclusively in the hands of another who could bind him to sell. And if, as a result of his own want of foresight and business acumen, he lands himself in the position that he must pay two commissions, that is no concern of the first agent. Therefore, I think the agent is entitled to his commission on the price which was actually accepted by the owner. It appears that the second agent sold to the customer of the first, of which fact the vendor was apprized before closing the sale.

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MARTIN, J.A.: As I view this case, it is not one of an authority to an agent to sell at a fixed price and in an unusual way, but an authority to sell at a named price subject to negotiation in the usual way. Starting from that, the case presents to me no difficulty whatever, and we find this, that after this general listing was given, and it had been in the hands of the plaintiffs for some time, from the 5th to the 19th of April the defendant owner placed herself in the dangerous position of having two outstanding agents. A position of that kind is one which requires very considerable caution. And if this were a case simply of an ordinary listing there is not a shadow of doubt at all, under the principles of *Toulmin* v. *Millar* (1887), 58 L.T. 96 and the other cases referred to, that the plaintiffs would have been entitled to their commission. It is then, the law that, notwithstanding that they would have been entitled in general, yet they are disentitled in particular because the

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defendant owner prevented herself from carrying out her contract in substance because she gave an exclusive listing? If she did so, she did it at her peril, and moreover rendered herself liable, possibly, to pay two commissions. The principles governing this case were long ago laid down in the leading case of *Mackenzie* v. *Champion* (1885), 12 S.C.R. 649, explained in (1887), 4 B.C. 153. There is no doubt in my mind that this appeal should be allowed.

GALLIHER, J.A.: I agree with what my brothers have said. Once we come to the conclusion that it was a general listing, the judgment below certainly must go, in the circumstances of this case. It is an unfortunate position and one feels sympathy for a woman, or for a man for that matter, who has placed herself in the position where she has to pay two commissions, perhaps unwittingly. But in this Court or in any other Court, while we may feel sympathy, we cannot strain the law to give effect to that sympathy. We must accept matters as we find them. Consequently, I feel obliged to join with my brothers who have just spoken in deciding that it is a proper case where the appeal should be allowed.

GALLIHER, J.A.

MCPHILLIPS, J.A.: I, likewise, am of opinion that the appeal should be allowed. With great respect to the learned trial judge, I think upon the facts that he went wholly wrong. The facts seem to me to well import that the agent was engaged generally for the purpose of finding a purchaser. The fact that $5,000 was stated is not in itself sufficient to preclude a a commission being earned if a sale is made at a lower price. I think it may be well taken that the custom and usage which obtains and which the Court may take judicial notice of, is that the vendor sets his maximum price, generally around the maximum price then prevalent in the market, but it is well known that the vendor is ready and willing in most cases to accept a price below that. I would expect that a vendor listing property with a real estate agent, if he was quite unwilling to accept any other price, would make some mention of it.

MCPHILLIPS, J.A.

This case of *Bridgman* v. *Hepburn* (1908), 42 S.C.R. 228, has given a good deal of difficulty to the profession, as to what

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the law is, but I think that since this Court's judgment in the *Prentice* case, there ought to be no doubt about the real effect of the *Hepburn* case. I took occasion in *Prentice* v. *Merrick* (1917), 24 B.C. 432 at p. 438 to refer to the judgment of HUNTER, C.J., and I say this, upon the cases cited and the judgment in *Bridgman* v. *Hepburn, supra*:

"I think it is clear that it cannot be deduced therefrom that where a price is fixed it is of necessity that the lower price at which the sale was made should be a matter of agreement with the broker beforehand or that the agreement should be at large, *i.e.*, a commission at whatever price the sale was made."

Then at p. 392 of the *Hepburn* case, the learned Chief Justice said:

"It is in all cases a question of intention, and I quite concede that there might well be a case in which the Court could see from the circumstances surrounding the negotiations that it was the real intention of the parties that the agent should receive a commission whatever the amount realized might be, and that the price given the agent was only a working basis, in other words, that the agreement was, to pay in the event of sale, and not in the event of a sale at a specified price."

Now, this particular case is one of many, no doubt, occurring from time to time where a price is given, but it is not conceivable that it means a sale will not be made at a lower price, and in this particular case it is quite evident that that was the intention, *i.e.*, the agent is to use his best efforts to obtain a purchaser, but not that he must obtain a purchaser at $5,000, or at his peril lose his commission. You might just as well say, if the sale behind the back of the agent was for $4,999 the agent would not get a commission. I cannot think that that is the law. It does not comport with the principles laid down in *Toulmin* v. *Millar* (1887), 58 L.T. 96, nor is it in conformity with the decision in *Burchell* v. *Gowrie and Blockhouse Collieries, Limited* (1910), A.C. 614. There must be reasonableness in all things and, if the vendor wishes to protect himself, then let him say to the agent, if that is what he means, "You sell my property for $5,000, but mark you, if you get a likely purchaser and to that person I am able to sell at a lower price, you get no commission." That does not look reasonable, and when it is a matter of intention the Court must proceed reasonably and deduce the intention from all the surrounding circumstances, and the intention I deduce from all

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the surrounding circumstances in this case is that this agent was induced to take up the sale of the property. The price was a mere incidence. The vendor cannot utilize the services of the agent, who proceeds to advertise, and use all his office facilities and his experience and his persuasiveness, and then say, "Well, I have sold at $4,750 through another agent and I owe you nothing." That does not carry out the ends of justice.

EBERTS, J.A.: I agree with my learned brothers that there was a general authority to get a purchaser in this case and, with all due deference for the judgment of the County Court judge, I would allow the appeal.

EBERTS, J.A.

Appeal allowed.

Solicitor for appellants: *D. E. McTaggart.*
Solicitors for respondent: *McGeer, McGeer & Wilson.*

McLELLAN v. WATANABE *ET AL.*

Woodman's liens—Case stated—Logs divided into booms—Sale of boom under agreement—Application of moneys realized—R.S.B.C. 1911, Cap. 243.

The plaintiff filed liens on the 11th of November and 29th of December, 1922, under the Woodman's Lien for Wages Act against all logs and timber cut and removed from the camp of the defendants at Thompson Sound where he was employed continuously as a logger from the 6th of June to the 9th of December, 1922. One boom of logs, cut during the term of employment was sold by the defendants on the 5th of October, 1922, from which no wages were paid. A second boom a portion of which was cut prior to the 31st of August, 1922, and the remainder afterwards was sold on the 5th of February, 1923, by the lienholders' solicitors under an agreement with the owner and the proceeds were distributed amongst the lienholders on their wages *pro rata*. The solicitors without the consent of the owner applied the moneys so paid on the wages of the lienholders earned prior to the 31st of August, 1922. The amount received by the plaintiff from the

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proceeds of the second boom was sufficient to pay his wages earned after the 31st of August, 1922. A third boom of logs cut during the period of employment but after the 31st of August, 1922, was sold by the owner on the 10th of April, 1923, and he refused to pay any of the proceeds on account of the lien. On a case stated agreed to by the parties for submission to CAYLEY, Co. J.:—

Held, that the plaintiff was entitled to a lien against the third boom of logs for work done and services rendered by him prior to the 31st of August, 1922.

Held, further, that the solicitors for the lienholders including the plaintiff were entitled to appropriate the proceeds of the second boom sold by them to the wages earned by the plaintiff and the others prior to the 31st of August, 1922.

ACTION to enforce a woodman's liens. The parties agreed to the following case stated for submission to the Court:

"1. The plaintiff is a logger and was continuously employed at the camp of the defendants, Watanabe and Tsubota, at Thompson Sound, B.C., from the 6th of June, 1922, to the 9th of December, 1922, at the rate of $6 per day.

"2. That the said defendants, Watanabe and Tsubota, were contractors for the defendant John M. Murray.

"3. The plaintiff duly and regularly filed liens under the provisions of the Woodman's Lien for Wages Act on the 11th of November, 1922, and the 29th of December, 1922, against all logs and timber cut and removed from the said camp for wages earned during the period of employment.

"4. That a certain boom of logs from the said camp cut during the said period of employment and prior to the 31st of August, 1922, was sold and disposed of on or about the 5th of October, 1922, by the defendants but out of the proceeds thereof no portion of the plaintiff's claim for wages was paid.

Statement

"5. That subsequently to the said 31st of August, 1922, and on or about the 5th of February, 1923, a second boom of logs from the said camp, composed of some 72,000 ft. B.M. of logs cut prior to the said 31st of August, 1922, and the balance, namely, 267,000 ft. B.M. of logs cut after that date, were sold and disposed of by the solicitors for the lienholders including the plaintiff pursuant to an agreement entered into on or about the 1st of February, 1923, and attached hereto and made a part of this case stated under which the proceeds of the said logs were to be divided among the lienholders entitled thereto *pro rata*.

"6. That the proceeds of the said second boom were applied by the solicitors for the lienholders without the consent of the said John M. Murray in payment of the wages of the said lien claimants earned prior to the said 31st of August, 1922.

"7. That the amount realized by the plaintiff from the proceeds of the said second boom was sufficient to pay the plaintiff's wages earned during the whole of his period of employment subsequent to the 31st of August, 1922, and during which the logs in the third boom hereinafter mentioned were being cut and removed.

"8. That subsequently on or about the 10th of April, 1923, a third boom of logs, also cut during the said period of employment but subsequent to the said 31st of August, 1922, and against which the plaintiff had filed his lien, was sold and disposed of by the defendant John M. Murray who refuses to pay to the plaintiff any portion of the proceeds thereof on account of the said lien on the ground that the said plaintiff was not entitled to a lien thereon having received sufficient moneys from the proceeds of the said second boom to cover full payment for his services since the said 31st of August, 1922.

"9. The questions now submitted to this Honourable Court for decision are:

"(a). Is the plaintiff entitled to a lien against the said third boom of logs for work done and services rendered by him prior to the said 31st of August, 1922; and

"(b). Further, were the solicitors for the lienholders, including the plaintiff, entitled to appropriate the proceeds of the second boom sold by them in the manner referred to in paragraph 7 hereof, namely, to the wages earned by the plaintiff and others prior to the said 31st of August, 1922?"

Statement

Phipps, for plaintiff.

Wallbridge, for defendant Murray.

24th October, 1923.

CAYLEY, CO. J.: A workman has a lien (if he obeys the rules) on all logs which he has helped to cut, and this includes logs which he has not individually cut, otherwise he would have to mark individual logs, which is absurd. Similarly he has a lien on all booms towards which he has contributed his services, notwithstanding that such booms may include logs cut after his services have been discontinued, because it is not possible to sever the boom up into so many logs cut by this worker and so many cut by that. If a boom of logs on which he has filed a lien has been sold before the lien has been filed, the owner is so much to the good on account of the difficulty of following the sold boom, not because the lien is not legally enforceable against such boom: see section 6 of the Act, which says:

Judgment

"No sale . . . . previous to the filing thereof . . . . shall in any wise affect such lien."

A lien filed within 30 days of quitting work attaches to all logs on the timber limit cut or being cut or assembled in booms with logs cut during the period of employment of the lienholder.

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Now, the lien here attaches to the first, second and third booms, because all the logs in these booms were cut or were assembled with those cut during the period of employment, and the lien was filed within the 30-day limit after the employment ceased and was prosecuted within 30 days thereafter.

The case of *A. Lee & Co.* v. *Hill* (1909), 11 W.L.R. 611 does not apply because the houses contracted to be built were severable contracts, and were so decided to be by Beck, J. The shipping of certain logs in a boom is a convenience not a severance for the purpose of marking a time limit. The logs so shipped and the logs still unshipped are a unity as far as the work put upon them is concerned, and the 30-day limit does not commence from the period of shipment of each boom, but from the termination of the workman's employment in the cutting of all the logs. This is evident from the Act itself (Cap. 243, R.S.B.C. 1911), which deals, not with booms (save in section 3, where it speaks of tolls due to the "owner of a boom"), but with logs and timber as a whole. To apply section 3 to the individual separate log or piece of timber on or to which this or that man used his axe or applied his labour would be refining words to an absurdity.

Judgment

Both questions submitted to me, therefore, in the form of a case stated are answered in the affirmative.

Question answered in the affirmative.

CHANNELL LIMITED AND CHANNELL CHEMICAL COMPANY v. ROMBOUGH.

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Trade-marks—Word "O-Cedar"—Description of character of goods—Not registerable—No benefit conferred if improperly registered—English decisions—Applicability in considering "essentials"—Non-registerable trade-mark—Remedy for infringement—Proof of fraud—R.S.C. 1906, Cap. 71, Sec. 11.

The plaintiffs sued for an alleged infringement of their trade-mark which was the word "O-Cedar" as applied to the sale of furniture polish and polishing mops and was registered as a trade-mark under the Trade Mark and Design Act.

Held, that it should not have been registered as it was a word descriptive of the character of the goods in connection with which it was used, and the word "cedar" even with the prefix "O" is not an "arbitrary" or "inventive" word such as was essential to entitle it to be registered. The plaintiffs were therefore not entitled to the statutory protection given by reason of registration.

Even if there is the presumption that the minister had considered and passed upon the trade-mark as provided in section 11 of the Act, it could not be successfully contended that improper registration conferred any benefit upon the proprietor of such trade-mark.

When the "essentials" of a trade-mark are being considered English decisions, even with the difference in the statutes, afford not only assistance but guidance.

The principle to be applied in cases of alleged infringement of trade-marks, aside from statutory protection, is that one is not to be allowed to use names, marks, letters or other *indicia* whereby to induce purchasers to believe that the goods he is selling are the manufacture of another person.

There is a remedy for an infringement of a trade-mark that cannot be registered. The onus, however, is on the plaintiffs to prove fraud, and in the present case the plaintiffs have failed to discharge that onus.

ACTION for damages for alleged infringement of a trade-mark. The facts are set out fully in the reasons for judgment. Tried by MACDONALD, J. at Vancouver on the 18th of September, 1923. Statement

A. H. MacNeill, K.C., and *Pepler*, for plaintiffs.
R. M. Macdonald, and *Collins*, for defendants.

29th October, 1923.

MACDONALD, J.: Plaintiffs complain of an infringement by Judgment

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the defendants of their trade-mark "O-Cedar." In 1912, the plaintiff, Channell Chemical Co., registered such trade-mark in the United States patent office and then, in 1913, obtained its further registration in Canada, as applied to the sale of furniture polish and polishing mops. The plaintiff, Channell Ltd., became incorporated in Ontario, and by assignment, in 1915, obtained the right in Canada to the use of the inventions of the parent Company, which were covered by patent, together with the right to the exclusive use and possession of such trade-mark "O-Cedar." In June, 1916, the plaintiff, Channell Ltd., registered various specific trade-marks in Canada, covering various products under the name so acquired from the parent Company organized in the United States. It appears that one Traill, in 1913, manufactured and sold a polish under the name of "Oil of Joy" and then, without altogether abandoning such name for this product, prepared and sold one for a like purpose called "Cedar Polish." Defendant Margot Rombough, then the wife of Traill, took no part in the business carried on by him. After his decease, she, as executrix, sold the business under an agreement for sale. Upon failure of the purchaser to make the payments required under the terms of the purchase, she re-acquired the business and continued the manufacture and sale of polishes and mops in the same manner as had been carried on by her late husband. Improvements had taken place in the mop and such improvements patented. It differed in construction from that sold by the plaintiffs. This fact was not, however, material as, after some discussion with reference to the patents, issue was narrowed at the trial, as to whether there was infringement by the defendants of the trade-mark claimed by plaintiffs.

Judgment

Defendants, no doubt, in 1922, were manufacturing and selling polish and mops, terming such products respectively as "Cedar Polish" and "Cedar Mops." Plaintiffs commenced this action in September, 1922, and, shortly thereafter, defendants, in an effort to avoid litigation, proposed to discontinue the use of the name "Cedar" and to call their productions in the future "Cedarbrite," but this proposition was not accepted by the plaintiffs. They contended then, and still contend, that

the defendants are not entitled to use the word "Cedar" in any form or in any combination of words, as applied to polish or mops manufactured or sold by them. Plaintiffs contention, in other words, is, that they possess a monopoly of the word "Cedar" in this respect, for the purposes outlined. Under these circumstances, it would be fruitless to discuss whether the use of the word "Cedarbrite," which, as a matter of fact, has been adopted by the defendants, strengthens their position against the plaintiffs, as compared with the situation at the commencement of the action. If the offer of the defendants, as to changing the name to designate their products, had been accepted by plaintiffs, there might have been some adjustment required of the small amount of costs then incurred.

As the action now stands, the issue is clear cut as to whether plaintiffs possess the exclusive right to which I have referred. The proprietor of a trade-mark, who has registered a trade-mark under the Trade Mark and Design Act, obtained the right under section 19 of such Act to maintain an action to prevent infringement of his trade-mark as follows:

"19. An action or suit may be maintained by any proprietor of a trade-mark against any person who uses the registered trade-mark of such proprietor, or any fraudulent imitation thereof, or who sells any article bearing such trade-mark or any such imitation thereof, or contained in any package of such proprietor or purporting to be his, contrary to the provisions of this Act."

Judgment

In *McCall* v. *Theal* (1880), 28 Gr. 48, Blake, V.C. at p. 58 refers to the general principles, aside from statutory protection, which should guide the Court, in what appeared to him to be the real foundation in all cases of infringement of trade-marks, by referring to a portion of the judgment of Lord Langdale in *Perry* v. *Truefitt* (1842), 6 Beav. 66 as follows:

" 'I think that the principle on which both the Courts of Law and Equity proceed, in granting relief and protection in cases of this sort, is very well understood. A man is not to sell his own goods under the pretence that they are the goods of another man; he cannot be permitted to practise such a deception, nor to use the means which contribute to that end. He cannot, therefore, be allowed to use names, marks, letters, or other *indicia*, by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person. I own that it does not seem to me that a man can acquire a property merely in a name or mark; but whether he has or has not a property in the name or mark, I have no doubt that another person has not the right to use that name or mark

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for the purpose of deception; and in order to attract to himself that course of trade, or that custom which, without that improper act, would have flowed to the person who first used, or was alone in the habit of using the particular name or mark.'"

Defendants, while necessarily admitting the applicability of such principles to the carrying on of their business, contend that the plaintiffs are not afforded the additional protection, that they might otherwise receive, under the Trade Mark and Design Act, on the ground that the name "O-Cedar" should not have been registered as a trade-mark. It is submitted that, if this contention can be legally supported, then, that the plaintiffs would not be in any better position, than if such trade-mark had not been registered.

Section 11 of said Act provides that the minister of agriculture may refuse to register any trade-mark, *inter alia*:

"(*e*) If the so-called trade-mark does not contain the essentials necessary to constitute a trade-mark, properly speaking."

It might be argued that these conditions were presumably considered and passed upon by the minister, before registration was permitted, still, I do not think that even if such a presumption were accepted as correct, that it could be successfully contended, that improper registration conferred any benefit upon the proprietor of such trade-mark. The result of improper registration would, in this case, be that the plaintiffs must seek their protection and remedy apart from the statute. Then, if registration of a trade-mark improperly obtained, is not a finality and such registration may be considered, where a party is claiming exclusive rights thereunder, what is the basis upon which the validity of the registration is determined? Have any of the requisites entitling the proprietor to registration been non-existent? On this point, defendants contend that the so-called trade-mark "does not contain the essentials necessary to constitute a trade-mark properly speaking."

In this connection, the distinction between the English and Canadian Acts is quite apparent, as to obtaining registration of a trade-mark. For example, it would not be probable that under the English Act registration would have been obtained of the word "O-Cedar," even after the stringent interpretation placed by the Courts upon the phrase "fancy words" had, as a concession to commercial requirements, been modified and such

phrase replaced in the English Act of 1888 (51 & 52 Vict., c. 50) by the following terms:

"64.—(1.) (*d.*) An invented word or invented words; or

"(*e.*) A word or words having no reference to the character or quality of the goods, and not being a geographical name."

Under either of these essentials the trade-mark "O-Cedar" adopted by the plaintiffs would have been objectionable and incapable of registration, as the term is not an invented word. It also has a reference to the "character of the goods," as the polish, on their own statements, contains, as an ingredient, the oil of cedar leaf and the mops are saturated with such oil and thus bear a decided odor of cedar.

It is contended that, on account of the difference between the two Acts, that the English decisions, as to trade-marks, are not beneficial and apt to mislead. Further, that they should not be followed in determining the rights of a party having a trade-mark registered in Canada. In support of this contention, attention is drawn to the judgment of Idington, J. in *In re Horlick* (1917), 64 S.C.R. 466 at p. 469:

"The reference to English decisions is certainly not very helpful. There is such a wide difference between the frame and express language of the English Act and ours, that decisions under the former are often more apt to mislead than help or to put us on our guard."

Still, in the same case, the Chief Justice assumed that the minister of agriculture, in refusing an application to register a trade-mark, acted under section 11 of the Act and exercised the powers conferred by subsection (3) of such section (p. 467):

Judgment

"To the effect that the trade-mark of which registration was sought did not contain the essentials of a trade-mark properly speaking."

He then added:

"I am not quite clear as to what that language means but in any event both before and after the statute the office of a trade-mark was and is to point out the origin or ownership of the article to which it is affixed."

Anglin, J., in his judgment, after mentioning the extensive, conspicuous and persistent use by the applicants of the name "Horlicks" as applied to their products, refers to such name being "somewhat peculiar and uncommon. . . . . It has become a name 'adapted to distinguish the goods as the goods of one particular maker.'" While the appeal was allowed and the applicant for registration was held entitled to have the word

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"Horlicks" registered as a trade-mark, the judgments support a contention that this result followed through the name adopted containing the "essentials of a trade-mark properly speaking."

Lord Macnaghten, in delivering the judgment of the Privy Council in *Standard Ideal Company* v. *Standard Sanitary Manufacturing Company* (1911), A.C. 78 at p. 84, refers to the "essentials" necessary in obtaining the registration of a trade-mark in Canada.

While the English decisions might in some cases be misleading, still, I think when the "essentials" of a trade-mark are being considered they, even with the difference in the statutes, afford not only assistance but guidance. The learned Lord referred to the Canadian Act not containing a description of the trade-marks capable of registration and that the minister might refuse to register the trade-mark, through lack of necessary essentials, and then added:

> "The Act does not define or explain the essentials of a trade-mark nor does it provide for taking off the register an alleged trade-mark which does not contain the requisite essentials. In applying the Act the Courts in Canada appear to consider themselves bound or guided mainly by the English law of trade-marks and the decisions of the Courts of the United Kingdom."

After thus expressing his opinion, as to the Canadian Courts being bound or guided by English law, as to trade-marks or at any rate as to the "essentials" of a trade-mark, he then discussed the word "Standard," which had been registered as a trade-mark. He mentioned that it had obviously been intended to convey the notion that the goods, in connection with which it was used, were of a high class or superior quality. Then, without attempting to define in detail what are the necessary essentials of a trade-mark, he stated that (p. 85):

Judgment

> "It seems to their Lordships perfectly clear that a common English word having reference to the character and quality of the goods in connection with which it is used and having no reference to anything else cannot be an apt or appropriate instrument for distinguishing the goods of one trader from those of another. Distinctiveness is the very essence of a trade-mark. The plaintiff Company was therefore not entitled to register the word 'Standard' as a trade-mark. The result is, in accordance with the decision of the Supreme Court in *Partlo* v. *Todd* [(1888)], 17 S.C.R. 196, that the words though registered is not a valid trade-mark. The action, so far as it is based on alleged infringement of trade-mark must fail."

In *Kerstein* v. *Cohen* (1906), 13 O.L.R. 144, plaintiffs failed in an action to restrain the defendants from infringing the plaintiffs trade-mark "Shur-On" as applied to optical goods, by using the words "Sta-Zon" also as applied to similar optical goods. Both parties had obtained registration of these names as trade-marks. It was held that such words, or distortions of words thus in common use, were neither visually nor phonetically alike, though the idea intended to convey by each, might be the same and that the contention of the plaintiffs, as to an infringement, was thus untenable. While Meredith, J.A. did not agree with the majority of the Court in their findings, as to similarity in the words, he formed an opinion, favourable to the defendants upon another ground which is of assistance in determining the question as to what are the "necessary essentials of a trade-mark." Such a trade-mark that when registered, it would create adequate protection to the proprietor. He decided that one of the essentials of a valid trade-mark did not exist and that registration was ineffectual to aid the plaintiff for that reason. The effect of his decision was that neither of the parties had "any trade-mark right in respect of which an action would lie." He referred to the lack of an essential element in the trade-mark as follows (p. 154):

"The trade-mark of each of the parties is composed of two ordinary words in constant use by all those who speak the English language:—sure on, and stays on; a combination of illiterate and supposedly humorous mis-spelling does not alter them; they are both used to indicate the character of the article to which they are applied, and each does so effectually. To those who are familiar with the misuses of the word 'sure' on this continent, the appropriateness of the sure on is quite as great as that of stays on. If, for instance (to indicate the wide uses of the word sure), we ask whether such a road leads to Washington, in many cases the affirmative answer will be neither 'it is' nor 'yes,' but will be 'sure'; and so, too, of almost any other question, whether or not it is intended as an abbreviation of the word assuredly, it is 'sure.' These facts shew that the words cannot be the subject of a valid trade-mark; no one can rightly appropriate them to his own use; nor can he any the more do so by merely mis-spelling them and joining them with a hyphen. No one can rightly be deprived of the use of such words to describe his goods."

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This case was, on appeal, affirmed in the Supreme Court: see (1907), 39 S.C.R. 286. The necessity for the word used as a trade-mark being "inventive" along the lines followed by

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Meredith, J.A., *supra,* was considered and on this point Davies, J., at pp. 287-8, says:

"I do not think either of the words or distortions of words 'Shur-on' or 'Sta-Zon' is merely an inventive word which could be used as a trade-mark. On the contrary, I hold these terms to be merely corruptions of words descriptive of the eye-glass frames to which they were intended to be applied—and that they were intended to be so descriptive. They cannot therefore be properly trade-marks. . . . . The idea intended to be conveyed by the use of these corruptions of words may have been the same, but the fact that there is a common idea underlying the use of both words or corruptions and intending to describe some special merit in the article would not of itself be sufficient to enable plaintiffs to maintain the action. He could not pre-empt nor claim the exclusive use of the idea descriptive of some merit in the article."

Here the plaintiffs allege that the name "O-Cedar" is an arbitrary or fanciful name, that is not descriptive of the polish or mops manufactured by the plaintiffs and is not intended to be so. They thus contend that the word is not "descriptive" but seek to have it

"fall within the class of trade-marks usually called fancy names or 'trade-marks,' which are arbitrarily selected by an inventor or manufacturer to catch the eye or ear of the public and to distinguish his article from others of the like nature":

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see Spragge, V.C. in *Davis* v. *Kennedy* (1867), 13 Gr. 523 at p. 530. It is difficult to see how such a contention can be upheld. While the polish thus sought to be so exclusively protected has, as its basis, a mineral oil, still, it is scented with a vegetable oil, *viz.,* the oil of cedar leaf. It is doubtless a fact that the amount of oil of cedar leaf thus used, to give an attractive odor to the polish, is small compared with the basic oil used for polishing purposes, yet it is very noticeable. It lends itself to the sale of the polish and mops, and from the aroma they bear, the word "Cedar" is certainly descriptive of "character of the goods." This condition must, beyond question, have been apparent, at the time when the defendant Margot Rombough, or those whom she succeeded in the manufacture of polish, adopted the name of "Cedar Polish" as applied to their product. Then, in addition, there was evidence adduced to shew, that the use of cedar oil, not only supplied an attractive odor, to the polish, when applied to floors and furniture, but it had other properties which doubtless appealed to the purchasing public. It operated as an insecticide and thus banished

insects from the room in which it was being used. It also, in some instances, assisted in polishing the wood, or rather, where the surface of the wood was checked or broken, it renewed the oil in the wood, which had, in the course of time, been depleted. These facts were fully proven by the evidence of Newman and others. It was well established that oil of cedar had been adopted and was in use as part of a furniture polish for years. There was no evidence that the plaintiffs had first utilized such oil for that purpose. It was stated to be preferable to oil of citronella or wintergreen. It might well be assumed, in the absence of evidence to the contrary, that both parties designated their products by their distinctive and noticeable character or quality as arising from the scent of cedar. This fact might have become impressed on the mind of those requiring the articles for use and formed a factor in assisting their sale. The name adopted was thus "descriptive" of their character.

As to a "descriptive" word not being capable of registration, as a trade-mark, many other authorities were cited and might be discussed, but a few leading cases will suffice. In *Eastman Photographic Materials Company* v. *Comptroller-General of Patents, Designs and Trade-marks* (1898), A.C. 571, the report of the Commission, appointed to inquire into the Trade Marks Act, so far as it related to Trade-marks and Designs, was considered. In the judgment of the Earl of Halsbury, at p. 574, he referred to the difficulty in determining, what might properly be regarded as "fancy words," and that some limit should be placed upon the words which the individual might be permitted to register and thus claim to exclusively use. He remarked that the expression "fancy word" was not a particularly apt one and a portion of such report was then quoted as follows:

Judgment

"'It is manifest that no one ought to be granted exclusive use of a word descriptive of the quality or character of any goods. Such words of description are the property of all mankind, and it would not be right to allow any individual to monopolize them and exclude others from their use.'"

Then, to the same effect, Lord Herschell at p. 580 says:

"In these circumstances it would obviously have been out of the question to permit a person by registering a trade-mark in respect of a particular class of goods to obtain a monopoly of the use of a word having

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reference to the character or quality of those goods. The vocabulary of the English language is common property: it belongs alike to all; and no one ought to be permitted to prevent the other members of the community from using for purposes of description a word which has reference to the character or quality of the goods."

In the result the word "Solio" was held to be an invented word, so that it might be registered as a trade-mark, and the decision in *In re Farbenfabriken Application* (1894), 1 Ch. 645 was overruled.

The case of *The American Druggists Syndicate Ltd.* v. *The Centaur Co.* (1920), 56 D.L.R. 137 was cited by the plaintiffs in support of their position, but I do not think that it gives them any assistance, as the Court, in deciding that the word "Castoria," as applied to medicine, should be protected, so held on the ground that the word was a coined or invented one, Carroll, J. said, in his judgment, at p. 142, that

"the ingredients which enter into the composition of 'Castoria' shew that that word is, of its nature, in no way descriptive. The word clearly is imagined or fabricated and may not be infringed by other competitors."

Then again, at p. 143, reference is made to the English doctrine as summed up in the case of *Cellular Clothing Company* v. *Maxton & Murray* (1899), A.C. 326 being very much the same. An extract, at p. 143, from the judgment of Lord Shand in the latter case shews that the distinction that is to be drawn between an invented or fancy word and one that is descriptive:

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"'The word used and attached to the manufacture, being an invented or fancy name and not descriptive, it follows that, if any other person proceeds to use that name in the sale of his goods, it is almost if not altogether impossible to avoid the inference that he is seeking to pass his goods off as the goods of the other manufacturer.'"

In the notation to the "Castoria" case, there is an interesting annotation by Mr. Smart, of the Ottawa bar, discussing the use of an "arbitrary" word as a trade-mark. Here there can be no doubt that the word "Cedar," or even with the prefix of the letter "O" to such word is not arbitrary nor inventive.

Lord Herschell in *Eastman Photographic Materials Company* v. *Controller-General of Patents, Designs, and Trade-marks, supra,* at p. 581, considered that a combination of two English words did not form an inventive word, as follows:

"I do not think the combination of two English words is an invented word, even although the combination may not have been in use before;

nor do I think that the mere variation of the orthography or termination of a word would be sufficient to constitute an invented word, if to the eye or ear the same idea would be conveyed as by the word in its ordinary form."

In conclusion, as far as the question of the right of a party to pre-empt any ordinary word in the English language, my attention has been drawn to a judgment of Mr. Justice Sargent appearing in The Times newspaper of Friday, June 15th, 1923, in the case of *Ridgeway Co.* v. *Hutchinson et al.* In that case the statement of Mr. Justice Neville in *Williams Stevens Limited* v. *Cassell & Co. (Limited)* (1913), 30 R.P.C. 199; 29 T.L.R. 272, was referred to as follows:

"It is a matter of importance to protect a trader from any unfair attempt to take advantage of the reputation he has acquired for his goods or in his business. But it is equally important to protect His Majesty's subjects in their use of the English language, and the law does not recognize a monopoly of the King's English."

In my opinion, the plaintiffs have no right to monopolize such a well-known and descriptive word as "Cedar" for use, in disposing of their products. Nor did they obtain any additional benefit or protection from registration of such word with the prefix "O" as a trade-mark. When the nature of the word is considered, it could not well have, nor has it, acquired a secondary meaning as applied to the plaintiffs' goods. The contention of the defendants that the word "O-Cedar" should not have been registered as a trade-mark is upheld.

Judgment

If the plaintiffs had been entitled to have such name registered, as a trade-mark, then it would have afforded a protection and given them a right of action for infringement against the defendants, even though they had used such name, or one closely resembling it, innocently: see *Smith* v. *Fair* (1887), 14 Ont. 729 and cases there cited.

Still the plaintiffs, though not entitled to registration, may, under certain circumstances, not be without recourse. Their remedy, however, for use by the defendants of a name similar to the one they have adopted, in connection with their business, must be on the ground that such course has been pursued fraudulently.

"Independently of this statute it would seem that there is a remedy for a fraudulent infringement of marks that could not be registered":

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Smith v. *Fair, supra,* at p. 737, referring to *Lever* v. *Goodwin* (1887), 36 Ch. D. 1.

Assuming that I am right, as to "O-Cedar" not constituting a valid trade-mark, then the plaintiffs are in the same position as Lever and Company stood when the Court had similarly decided in the last-mentioned case. They were required and undertook the burden of proving a fraudulent "passing off" of their goods by defendants. They must be shewn, in disposing of their goods, to have pursued the course referred to by Mr. Justice Sargent in *Ridgeway Co.* v. *Hutchinson et al., supra,* of taking and using the name "Cedar" "with a view to appropriating the reputation and good will of the plaintiffs." In such case the burden of proof on the plaintiff was extremely heavy. "It must be shewn that the word [adventure] had become descriptive in this country of the plaintiff's magazine and nothing else."

Here the plaintiffs' evidence fell far short of answering this requirement. It was shewn that for years a polish had been in general use which might be properly described, on account of its odor, as "cedar polish." There was no evidence to shew, except in one single instance, that the polish sold by defendants was confused in purchase with plaintiffs' product. I think the likelihood of this mistake frequently occurring was meagre. Actions for "passing off goods" generally turn upon the appearance of the goods or the package in which they are wrapped or contained being of a nature calculated to mislead the public into believing that such goods were the product of the party complaining and not of the party offering them for sale. If the defendants had by such means or by advertising or circularizing sought to delude people into the belief that their goods were really those of the plaintiffs, such a course would be actionable. Even without the change, suggested as a solution of the controversy, it was quite plainly evident that, according to the wrapper and other printed matter, that the goods defendants were offering for sale were not produced by the plaintiffs. There was a mass of evidence supporting a conclusion that to an ordinary careful person no deception was likely to take place. Further, there was no evidence that any deception was intended or had been attempted by the defendants. There was no direct

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evidence to shew why the plaintiffs had adopted the name of "O-Cedar" as applied to their products. They allege, in their statement of claim, as I have mentioned, that this name is a fanciful one. It might, however, very reasonably be assumed that both parties adopted the name because it applied to the distinctive odor arising from the polish and mops through the use of oil of cedar.

Then have the plaintiffs satisfied the burden of proving fraud on the part of the defendants in the use of the word "Cedar."

"The party accused of piracy must be proved to have done the act complained of with the fraudulent design of passing off his own goods as those of the party entitled to the exclusive use of the trade-mark":

See *Wotherspoon* v. *Currie* (1872), L.R. 5 H.L. 508 at p. 519. These principles are applicable here, though in that case the Court was dealing with a case where the trade-mark was "not actually occupied." As might be expected, there is no direct evidence by admission or otherwise that the defendants, or the party from whom they acquired their business, fraudulently adopted the name "Cedar" as applied to the polish or mops. It is, however, contended that I should draw a conclusion of fraudulent adoption and use by defendants. That I should come to such conclusion partly from the extensive advertising of the plaintiffs and especially from the lack of explanation by the defendants, as to how the change in name took place, as before mentioned. The party who thus made the change in name is deceased and the present defendants simply followed in his course, as to the use of the name "Cedar" and, as far as the evidence goes, did so innocently. When a party's motives and actions are impugned and attacked on the ground of fraud, this should not only be alleged but proved to the hilt. This principle was applied in *Rodgers* v. *Rodgers* (1874), 31 L.T. 285. In that case Lord Justice Mellish, at p. 287, after referring to the time that had elapsed during which the defendants had used the name complained of, adds:

Judgment

"If the defendants had only recently adopted the description of 'Norfolk Works' they would be expected to give a plain and satisfactory explanation why they had chosen that expression before all the other words that they might have used for the purpose of distinguishing their own works, and unless they gave a satisfactory explanation the Court might very clearly come to the conclusion that they had done it fraudulently. . . . . But

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when it has gone on for such a number of years, and when it has to be proved that it was originally begun fraudulently and was continued fraudulently during all these years and that it is calculated to deceive, it appears to me that very much stronger evidence is required."

Reference is then made to the facts surrounding the adoption of the words and the hesitation that should prevail as to acting upon a sort of conjecture, having regard to the time that elapsed since the words were first adopted:

"and having regard to the fact that the man who originally adopted them cannot be called to explain why he did so, and having regard to the fact that fraud is to be proved and not assumed."

In this respect the situation there presented is similar to that in which the defendants are placed. Even if the plaintiffs had, at the time, acquired any right to complain of the adoption by Mr. Traill of the word "Cedar" as applied to his products, he cannot be called to explain his actions. I have no evidence upon which I could find that he acted fraudulently in the matter and this conclusion also applies to the defendants. In my opinion, there has been no "passing off" of goods by defendants, which gives plaintiffs any right of action.

Judgment

In the view I have taken of both these branches of the case, it is not necessary to decide whether or no the plaintiff Companies, not being registered nor licensed, were illegally carrying on business. Neither do I require to consider the effect upon a trade-mark, properly registered in Canada, should it be held that the proprietor was illegally carrying on business in one of the Provinces. The matter was discussed to some extent in *Standard Ideal Company* v. *Standard Sanitary Manufacturing Company, supra,* at p. 83, but the facts there presented did not necessitate a decision upon the point.

The action is dismissed with costs.

Action dismissed.

REX v. PROVINCIAL INSURANCE COMPANY.

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

1923

Nov. 19.

REX v. PROVINCIAL INSURANCE CO.

Fire insurance — Policy — Subsequent endorsement to be attached — A contract of insurance—Not signed by resident agent—Infraction of Act—R.S.B.C. 1911, Cap. 113, Sec. 43B—B.C. Stats. 1916, Cap. 28, Sec. 4.

An endorsement to a fire-insurance policy, increasing the property covered and for which a further premium is charged, is a contract of insurance within the meaning of section 43B of the British Columbia Fire Insurance Act and must be signed by the resident agent of the Company.

An endorsement to be added to a fire-insurance policy was completed in accordance with the terms arranged between the parties, executed by the insurers in its office at Montreal and forwarded direct to the insured Company at Vancouver.

Held, that the British Columbia Fire-Insurance Act referred to the document which evidenced the contract and not to the contract itself. It was therefore placed in Vancouver within the meaning of said Act, and a charge of an infraction of the conditions imposed by the Act is within the jurisdiction of the police magistrate at Vancouver.

APPEAL by way of case stated from the decision of H. C. Shaw, Esquire, police magistrate for the City of Vancouver whereby he dismissed a charge for an infraction of section 43B of the British Columbia Fire Insurance Act Amendment Act, 1916. The case stated was as follows:

"The defendant Company was charged before me upon the information of John P. Dougherty, Superintendent of Insurance, as follows:

" 'For that the Provincial Insurance Company, being a company licensed under the British Columbia Fire Insurance Act of the Province of British Columbia, did on or about the 29th day of July, A.D. 1923, at the City of Vancouver in the County of Vancouver, place a contract of insurance upon property situate in British Columbia, to wit: an endorsement to policy number 8893, which endorsement had not been signed or countersigned by an agent as required by subsection (2) of section 43B of the British Columbia Fire Insurance Act Amendment Act, 1916, in violation of subsection (7) of said section 43B.' Statement

"The case came on for trial before me on the 8th of October, 1923, and on the 22nd of October I dismissed the charge on the ground that the offence, if any, was not committed within my jurisdiction, to wit: the City of Vancouver. The facts are as follows: In the year 1921, negotiations were entered into in London, England, between the head office of the British Columbia Electric Railway Company, the assured, and the Provincial Insurance Company of London, England. As a result of these negotiations, Willis Faber & Co. of Canada, Limited, of Montreal, the chief agents in Canada for the Insurance Company prepared a policy of insurance intended to cover property of the British Columbia Electric Railway Company, Limited, in British Columbia, and the said policy was signed

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by Willis Faber & Co. of Canada, Limited, in Montreal. This policy purports to have been countersigned by the agents of the Insurance Company at Victoria, B.C., who are Duck & Johnston, having been stamped with a rubber stamp 'Duck & Johnston' on it and signed for them by W. G. Drysdale. W. G. Drysdale was employed in the office of Willis Faber & Co. in Montreal. Mr. J. H. Johnston when called, stated that his firm at Victoria had received no communication about this policy and that the policy had likely been countersigned in Montreal, but he added that he had authorized Willis Faber & Co. to sign policies for his firm as agents and a rubber stamp had been made for that purpose. He did not produce any written authority or copy of such, to Willis Faber & Co., to sign on behalf of his firm and he could not say whether authority was given verbally or in writing, but stated that he had given such authority. He stated that he did not receive any commission on this transaction, but that this was part of his agreement with Willis Faber & Co. The policy was mailed by Willis Faber & Co. from Montreal to the office of the British Columbia Electric Railway Company in the City of Vancouver in the Province of British Columbia.

"Subsequently, namely, on the 25th of July, 1923, after certain correspondence as to the property covered by the schedule attached to the policy above referred to, Willis Faber & Co. mailed to E. H. Adams, Comptroller of the British Columbia Electric Railway Company, the endorsement referred to in the charge herein in a letter. This letter and endorsement were received by Mr. Adams, Comptroller of the British Columbia Electric Railway Company at Vancouver, B.C., and were put by him among the insurance papers of the Company there of which he had the custody, although it was not physically attached to the policy.

Statement

"At the conclusion of the Crown's case and after considering the material facts, written arguments and authorities cited on the question of jurisdiction, I dismissed the charge on the ground that the company had not placed the contract of insurance, to wit: the endorsement, in the City of Vancouver, within the meaning of the said section 43B of the Insurance Act, therefore the offence, if any, had not been committed within my jurisdiction.

"The question reserved is whether I was right in so holding."

Argued before HUNTER, C.J.B.C. at Chambers in Vancouver on the 19th of November, 1923.

Wood, for appellant.

Russell, K.C., for respondent.

HUNTER, C.J.B.C.: Section 43B, subsection (2) enacted by the statute of 1916, requires written contracts of insurance on property in the Province to be validated by the signature of a local agent as therein defined. In other words, the Act concerns itself with the document itself rather than the transaction. It follows that in this case the magistrate had jurisdiction.

Judgment

Appeal allowed.

CORYELL v. BERTHA CONSOLIDATED GOLD MINING COMPANY LIMITED.

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CORYELL v. BERTHA CONSOLIDATED GOLD MINING CO.

Negligence — Mineral claim owned by defendant — Compressor plant on claim—Claims transferred to another in trust—To be so held pending formation of new company—Trustee contracted for running tunnel with compressor plant—Fire originating from compressor plant—Fire spreading destroyed plaintiff's posts—Liability.

Defendant Company owned the Little Bertha mineral claim on which was installed a compressor plant. The defendant with several others who owned a group of claims adjoining the Little Bertha agreed to transfer their claims to H. as trustee to be held by him pending his forming a company in Washington State which company was to take over the claims when complete and capable of being licensed in British Columbia, H. in the meantime to take over the management of the claims. The transfers were signed and placed in escrow pending the establishment of the new company. While the transfers were still in escrow H. contracted for the running of a tunnel on the claims and the compressor plant on the defendant's claim was used for carrying on the work. A fire originated through sparks from the plant and started a forest fire that eventually spread to the right of way of the Kettle Valley railway on which the plaintiff had piled two sets of posts which were destroyed. An action for damages against the defendant was dismissed.

Held, on appeal, reversing the decision of BROWN, Co. J. (MCPHILLIPS and EBERTS, JJ.A. dissenting), that it was by reason of H.'s operations that the fire took place, that the defendant remained the owner of the claim on which the plant was installed as the sale to the new company had not been completed and the defendant Company was still subject to liability for the loss occasioned by the fire.

APPEAL by plaintiff from the decision of BROWN, Co. J., of the 16th of March, 1923, in an action to recover $973.92 damages for the loss of two sets of posts on the right of way of the Kettle Valley Railway. One lot of 3,468 split cedar fence posts was about one mile south of Lynch Creek, and another lot of 4,990 round posts about two miles further south. The defendant Company was the owner of the "Little Bertha" and "Jasper" mineral claims situated near Lynch Creek. In the summer of 1922 a compressor plant was in operation on these claims and the plaintiff claims that sparks from the engine started a fire on the 13th of July, 1922, that the fire spread

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to the railway right of way and eventually reached and destroyed the plaintiff's said posts. The defendant Company had not worked or operated the said claims since 1917, when they entered into an agreement with the Little Bertha Mining Co., Bertha J. Knight and J. W. Hays whereby a new company was to be formed by Hays in the State of Washington to be called the Pathfinder Consolidated Mining Company. The first three mentioned were to put their claims in said company for a portion of the stock. In the meantime, however, they transferred all claims to Hays to be held by him in trust pending the formation of the company and registration in British Columbia. The company was formed but had not yet been registered in British Columbia, the claims remaining in Hays's name in trust. In the spring of 1922 a contract was entered into between the Pathfinder Consolidated Mining Company, Hays, and one Allison whereby Allison was to drive a tunnel for the Pathfinder Consolidated Mining Company and he operated the compressor plant during the summer of 1922, driving a tunnel about 100 feet. The learned trial judge dismissed the action.

Statement

The appeal was argued at Victoria on the 21st of June, 1923, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Mayers, for appellant: Notwithstanding the agreement of 1917 the claims still remained in the name of the defendant Company and the Company is the recognized owner and liable for the acts of the contractor: see *Black* v. *Christchurch Finance Co.* (1894), A.C. 48; *Stone* v. *Cartwright* (1795), 6 Term Rep. 411; *Musgrove* v. *Pandelis* (1919), 2 K.B. 43 at p. 46; *Port Coquitlam* v. *Wilson* (1923), S.C.R. 235 at p. 243.

Argument

Harold B. Robertson, K.C., for respondent: We say (1) there was no proper evidence to shew the fire started from the compressor; (2) no proof of negligence; (3) we were not owners at the time of the fire; and (4) the work on the claims was done by an independent contractor and was not work from which injurious consequences to others could be expected to arise. If any one is liable it is the new company. There is

no evidence of negligence: see *Wilson* v. *City of Port Coquitlam* (1922), 30 B.C. 449 at p. 452; (1923), S.C.R. 235. If an accidental fire starts on my property and spreads the statute of 14 Geo. III. is an answer. The new company was operating at the time of the fire. The parties took their stock and were paid for their interests. On defendants waiving the question of registration in British Columbia see *Entwisle* v. *Lenz & Leiser* (1908), 14 B.C. 51; *Bank of Hamilton* v. *Hartery* (1919), 58 S.C.R. 338; *Morrissy* v. *Clements* (1884), 11 V.L.R. 13. The Pathfinder Company has a good title by possession: see *Dorrell* v. *Campbell* (1916), 23 B.C. 500 at p. 503. The statute as to registration does not affect contracts and the evidence is not clear as to which claim the compressor was on. We were not a party to the contract. By giving dangerous work to a contractor a person is not relieved: see *Hounsome* v. *Vancouver Power Co.* (1913), 18 B.C. 81; (1914), 49 S.C.R. 430 at p. 434; *Dalton* v. *Angus* (1881), 6 App. Cas. 740 at p. 831; *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330 at p. 339; Salmond on Torts, 5th Ed., 230; *Whitmores (Edenbridge), Limited* v. *Stanford* (1909), 1 Ch. 427 at p. 438; *Rich* v. *Basterfield* (1847), 4 C.B. 783; *Pretty* v. *Bickmore* (1873), L.R. 8 C.P. 401. In the case of a licence see *Pwllbach Colliery Company, Limited* v. *Woodman* (1915), A.C. 634 at p. 641; *Malzy* v. *Eichholz* (1916), 2 K.B. 308 at p. 319.

Argument

Mayers, in reply: We allege negligent operation. We do not need to plead the Forest Act. When we shew a fire originated from land on which a stationary engine is installed that is all we have to shew: see *Milliken* v. *Glasgow Corporation* (1918), S.C. 857 at p. 867; *The Great Western Railway Company of Canada* v. *Braid* (1863), 1 Moore, P.C. (N.S.) 101 at p. 116.

Cur. adv. vult.

6th November, 1923.

MACDONALD, C.J.A.: The fire started from an engine that was being operated in connection with an air compressor on the Little Bertha mineral claim, belonging to the defendant. There were several mineral claims, including the Little Bertha,

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being operated by one Hays, under the agreement (Exhibit 1). That is a voluminous document, but the effect of it, so far as pertinent, is that several claim-owners, including the defendant, agreed to transfer their mineral claims to Hays, as trustee for themselves and upon other trusts mentioned in the agreement. Hays agreed to incorporate a new company to take over and operate all these claims when the organization thereof should be complete and the company capable of being licensed in British Columbia. The owners signed the transfers and placed them in escrow with a trust company, to be delivered under conditions specified in the agreement, which conditions had admittedly not been complied with up to the time of the trial and the transfers have not yet been delivered. The said agreement also provided that Hays was "to look after the management, caring for and operation of the said mines until such time as the same are deeded to the said Corporation" (the new Company).

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It was by reason of Hays's operations that the fire complained of occurred. I think, therefore, that the defendant's contention that it is not the owner or occupier of the Little Bertha, nor privy to the operations of Hays, is not well founded. I would therefore allow the appeal.

If there is any question of the amount due the plaintiff for damages, it may be referred to the learned County Court judge to find it.

MARTIN, J.A.: I agree that this appeal should be allowed, and think it only necessary to add that, according to my understanding of the reasons therein, the recent decision of the Supreme Court of Canada in *Port Coquitlam* v. *Wilson* (1923), S.C.R. 235, wherein the leading authorities are reviewed, establishes the liability of the defendant for the consequences of the spread of the fire from its land on the facts before us.

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GALLIHER, J.A.: It would have been more satisfactory if we had before us the contract for running the tunnel. This contract, as I gather from the evidence, was between the Pathfinder Consolidated, Hays and Allison. Allison was, I think, doing the work on behalf of the Pathfinder Consolidated.

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Under the agreement for the sale of the properties, which was made an exhibit in the trial, Hays was a trustee for the defendant and other owners mentioned in the agreement, as well as for the company to be formed by him to take over the property, which company was formed and known as the Pathfinder Consolidated Mining Company. This company was incorporated in Spokane, and the conveyances by the different vendors and the stock to be allotted to them in payment of their respective properties, were deposited in escrow, to be delivered to the respective parties so soon as the Pathfinder Consolidated became registered in British Columbia. This had not been done at the time the fire took place which caused the damage to the plaintiff.

In the agreement Hays was appointed manager, to manage and operate the mine. I take it that it was the Consolidated who were really in occupation of the property while Allison was running the tunnel, and were furnishing the money for same.

In these operations a compressor plant, paid for by the Consolidated, was installed and used by Allison on the work, and it must, I think, be taken from the evidence that the fire which did the damage was started from sparks from the smoke-stack of the engine operating the compressor. The matter would seem to stand thus: The Consolidated was doing the work by their contractor Allison, with the assent of the owners, of which the defendant was one. The defendant was aware of the operation of this compressor, and that the work was being done. The operation was one dangerous in itself if not properly controlled. Had Allison been the servant or contractor of the defendant, there can be no doubt, under the authorities, that it would have been liable. Assuming, then, that my premises are right, and that the Consolidated at the time of the fire were occupying the property in the sense that they were carrying on development work thereon through their contractor, can the fact that the defendant owner permitted the Consolidated to operate on its property render them liable to a stranger for damage arising out of such operations? Most of the cases cited to us were cases of landlord and tenant, and were this a

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case of landlord and tenant, there might be more difficulty in holding the defendant liable, but where, as here, I regard it as a case of leave and licence and an owner knowingly permits another to erect and operate works on his premises, which, if not properly controlled, are liable to occasion damages to a stranger and damage ensues by negligence of such operator, the owner is, in my opinion, liable.

I would allow the appeal.

MCPHILLIPS, J.A.: I have no hesitation whatever in agreeing with the conclusion arrived at by BROWN, Co. J., and in my opinion his reasons for judgment conclusively shew that the respondent is in no way liable for the damages that followed from a fire alleged to have occurred through negligence in the operation of a compressor upon the Jasper mineral claim.

It would appear that the Jasper mineral claim, along with other mineral claims, was agreed to be sold to a company to be later formed and which was incorporated as the Pathfinder Consolidated Mining Company, in the State of Washington. It would not appear that the company obtained registration in British Columbia or actually acquired documentary title to the mineral claims, but the agreement for sale was apparently carried out and the consideration for the sale, being shares in the Pathfinder Consolidated Mining Company, were all issued and distributed to the vendors, amongst others, to the respondent, and the Pathfinder Consolidated Mining Company took actual physical possession of the mineral claims, amongst others, the Jasper mineral claim, and it is contended that the fire arose from sparks issuing from the smoke-stack of a boiler upon this mineral claim causing the damage sued for.

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Now, it would appear that some five years elapsed from the time the transaction took place, *i.e.*, the sale of the claims to the Pathfinder Consolidated Mining Company, when the damage sued for occurred. Throughout all that time the respondent had nothing whatever to do with the property and took no part in the operations being carried on. It is, however, attempted to hold the respondent liable because of the fact that the actual documentary transfer of the mineral claims did not take place

and, as the legal estate in the mineral claims was in the respondent at the time of the fire, that there is liability upon the respondent. Although the respondent was admittedly in no way connected with the operation of the compressor, this attempt is based upon the agreement for sale and the following provision therein, which reads:

"In consideration of the foregoing [and in the agreement that which immediately preceded was the provision covering the consideration and distribution of the stock in the new company] it is further understood and agreed that the fourth party [one J. W. Hays] will on his part proceed at once with the organization of the said company and will also take charge of the said properties owned by the first, second [the respondent Company] and third parties hereto as soon after the organization of the said company by the fourth party [Hays], and the depositing of said deeds by the first, second and third parties hereto with the said Washington Trust Company and the fourth party is to look after the management, caring for and operation of the said mines until such time as the same are deeded to the said corporation to be organized by the fourth party as hereinbefore provided."

The conveyances were duly executed, and in accordance with the agreement were placed in escrow. As before stated, the new company did not obtain registration in British Columbia, but notwithstanding this the whole contemplated transaction of sale was carried out, the consideration for the mineral claims handed over and the new company went into possession and was in possession for several years, and was operating the compressor at the time of the occurrence of the fire, the respondent in no way being connected therewith, yet the contention is that Hays was nevertheless in possession by reason of the foregoing quoted provision, and thereby the respondent is liable because the fire escaped from a mineral claim of which the respondent is still the owner. As to this contention I cannot refrain from saying that it lacks even a scintilla of force, in a case of this character where no liability could be imposed save where there has been an absence of due care and caution. In view of the facts of the present case, how can it be for a moment contended that because of the mere fact that the legal estate in the mineral claims may be said to be in the respondent, although the title in equity is in the vendee, *i.e.*, the Pathfinder Consolidated Mining Company, there is liability upon the respondent? This, to me, is a contention without merit. The

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respondent gave up possession of the mineral claims to the Pathfinder Consolidated Mining Company, and accepted the consideration moving to it from its vendee and had retired absolutely from the occupation and possession of the mineral claims, and this condition of things continued for some five years when the fire occurred by reason, it is alleged, of the operation of the compressor plant of the Pathfinder Consolidated Mining Company. That is, there is liability because the technical bare trusteeship in the mineral claims is in the respondent.

I cannot view the contention made of liability upon the respondent in a serious light. It wholly lacks merit. Wherein can it be said that the respondent has failed to do what the law required? It was not in possession of the mineral claims, it was not operating the compressor plant, it did not negligently operate the plant and give rise to the fire and consequent damages, yet it is to be mulcted in damages therefor. It is unthinkable that such is the law. How could the want of care or want of skill in the operation of the compressor be a liability imposed upon the respondent, the respondent not having anything whatever to do with the operation of the compressor plant? The length to which the argument is advanced would by analogy extend to a case where a trespasser upon another's property did something which caused damage that the owner of the property would, because of that ownership alone, be liable. It is only necessary to state the proposition to see its fallaciousness—it is a vain contention in law. What conceivable prudence would the respondent have exercised in view of the facts of the present case? It had nothing whatever to do with the operation of the compressor plant, in truth knew nothing of it. How then can any liability be imposed? Here the cause of damage was the act of a stranger, *i.e.*, the Pathfinder Consolidated Mining Company, and there can be no liability in such case upon the respondent (*Box* v. *Jubb* (1879), 4 Ex. 76; 48 L.J., Ex. 417; *Wilson* v. *Newberry* (1871), L.R. 7 Q.B. 31; 41 L.J., Q.B. 31; *Rickards* v. *Lothian* (1913), A.C. 263; 82 L.J., P.C. 42). The rule even in *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330; 37 L.J., Ex. 161; 143 R.R. 629, is to some extent modified when *Nichols* v. *Marsland* (1875), L.R. 10 Ex.

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255; (1876), 2 Ex. D. 1; 46 L.J., Ex. 174, is considered, and juries are empowered to mitigate the rule whenever its operation seems harsh (*Greenock Corporation* v. *Caledonian Railway* (1917), A.C. 556; 86 L.J., P.C. 185).

The present case is one which even looked at as something occurring on the land of the respondent is the doing of something, not the act of the owner of the land, but the act of a third person, *i.e.*, the Pathfinder Consolidated Mining Company, not for the owner's, but for the company's purposes, and there can be no liability in such a case upon the owner (*Whitmores (Edenbridge), Limited* v. *Stanford* (1908), 78 L.J., Ch. 144; (1909), 1 Ch. 427). The present case can be said to be determined alone upon the fact that the Pathfinder Consolidated Mining Company was in no way the servant or contractor of the respondent, and there can be no liability imposed upon the respondent for damage done by fire lighted by that company (*Black* v. *Christchurch Finance Co.* (1893), 63 L.J., P.C. 32; (1894), A.C. 48). Even at common law there would be no liability unless the respondent could be said to have knowingly lighted the fire, "for otherwise how could it be described as *ignis suus?*" (*Tubervil* v. *Stamp* (1697), 1 Salk. 13; S.C. 1 Ld. Raym. 264; *Filliter* v. *Phippard* (1847), 11 Q.B. 347; 17 L.J., Q.B. 89; 75 R.R. 401; *Musgrove* v. *Pandelis* (1919), 2 K.B. 43; 88 L.J., K.B. 915; Pollock on Torts, 11th Ed., p. 505, note (*r*), and 12th Ed., 508). In short, the liability for the fire could only fall upon the respondent if the compressor plant was being operated negligently by its servant or contractor. Mere ownership of the mineral claims, if that were admitted, is not enough. The duty and responsibility is not founded on ownership but on possession. Were this not the case, then the owner of land would be liable for fire escaping negligently when the land was in the possession of his tenant. It is only necessary to state this to bring its refutation. It is inconceivable that there should be liability based upon ownership alone—no case has so decided. The fact that there is no registered title to the mineral claims or registration of the Pathfinder Consolidated Mining Company under the Companies Act of British Columbia, is quite an immaterial matter. The

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respondent gave up possession of the mineral claims and received its purchase price. The parties to the sale may waive any or all the requirements of the agreement for sale, there was a complete change of possession, and at the time of the alleged negligent escape of the fire the Pathfinder Consolidated Mining Company was admittedly in possession of the mineral claims, not the respondent.

I cannot persuade myself that there can be any liability imposed upon the respondent in the present case. I am impelled to the contrary view, and am in agreement with the conclusion arrived at by the learned trial judge.

I would dismiss the appeal.

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

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

Solicitor for appellant: *C. F. R. Pincott.*
Solicitor for respondent: *F. B. Hetherington.*

THE CHARTERED BANK OF INDIA, AUSTRALIA AND CHINA v. THE PACIFIC MARINE INSURANCE COMPANY.

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Marine insurance — Policy — Deviation — Provision in policy that it be covered at premium to be arranged — Issued on understanding of straight route—Company's intention before starting to call at another port—Ship lost en route to other port—Notice of change of course not given until after loss.

A policy of marine insurance was issued by the defendant to cover 318 crates of veneers on a voyage from Vancouver to Yokohama. The policy contained a deviation clause providing 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." It was the Company's intention before sailing that the vessel should call at Portland. After partially loading at Vancouver the vessel 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. It was held by the trial judge (see 32 B.C. 60) 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 amount could be determined by the Court.

Held, on appeal, affirming the decision of GREGORY, J., that although it was always the intention to call at Portland the deviation clause applied and the risk attached.

Kewley v. *Ryan* (1794), 2 H. Bl. 343 followed.

Held, further, that as the goods were lost before the shipper knew of the deviation and the insurers had actual notice of deviation from other sources, the notice actually given, though late, was in the circumstances sufficient.

APPEAL by defendant from the decision of GREGORY, J. (reported 32 B.C. 60), in an action to recover $17,000 under a marine-insurance policy for the loss of 318 crates of veneers shipped on the "Canadian Exporter" which sailed from Vancouver on the 29th of July, 1921. The policy was taken out on the 18th of July, 1921, the vessel sailed on the 29th and on the 31st of July was lost on Willapa Spit off the mouth of the Columbia River. The policy was issued for a voyage from

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Vancouver to Yokohama. According to the evidence it was the intention of the Company before sailing that the vessel should go from Vancouver to Portland and from there straight across to Yokohama. The policy contained a deviation clause that "in the event of the vessel making any deviation or change of voyage, it is mutually agreed 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 of voyage." The plaintiff or its agent did not know of the deviation until after the loss and the notice of deviation was not given until some weeks after the policy was cancelled. It was held by the trial judge that the notice of deviation given was a sufficient compliance with the notice required and that the deviation to Portland was covered by the deviation clause in the policy. The defendant Company appealed on the grounds: (1) That the policy never attached as the voyage insured was never contemplated or commenced, the voyage insured being from Vancouver to Yokohama; (2) that there was no deviation after the voyage commenced so the deviation clause does not apply; (3) the policy was void for non-disclosure of the route to Portland; (4) even if there was a deviation the notice required by the deviation clause was not given; (5) further, if there was deviation the premium was not arranged as required by the deviation clause; (6) the increased premium cannot be determined by the Court.

The appeal was argued at Victoria on the 11th to the 14th of June, 1923, before MACDONALD, C.J.A., MARTIN, GALLIHER and EBERTS, JJ.A.

Argument

McPhillips, K.C., for appellant: The voyage in question was not covered by the policy. There was no notice of their going to Portland: see Arnould on Marine Insurance, 10th Ed., Vol. 1, p. 519, par. 372. As to the effect of the deviation policy see Halsbury's Laws of England, Vol. 17, pars. 779 to 781, p. 395; *Redman* v. *Lowdon* (1814), 5 Taunt. 462; *Wooldridge* v. *Boydell* (1778), 1 Dougl. 16. The stop at Portland was decided on before the ship sailed from Vancouver. There cannot be deviation from a course never contemplated: see

Way v. *Modigliani* (1787), 2 Term Rep. 30; Chalmers & Owen's Marine Insurance Act, 2nd Ed., 47-8; *Maritime Insurance Company* v. *Stearns* (1901), 2 K.B. 912 at p. 918. The voyage insured is different from the one in course of being carried out. They always intended to go by Portland: see *Laing* v. *The Union Marine Insurance Co.* (1895), 1 Com. Cas. 11 at p. 15; *Simon, Israel & Co.* v. *Sedgwick* (1893), 1 Q.B. 303. The voyage insured was across the Pacific so that in fact the ship did not sail as the voyage would be from Portland to Yokohama: see Chalmers & Owen's Marine Insurance Act, 2nd Ed., 65; *Thellusson* v. *Fergusson* (1780), 1 Dougl. 361 at p. 370; *Hood* v. *West End Motor-Car Packing Company* (1917), 2 K.B. 38 at p. 48. No premium was arranged as required by the deviation clause: see Chalmers & Owen's Marine Insurance Act, 2nd Ed., 48; *Hotham* v. *The East India* Company (1779), 1 Dougl. 272. The Courts will not make contracts between parties. There is no debt proved as the premium was not paid, and nothing upon which interest was payable.

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Reid, K.C., on the same side: It was the duty of the insured to know how the goods were to be carried, and not taking care to find out and advise as to the route of carriage the policy is void by reason of the ship going *via* Portland: see *Glasgow Assurance Corporation* v. *Symondson* (1911), 16 Com. Cas. 109. Not advising of the Portland route was concealment of a material fact: see *Middlewood* v. *Blakes* (1797), 7 Term Rep. 162; *Harrower* v. *Hutchinson* (1870), L.R. 5 Q.B. 584; *London General Insurance Co.* v. *General Marine Underwriters' Association* (1921), 1 K.B. 104. On non-disclosure of a material circumstance see *Rivaz* v. *Gerussi* (1880), 6 Q.B.D. 222 at pp. 227-230. Assuming the variation comes within the policy there was no notice in compliance with the variation clause. The accident was on the 31st of July, repudiation on the 19th of September, and notice of deviation on the 18th of November, 1921. This notice was too late: see *Thames and Mersey Marine Insurance Co.* v. *Van Laun & Co.* (1917), 2 K.B. 48 (*note*); *Mentz, Decker & Co.* v. *Maritime Insurance Company* (1910), 1 K.B. 132.

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A. H. MacNeill, K.C., for respondent: The agents of the defendant Company expected that the vessel in the ordinary course of business would call at different ports. There is evidence that the vessel had a range from San Francisco to Prince Rupert. The inference to be drawn from the evidence is that both the home office and the agents in Vancouver knew the "Exporter" would call at different ports before starting across the Pacific. If it is found that evidence on question of usage was improperly excluded we are entitled to a new trial. An application was made to amend by adding an allegation of usage in tramp steamers to call at different ports between San Francisco and Prince Rupert: see Arnould on Marine Insurance, 10th Ed., Vol. 1, p. 524, note (*i*). As to deviation see Arnould, Vol. 1, p. 528, par. 380; Halsbury's Laws of England, Vol. 17, p. 397, par. 780; Chalmers & Owen's Marine Insurance Act, 2nd Ed., 67; *Kewley* v. *Ryan* (1794), 2 H. Bl. 343. They referred to *Maritime Insurance Company* v. *Stearns* (1901), 2 K.B. 912 at pp. 917-8, but that case is in our favour as to the deviation clause in the policy. They say there was no deviation as the Portland trip was contemplated before starting but *Kewley* v. *Ryan, supra,* is an answer to that. As to *Laing* v. *The Union Marine Insurance Co.* (1895), 1 Com. Cas. 11 and *Rivaz* v. *Gerussi* (1880), 6 Q.B.D. 222, fraud was involved in both these cases. As to concealment (and they cited *Harrower* v. *Hutchinson* (1870), L.R. 5 Q.B. 584) we only have to disclose what we know and we know nothing of the call at Portland. An insured says he wants to insure goods going from A to B; the broker should know the route that the boat takes. On the question of paying an increased premium see *Greenock Steamship Company* v. *Maritime Insurance Company* (1903), 1 K.B. 367; *Hyderabad (Deccan) Company* v. *Willoughby* (1899), 2 Q.B. 530; *Mentz, Decker & Co.* v. *Maritime Insurance Company* (1910), 1 K.B. 132. On the question of concealment see *Foley* v. *Tabor* (1861), 2 F. & F. 663; *Vallance* v. *Dewar* (1808), 1 Camp. 503; *Friere* v. *Woodhouse* (1817), 1 Holt 572. As to amount of premium see *Foley* v. *United Fire, &c., Insurance Co.* (1870), L.R. 5 C.P. 155; *Taylor* v. *Lowell* (1807), 3 Mass. 331. When the

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insurer demands proof of loss he waives certain matters including increased premium: see Macgillivray on Insurance Law, p. 346; *Canada Landed Credit Co.* v. *Canada Agricultural Ins. Co.* (1870), 17 Gr. 418; *Armstrong* v. *Turquand* (1858), 9 Ir. C.L.R. 32; *Wing* v. *Harvey* (1854), 5 De G.M. & G. 265. On the question of interest see Macgillivray's Insurance Law, p. 406; *Westminster Woodworking Co.* v. *Stuyvesant Insurance Co.* (1915), 8 W.W.R. 187 at p. 194, and on appeal, 22 B.C. 197. On the question of usage the insurer should know the peculiarities of trade to which a policy relates: see *Noble* v. *Kennoway* (1780), 2 Dougl. 510; *Pelly* v. *Royal Exchange Assurance Company* (1757), 1 Burr. 341; *The "Freiya"* v. *The "R.S."* (1921), 30 B.C. 109.

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McPhillips, in reply, referred to *Redman* v. *Lowdon* (1814), 5 Taunt. 462; *Leduc* v. *Ward* (1888), 20 Q.B.D. 475; 57 L.J., Q.B. 379; *Constable* v. *Noble* (1810), 2 Taunt. 403 at p. 406.

Cur. adv. vult.

6th November, 1923.

MACDONALD, C.J.A.: The appeal, to my mind, turns on the deviation clause in the policy. The vessel owners intended the voyage to commence at and from Vancouver and to end at Yokohama, but they intended to make the voyage *via* Portland, Oregon, a departure from the direct route. This intention existed at the time they contracted to carry the goods in question. The defence contend that this being so, the policy never attached; that the deviation clause in the policy covers only deviation from the direct course when the intention to deviate is come to during the voyage. In other words, that the clause is intended to apply where, after the vessel had sailed, the owners had decided to deviate, in which case notice was to be given thereof by the shippers to the insurers when they became aware thereof. If that had happened, then, as I understand their counsel, the insurers could not dispute their liability. The policy provides for an additional premium in case of deviation, such additional premium as would be reasonable having regard to the deviation. The insurers contend, that because it was always the intention to call at Portland, even if the risk attached,

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the deviation clause was inapplicable to the case. Of course, if this contention be upheld, the insurers are not liable, since the deviation was not one of necessity.

On the facts of the case the questions for decision are: Did the policy attach? Is the deviation clause applicable in the circumstances? And was the notice sufficient? There is the further question as to the increased premium, which if the contract of insurance is upheld, can be decided on the reference directed below.

That the risk attached is, I think, on principle and on authority, quite clear. *Kewley* v. *Ryan* (1794), 2 H. Bl. 343, is distinct authority for this. None of the other cases cited weaken its authority; they are distinguishable from it and from the case at bar. *Wooldridge* v. *Boydell* (1778), 1 Dougl. 16, replied on by Mr. *McPhillips,* is an illustration of this. The language of the judges there must be read as applicable to the facts of that case. There, there was no *terminus ad quem,* here there was. Then what is the meaning of the deviation clause? The law permits deviation of necessity. The clause in question here permits deviation not of necessity and it provides for compensation to the insurer for such deviations when they occur. It was no doubt found to be not only a convenient clause, but one which is in the interest of shipping and insurance business; one of practical necessity to obviate just such questions as have arisen in this case.

The owner of the goods, or his agent, makes a contract for the carriage of goods from Vancouver to Yokohama, he then takes a policy of insurance and neither he nor the insurance company take the trouble to ascertain the precise course of the voyage. It is not too much to assume that they are indifferent, owing to the belief that the deviation clause in the policy gives them both protection. Here neither the shipper nor the Company made inquiries about the route which the ship would follow. If they had done so no doubt the higher rate would have been exacted at the time of insurance. To give the contract the narrow interpretation contended for by Mr. *McPhillips,* would be to give it a construction contrary, I think, to the common understanding which shipping men and marine insur-

ance companies have of the clause, and would lead persons taking insurance into a trap. Such a construction is to be avoided when the language of the clause is susceptible to a more liberal interpretation. Once it is decided that the risk attached, what was there on the facts to discharge it unless, indeed, the want of sufficient notice?

As to the notice, it was not given promptly, but as the goods were lost before the shipper became aware of the deviation and the insurers had actual notice of this at the time from other sources, the want of promptness in giving the notice is, I think, not a deciding factor in the case. The notice was given eventually and in the circumstances of this case I think it was a sufficient notice.

I would dismiss the appeal.

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MARTIN, J.A.: In my opinion the learned judge below reached the right conclusion, and I am so largely in accord with the reasons of my brother GALLIHER upon the main points of this appeal that I do not think it would be profitable to add to them.

MARTIN, J.A.

GALLIHER, J.A.: Although I have given consideration to the different points raised on the appeal, and the authorities bearing upon same, there are only two, as I view it, upon which the appellant might hope for a reversal of the judgment below. These are: First, non-disclosure, and second, did the policy ever attach? Mr. *Reid,* who argued the question of non-disclosure, put the matter before us very clearly and concisely, and among the cases cited by him was that of *Harrower* v. *Hutchinson* (1870), L.R. 5 Q.B. 584. This was the unanimous judgment of a very strong Court composed of Kelly, C.B., Channell, Pigott, Martin and Cleasby, BB., and Byles, Brett and Willes, JJ. on this point. The tenor of all the reasonings in that case was that the assured had deliberately concealed from the underwriters a material fact known to him and unknown to the underwriters for the purpose of obtaining the insurance at a lower rate. Does the case at bar fall within that decision? In my view, upon the evidence, it does not. Here, the voyage was from Vancouver to Yokohama. Neither the assured nor the under-

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writers knew that the vessel intended to call at Portland except in this general way, that the vessel might call at ports other than the port *a quo for* the purpose of completing cargo. The fact that the vessel intended to call at Portland was not actually known to either, and each had the same means of acquiring knowledge of that fact. It was, therefore, not something known to and concealed by the assured, either innocently or for an improper purpose, and moreover, there is a clause in the policy providing for deviation, and whether there was deviation or not, will be considered in the question argued by Mr. *McPhillips*.

On the second question to be determined, Mr. *McPhillips*, senior counsel, strenuously argued that calling at Portland would not be on a direct route Vancouver to Yokohama; that the ship always intended before sailing to go to Portland, and thence to Yokohama; that there could be no deviation from a route always intended, *viz.*, Vancouver to Portland, to Yokohama—that route actually was started upon and was not the risk insured against, and hence the policy never attached. It was upon this route that the vessel was wrecked before reaching Portland. The point is one that has occasioned me no little difficulty. If the ship had started on the direct route from Vancouver to Yokohama, and after sailing some distance on that route, had, for some reason gone to Portland, that would have been a deviation within the terms of the policy, as I would hold, upon the evidence, that Portland was not within the meaning of the words "from Vancouver to Yokohama," unless there was proof of custom or usage, which I cannot find on the evidence here. In the absence of such proof, the question narrows itself down to this: Can there be deviation where the ship started on the course always intended by the ship-owners, but unknown to either the assured or the underwriters, except in the general way I have stated? And secondly, can it be said that the policy ever attached under the evidence in this case? The words in what is termed the deviation clause (clause 5 of the combination policy No. 1215) are:

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"In the event of the vessel making any deviation or change of voyage, it is mutually agreed 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 of voyage."

I would deduce from the case of *Kewley* v. *Ryan* (1794), 2 H. Bl. 343, that even where the intention to deviate is formed prior to the sailing of the vessel, and the *termini* always remain the same throughout, the sailing to Portland *en route* (in this case) would be a deviation and would be covered by the deviation clause. As the learned judge below points out, the cases of *Wooldridge* v. *Boydell* (1778), 1 Dougl. 16, and *Way* v. *Modigliani* (1787), 2 Term Rep. 30, are there explained and I need not refer to them further.

Then, can it be said that there was a change of voyage by reason of which the voyage taken was not the one insured and the policy did not attach? It is a nice point, but I think the broader and not the narrower construction should be adopted, and that where the port *a quo* and the port *ad quem* always remain the same and the deviation which I have already found is provided for, it should not be held that this is a different voyage from the one insured, so that the policy would not attach.

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On the other points raised, as well as upon the ones I have discussed, I think the learned judge below has come to a right conclusion, and would dismiss the appeal.

EBERTS, J.A. would dismiss the appeal.

EBERTS, J.A.

Appeal dismissed.

Solicitors for appellant: *McPhillips, Smith & Gilmour.*
Solicitors for respondent: *Walsh, McKim & Housser.*

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FOREMAN v. MUTCH: UNITED GRAIN GROWERS SAWMILLS, LIMITED, CLAIMANT.

Woodman's lien—Statement of lien—Contents—Sections of Woodman's Lien for Wages Act—Schedule A—R.S.B.C. 1911, Cap. 243, Sec. 5.

Section 4 of the Woodman's Lien for Wages Act requires that every statement of lien be verified by affidavit before filing with the registrar of the County Court. Section 5 requires that "such statement 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." Schedule A specifically requires the name and residence of the person upon whose credit the work was done. It was held on the trial that the statement of lien as filed complied with section 5, but not with the schedule as it did not contain the name and residence of the person upon whose credit the work was done, that this was not a substantial compliance with the Act and the lien did not attach.

Held, on appeal, reversing the decision of ROBERTSON, Co. J. (MCPHILLIPS and EBERTS, JJ.A. dissenting), that irrespective of whether it should be set out in the statement of lien the name and residence of the debtor does appear in the affidavit of verification which is attached to and registered with the statement of lien and this is a sufficient compliance with the Act.

APPEAL by plaintiff from the decision of ROBERTSON, Co. J., of the 28th of May, 1923, in an action on a lien. The lien was filed on the 10th of March, 1923, for work done between the 1st and 23rd of February, 1923, the work consisting of swamping, skidding and loading logs. The writ was issued on the 10th of March. Judgment by default was entered on the 27th against the defendant Mutch, the plaintiff being declared entitled to a lien on the defendant's logs in Eaglet Lake. Execution was issued on the 23rd of April and the sheriff seized the said logs. The U.G.G. Sawmills, Limited, claimed the logs and on application for an interpleader it was ordered that the logs be released upon the U.G.G. Sawmills paying into Court $2,900 to cover the amount of the liens and that there be a summary trial. The action was tried at South Fort George on the 23rd of May, 1923, and it was held that as

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the statement of lien did not contain the name or residence of the person upon whose credit the work was done there was not a substantial compliance with the Woodman's Lien for Wages Act and the lien did not attach.

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

Mayers, for appellant: Section 5 of the Act was complied with in the statement of lien but the schedule requires that the name and residence of the person for whom the work was done should also appear. This is not in the statement of lien but was in the affidavit attached. A meticulous observance is not necessary. No one was misled: see *Douglas* v. *Mill Creek Lumber Co.* (1923), 32 B.C. 13. They knew the whole position. Where there is inconsistency between the Act and the schedule the Act applies: see *Allen* v. *Flicker* (1839), 10 A. & E. 640; *Reg.* v. *Baines* (1840), 12 A. & E. 210 at p. 226; *Regina* v. *Russell* (1849), 13 Q.B. 237; *Dean* v. *Green* (1882), 8 P.D. 79 at p. 89.

Argument

P. E. Wilson, for respondent U.G.G. Sawmills, Limited: There must be a substantial compliance. He has the name of the wrong owner and there is no statement for whom the work was done. In *Douglas* v. *Mill Creek Lumber Co.* (1923), 32 B.C. 13, there was a substantial compliance. That the schedule must be deemed part of the Act see *Saunders* v. *White* (1902), 1 K.B. 472. The affidavit attached is only a verification: see *Dominion Radiator Co. Ltd.* v. *City of Calgary* (1918), 1 W.W.R. 137 at p. 145. There must be some protection for any person who might search.

Mayers, in reply.

MACDONALD, C.J.A.: I would allow the appeal. The statute on which this case has been argued, section 5 of the Woodman's Lien for Wages Act, reads as follows: I might say, before reading it, that the question is whether or not the claims of lien were sufficient under this section. Now, the section reads as follows:

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"Such statement shall set out briefly the nature of the debt, demand,

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or claim, the amount due to the claimant, as near as may be, over and above all legal set-offs or counterclaims."

That would imply that there is an amount due by some person, but to proceed:

"A description of the logs or timber upon or against which the lien is claimed."

The contention is that that section does not require the name of the debtor to be stated, that is, the claimant may have been an employee of A, he sets out the amount of his claim, but he does not say that he was the employee of A—he says nothing about that. It seems to me that the language of the section might be held to imply that the name of the debtor should be set out in the claim, but I do not decide that, because the name of the debtor is stated in the affidavit which is a part of the claim and must be registered with it. That I think overcomes any question as to the construction of section 5. As I say, I do not put a construction either one way or the other upon that section, because I find it unnecessary to do so because of the affidavit.

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Oddly enough, that is the only one of the three requirements to be set out in the statement that is covered by the affidavit. It so happens that the form given in the schedule itself—the form of the affidavit—covers that particular item. It seems to me that the appeal must succeed, and the case, in the event of the parties not being able to agree on the amount of the lien, should go back for either rehearing or a continuation of the hearing which was had before the learned County Court judge.

MARTIN, J.A.: This appeal, in my opinion, should be allowed. In the first place, I have no doubt that the correct procedure was followed, *i.e.*, by obtaining the judgment and issuing the writ of execution under section 7, followed up by the proceedings taken under sections 9 and 10. That is a special procedure, something quite apart from the ordinary procedure of the Court in relation to the enforcement of execution, because it does depart from the ordinary rule that the execution should be enforced against the owner of the goods. Here, the effect of the statute is that it recognizes the enforcement of a special interest of a third person in the goods, that

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interest being the lien which the statute confers. The procedure that has to be followed is, as I have said, that provided by said sections and the practical working out of it in the end, in a case such as this, is to be found in subsection (2) of 10, and the learned judge has adopted that appropriate summary procedure which would enable justice to be done in its completeness. There was no necessity whatever for the sheriff in the circumstances to take interpleader proceedings, they were entirely unnecessary, obviously. The procedure would, in the case of an attachment, be of a different nature, but as to that it is unnecessary to say anything more.

Then as to the requirements of the statute and the alleged defect, under section 5, in the claim for the lien. In the first place I have to say that I entirely approve, so far as they go, the observations of this Court in *Douglas* v. *Mill Creek Lumber Co.* (1923), 32 B.C. 13.

Referring then to section 5, I am of opinion that it has been complied with. The only requirement which is now put forward as not having been observed is that the "statement" does not "set out briefly the nature of the debt, demand or claim," and what is complained of is that the name of the debtor is not given. Now, with all respect, that to my mind is an entirely different thing from the "nature" of the debt, etc., which is one thing and one thing only here, *viz.*, what may arise out of the contract for the "labour, service, or services" for which the lien is given under section 3; the parties to the contract are another and distinct thing quite apart from the "nature" thereof, and therefore when the statute requires only the nature of the debt to be set out, it does not require the claimant to take still another step and set out the names of the parties against whom that debt, etc., or demand is to be enforced. The statute, in short, is satisfied by the statement of that which it calls for, and it calls for "nature" alone to be stated, and not parties.

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But if I should be wrong in that (while I entertain a clear opinion that I am not wrong), then the information (the missing information, if it is missing) is to be found by looking at the schedule A, which prescribes the form of the "Statement

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of Claim of Lien." That schedule has two elements, the first is the claim, and the second the affidavit attached to it, and they both must, in my opinion, for the purposes of this appeal at least, be read as one entire statement directed to the satisfaction of the statute, and in that statement as a whole, we, beyond question, with all respect to other views, find that the missing information of the name of the debtors is set out; so therefore, from whatever aspect one regards the statute, it has been satisfied.

And I wish to make this remark, that in arriving at the view as to whether or no these schedules are permissive or imperative, one has to scan the language carefully, and the language in this section 5 is that the lien "may be in the form in schedule A to this Act, or to the like effect." Now, in certain cases it has been held that the schedule must be followed strictly. I gave an example of it yesterday in the leading case under the Bills of Exchange Act of *Saunders* v. *White* (1902), 1 K.B. 472, where the Court of Appeal held that a bill of sale was invalid because it did not adhere to the form given in the schedule, but the Court so held because it deemed the statute (section 9 of the Bills of Sale Act (1878) Amendment Act, 1882) was intractable in its clear provisions, which required strict adherence to said form.

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There is also another exception, perhaps, to the general rule, which is to be found set out by Lord Chancellor Campbell, on appeal from Vice-Chancellor Wood, in *Liverpool Borough Bank* v. *Turner* (1860), 30 L.J., Ch. 379, where he says that this question as to whether or no schedules are to be considered as permissive or imperative must be decided by looking at the Act as a whole; and in that case he decided that it was in the public interest (as he says, for the honour of the British flag upon the high seas) that a strict consideration should be given to the statute, and so he held that the form in the schedule there was imperative and should be adhered to. That element is entirely absent here, just as is the element of the imperative words that I cited in section 9 of the preceding case.

The learned judge below, it is to be observed, took the same view of section 5 as I do, and he did not rely upon any defects

therein, but relied upon defects in section 7, which counsel has now to admit really cannot be supported; that is to say, counsel does not support the learned judge's view upon section 7.

I wish only to add this, that in regard to the two claims under $100, it may possibly be that our jurisdiction is affected by our decision in *Andrews* v. *Pacific Coast Coal Mines Ltd.* (1922), 31 B.C. 537, which I should like to read and have an opportunity of considering before finally deciding that point. But I do not understand we are now deciding it, or that counsel really wishes us to do so, in view of what was said yesterday.

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[Counsel here stated that they did not ask for such a decision.]

GALLIHER, J.A.: I would allow the appeal. The name of the person for whom the work was done is, I think, clearly enough indicated in the affidavit which is necessary to file in support of the claim. I do not think we should treat those as two separate documents, bearing no relation to each other. Both are required to be put in by the party filing his claim; so that I think, whatever might be said as to the name of the person for whom the work is being done not appearing in the first part of the proceedings filed, it is, or is at all events, in my opinion, clearly enough shewn in the affidavit in support of the claim.

I just wish to make reference to my judgment in *Douglas* v. *Mill Creek Lumber Co.* (1923), 32 B.C. 13. It might appear at first that I had intended to say that it is essentially an Act which should not be construed strictly without any qualifications, but I think it must be apparent from reading it that what I had in mind there was the very wording of the section 5, which made a reference to the schedule, because I have stated that if there was no schedule A I would hold that section 5 had been complied with. Now, speaking of schedule A, the specific words were used there, and the question really which we considered then was as to residence, which was stated, but whether or not it was strictly enough stated is another thing, and that is what I had in mind. I merely mention this so that in future counsel may not be misled in any way with regard to that.

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McPHILLIPS, J.A.: I would dismiss the appeal. In my opinion, the learned judge in the Court below arrived at a proper conclusion. It is impossible, in my opinion, to read this statute without the schedule. I refer to Craies's Statute Law, 3rd Ed., 200, and there it is said, using the language of Brett, L.J.:

"'A schedule,' as the Lord Justice said, in *Attorney General* v. *Lamplough* (1878), 3 Ex. D. 214 at p. 229, 'in an Act is a mere question of drafting, a mere question of words. The schedule is as much a part of the statute, and is as much an enactment, as any other part,' and if it contradicts an earlier clause prevails against it."

Now, the learned counsel for the appellant very frankly said, we will insert the schedule after section 5, it would then be the later clause.

I note this, that the learned judge in his reasons for judgment expressly puts his judgment upon the schedule and refers to the Interpretation Act, where he quotes:

"Every Schedule to an Act shall be deemed to be part of such Act."

We have these statutory provisions adding something to the common law—giving these statutory rights—and the statutory requirements should be strictly complied with. What astonishes me in this case is that we should be asked to approve of the form of proof that is attempted to be set up in this case as being compliance with the statute. If this is compliance, this scant proof will form a classic in the future, but, with deference to all contrary opinion, I cannot find in this proof any evidence whatever of who the debtor is—none whatever; and surely it was not intended that that should be absent. Section 5 says: "Such statement shall set out briefly the nature of the debt, demand, or claim." Now, if you have got a debt, a demand or a claim, surely you ought to know against whom you have the debt, demand or claim. As the House of Lords said once in discussing this principle, your debtor cannot be the whole world, your debtor must be somebody definite; and in this case who is that definite person? It is attempted to spell it out in this way, that Mutch is the one who was the debtor for whom the work was done. I cannot so read it. A lien is claimed against certain logs or timber, the property of Mutch, but that does not import that the work was done for Mutch. That is in the

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statement of claim itself. It is attempted by these words to import that Mutch was the person for whom the work was done—"And the amount claimed to be due to me in respect of my lien is due and owing to me after giving said H. Mutch credit for all sums of money, goods, or merchandise which the said H. Mutch is entitled to credit as against me." Now, as I have indicated during the argument, there might be business relations between this man Mutch and this claimant quite independent of the question of for whom the work was done.

The schedule is clear and precise. It says "[here state the name and residence of the owner of logs]," and we have that, Mutch is the owner. "[State the kinds of logs . . . . where situate . . . .] in respect of the following work, that is to say [here give a short description of the work done for which lien is claimed], which work was done for [here state the name and residence of the person upon whose credit the work was done]." Now, that is absolutely absent here; that is not here at all, and it is contended that it can be disregarded. It seems to me that it is fundamental, that it must be here, and when we have the schedule as part of the Act, it must, in my opinion, be complied with.

Now, it is said, though, that section 5 merely uses the words "and may be in the form in schedule A to this Act." But it also says, "or to the like effect." Now, that is perfectly understandable. What Parliament said was this, you can use this form, and if you use this form you shall be immune from attack; but if you do not use the form you shall use a form to the like effect. How can a form be to the like effect when it is absolutely silent as to a prerequisite, a fundamental provision in that schedule? All you can do under this language of the Act is, use the form or at your peril use a form to the like effect. How can it be to the like effect when it is silent in respect, as I say, of a fundamental requirement?

MCPHILLIPS, J.A.

Now, referring to the application of the word "may," in Craies's Statute Law, 2nd Ed., 561, we have in Appendix A this stated:

> "'May,' in rules of Court, has been held to mean may or may not—to give a discretion which is called a judicial discretion, but which still is a discretion."

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The analogy is complete enough here, there was discretion here. You can use the form in the schedule or you may not, but you must use a form which is to the like effect. And Cotton, L.J., in *In re Baker. Nichols* v. *Baker* (1890), 44 Ch. D. 262 at p. 270 said:

"I think that great misconception is caused by saying that in some cases 'may' means 'must.' It never can mean 'must,' as long as the English language retains its meaning; but it gives a power, and then it may be a question in what cases, where a judge has a power given him by the word 'may,' it becomes his duty to exercise it."

That is to say, whether the discretion is judicial or absolute, fettered or unfettered.

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Now, in this particular case, in my opinion, it is absolute, because unless you use the form you exercise that discretion at your peril, because if you do not use it you have to use a form to the like effect. Can an affidavit, or a statement of claim and affidavit be a form to the like effect as intended by Parliament when it is absolutely silent as to the person's name for whom the work was done? There is only one answer and that is in the negative.

EBERTS, J.A.: I would dismiss the appeal for the following reasons: Section 3 of the Woodman's Lien for Wages Act says in part:

"Any person performing any labour, service, or services in connection with any logs or timber in the Province, or his assignee, shall have a lien thereon for the amount due for such labour, service, or services, and the same shall be deemed a first lien or charge on such logs or timber," etc.

"4. The lien provided for in the last preceding section shall not attach or remain a charge on the logs or timber unless and until a statement thereof in writing, verified upon oath by the person claiming the lien, or some one duly authorized on his behalf, shall be filed in the office of the registrar of the County Court," etc.

"5. Such statement 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."

In the schedule to the Act the following words occur:

"Which work was done for [here state the name and residence of the person upon whose credit the work was done]."

The schedule, in my opinion, forms part of the Act: see Interpretation Act, Cap. 1, R.S.B.C. 1911, section 25, sub-

section (11); and *Attorney General* v. *Lamplough* (1878), 3 Ex. D. 214 at p. 229. The next above requirement in same "which work was done for," etc., is wholly absent in the statement filed under section 5, and should have been set out in same.

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

Solicitor for appellant: *W. P. Ogilvie.*
Solicitors for respondent (claimant): *Wilson & Wilson.*

IN RE LEE CHEONG, DECEASED.
LEE SHECK YEW v. THE ATTORNEY-GENERAL FOR THE PROVINCE OF BRITISH COLUMBIA.

Succession duty—Wife—Domicil—Deceased Chinaman domiciled in China—Married to two wives in China—Two business establishments, one in China and one in British Columbia—Will—Bequest to each wife—Status—R.S.B.C. 1911, Cap. 217.

A domiciled Chinaman contracted two lawful marriages in China to Chinese women of Chinese domicil. He had two business establishments one in China and one in British Columbia and travelled back and forward between the two countries in his business interests but always retained his Chinese domicil. He died in Victoria, British Columbia, in September, 1910, and by his will bequeathed an annuity of $1,000 to each of his wives. A petition by the executor for a declaration that each wife was entitled to be recognized as his lawful wife and that succession duty be payable in accordance therewith, was refused.

Held, on appeal, reversing the decision of MCDONALD, J., that both women should be recognized as wives of deceased, and they are entitled to the benefits extended to wives under the Succession Duty Act.

APPEAL by petitioner, Lee Sheck Yew, from the decision of MCDONALD, J. (reported 31 B.C. 437), in a petition that the marriages of Lee Cheong were legal marriages and that

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succession duty be payable at the rate payable on behalf of the wives of the testator. Lee Cheong was domiciled in China and was married twice in China, first in 1875, there being issue of the said marriage three children. The second marriage took place in April, 1893, and there were issue of the said marriage six children. He never changed his domicil from China but did business both in China and in British Columbia. In 1908 he went to British Columbia to attend to his business there intending to return to China in a few months. He however became ill and was unable to return to China as he intended, and died in Victoria on the 6th of September, 1910. He owned his house as a home in China. He made his will on the 16th of August, 1910, in British Columbia and left an estate of $115,000, leaving to each of his wives an annuity of $1,000 a year. He had assets in China, also in British Columbia. The petition is by the son of the deceased who claims that succession duty is governed by section 7 of the Act. The Crown claimed that as polygamy is legal in China where deceased was married to both wives that therefore even the first wife is not a wife within our law and therefore both wives must be considered strangers in blood and under another section the annuities should be charged 5 per cent. duty.

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The appeal was argued at Victoria on the 5th of July, 1923, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Luxton, K.C., for appellant: Lee Cheong was a domiciled Chinaman. He made his will here in 1910. He came here off and on but never abandoned his original domicil. He died on the 6th of September, 1910. He was married to his two wives in China. The law of domicil governs and the legacies should be charged one and one-half per cent. and not five per cent. The charge is fixed by section 7 of the Act. That the law of domicil governs see Halsbury's Laws of England, Vol. 6, p. 220. The question is whether they or either of them is a wife: see *Udny* v. *Udny* (1869), L.R. 1 H.L. (Sc.) 441 at p. 457. China is within the comity of nations: see Hall on International Law, 7th Ed., 42; Eversley & Craies's Marriage Laws of the British Empire, p. 1. He relies on *Hyde* v. *Hyde*

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and Woodmansee (1866), L.R. 1 P. & D. 130 and *Warrender* v. *Warrender* (1835), 2 Cl. & F. 488; but see Halsbury's Laws of England, Vol. 6, p. 224; *Doglioni* v. *Crispin* (1866), L.R. 1 H.L. 301; *In re Goodman's Trusts* (1881), 17 Ch. D. 266; *Connolly* v. *Woolrich and Johnson* (1867), 11 L.C.J. 197; *Rex* v. *Williams* (1921), 30 B.C. 303.

Carter, D.A.-G., for respondent: Marriage is the voluntary union for life of one man and one woman, to the exclusion of all others: see Halsbury's Laws of England, Vol. 6, p. 252; Vol. 16, p. 278; Dicey's Conflict of Laws, 3rd Ed., 289; *Brook* v. *Brook* (1861), 9 H.L. Cas. 193 at p. 209; *Hyde* v. *Hyde and Woodmansee* (1866), L.R. 1 P. & D. 130 at p. 136; *Harvey* v. *Farnie* (1880), 6 P.D. 35 at p. 51; *In re Bethell* (1888), 38 Ch. D. 220. The question of domicil does not apply to this case: see *Brinkley* v. *Attorney-General* (1890), 15 P.D. 76; *Chetti* v. *Chetti* (1909), P. 67; *Rex* v. *Hammersmith Superintendent Registrar of Marriages. Ex parte Mir-Anwaruddin* (1917), 1 K.B. 634 at pp. 645 and 677. Argument

Luxton, in reply.

Cur. adv. vult.

6th November, 1923.

MACDONALD, C.J.A.: This appeal involves, *inter alia,* the decision of a question of international law. Lee Cheong, a Chinese subject, domiciled in China, married two wives, also Chinese, domiciled there. The laws of China, it is admitted, permits polygamous marriages. The deceased died in this Province while temporarily residing here, leaving property here, and a will by which he gave annuities to each of his said wives. They claim, and the Crown denies, the right to the exemption from succession duty accorded to a wife by our statute. MACDONALD, C.J.A.

The contention of the Crown is founded on the definition of Christian marriage adopted in *Hyde* v. *Hyde and Woodmansee* (1866), L.R. 1 P. & D. 130. It is there said that the only marriage recognizable by our Courts is the voluntary union for life of one man and one woman, to the exclusion of all others. The Crown contends that both marriages offend against that formula; that these two persons who enjoy the full *status* of wives in China have no *status* as such in this Province.

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Judicial opinions are conflicting or, perhaps, it would be more correct to say that while there are many opinions bearing on the subject, there are only two or three decisions directly in point and those are not in harmony with each other. The first is *Connolly* v. *Woolrich and Johnson* (1867), 11 L.C.J. 197, in which Monk, J. held the marriage of a domiciled French Canadian with an Indian woman, celebrated according to the customs of her tribe, to have been a valid marriage notwithstanding that those customs recognized polygamy. A similar case, except as to the domicil of the husband, was decided the other way by Stirling, J., in *In re Bethell* (1888), 38 Ch. D. 220.

It will be convenient now to examine the opinons of several judges who have expressed themselves *obiter*. In *Warrender* v. *Warrender* (1835), 2 Cl. & F. 488, Lord Brougham leaves it doubtful whether or not he would admit the validity of the first marriage though denying that of subsequent ones. In *Hyde* v. *Hyde and Woodmansee, supra,* the Court decided that it could not dissolve the marriage, a mormon one, since it was, in the eye of the law of England, no marriage at all, but Lord Penzance declined to say what view the Court would take of such a marriage in matters affecting succession and legitimacy. He said (p. 138):

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"This Court does not profess to decide upon the rights of succession or legitimacy which it might be proper to accord to the issue of the polygamous unions, nor upon the rights or obligations in relation to third persons which people living under the sanction of such unions may have created for themselves. All that is intended to be here decided is that as between each other they are not entitled to the remedies, the adjudication, or the relief of the matrimonial law of England."

The point decided in *Hyde* v. *Hyde and Woodmansee* does not arise in this case, it depends upon the point which his Lordship declined to decide.

Mr. Justice Story, in his book on the Conflict of Laws, says that a marriage good by law of the country in which the contract was celebrated is good everywhere unless incestuous or polygamous, but he does not indicate whether he was speaking of marriages valid merely by the *lex loci contractus* or those valid by the *lex domicilii* as well. In respect of the incidents of marriage validity must be decided by the law of the domicil.

Capacity to contract marriage at all or the right to marry more than one wife is to be ascertained by reference to the domicil of the parties and hence though a marriage may be validly contracted in a country other than that of the domicil, yet if by the law of the domicil of the contracting parties it were illegal, it would not be given recognition in this country. I think that Story did not mean that a marriage valid by the law of the domicil must in countries in which it would, if celebrated there, have been incestuous or polygamous be invalid for that reason only. I am, I think, supported in this view by the opinions expressed by their Lordships in *Brook* v. *Brook* (1861), 9 H.L. Cas. 193. In that case the recognition in England of a marriage lawfully celebrated in Denmark, which if it had been celebrated in England, would have been invalid, was elaborately considered. At that time, marriage with a deceased's wife's sister was prohibited in England. That was the relationship of the parties in *Brook* v. *Brook,* but being domiciled British subjects the law of domicil governed. It is, therefore, important to see what would have been the logical decision had the parties been domiciled Danes. The Lord Chancellor, after referring to the distinction between marriages valid by the *lex loci* and those valid by the *lex domicilii,* said, at p. 213:

"The doctrine being established that the incidents of the contract of marriage celebrated in a foreign country are to be determined according to the law of the country in which the parties were domiciled and mean to reside, the consequences seem to follow that by this law must its validity or invalidity be determined."

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Lord Cranworth, in the same case, at p. 226, said:

"It was contended that, according to the argument of the respondent, such a marriage, even between two Danes, celebrated in Denmark, must be contrary to the law of God, and that, therefore, if the parties to it were to come to this country, we must consider them as living in incestuous intercourse, and that if any question were to arise here as to the succession to their property, we must hold the issue of the second marriage to be illegitimate. But this is not so. We do not hold the marriage to be void because it is contrary to the law of God, but because our law has prohibited it on the ground of its being contrary to God's law. It is our laws which makes the marriage void, and not the law of God. And our law does not affect to interfere with or regulate the marriages of any but those who are subject to its jurisdiction."

Lord Wensleydale, at p. 241, said:

"It is the established principle that every marriage is to be universally

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recognized, which is valid according to the law of the place where it was had, whatever that law may be. This is the doctrine of Lord Stowell in the case of *Herbert* v. *Herbert* [(1819)], 2 Hagg. Cons. 271. The same doctrine has been laid down in various authorities, as by Sir Edward Simpson, in *Scrimshire* v. *Scrimshire* [(1752)], *id.* 417, and by Story and others. If valid where it was celebrated, it is valid everywhere, as to the constitution of the marriage and as to its ceremonies; but as to the rights, duties, and obligations thence arising, the law of the domicil of the parties must be looked to."

The inference I draw from these opinions is that the *Brook* marriage, had it been contracted by domiciled Danes, would in a case of succession or legitimacy have been regarded as valid in England. It was invalid because it was contrary to the law of England, which was the country of domicil of the parties. The same principle was applied in *In re Bozzelli's Settlement* (1902), 1 Ch. 751.

It might be contended that there is a distinction between a marriage which, if celebrated in England, would have been void because prohibited there and one which would have been criminal if celebrated there, and that English Courts, while recognizing the *status* of a wife under the former, that is to say, rights of succession or legitimacy, yet would in no way recognize marriages of the latter character. I can, however, see no just distinction. In neither case would the marriage in the foreign domicil have been either prohibited or criminal. It is no crime in this country for a domiciled Chinese subject to marry two wives in China. We are not asked to enforce a contract repugnant to our policy but merely to recognize a *status* created by the foreign law. *Bowman* v. *Secular Society, Limited* (1917), A.C. 406; 33 T.L.R. 376, puts an end to the notion, if it were ever authoritatively entertained, that Christianity is part of the law of England. Christian tenets have to a considerable extent been adopted by the common and statute law, and to that extent only is it true to say that the Christian conception of morals is the law of the land. In the *Bowman* case, Lord Parker warned against the danger of denying rights merely because the person claiming them does not accept some of the fundamental doctrines of our own faith. Lord Sumner said that the question was whether an anti-christian society was incapable of claiming a legacy merely because the claimant was anti-christian. The case is not strictly cognate to the present dis-

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cussion, but it deals very completely with the religious phase of the subject, which appears to have had weight with some of the judges. I think these women are, in matters relating to the property of their deceased husband, entitled to be recognized as wives and entitled to the benefit of the Succession Duty Act, if, upon its fair construction, it can be said to extend its benefits to them.

This brings me to the second question, the construction of the statute. "Wife" is not defined by the Act, nor, so far as I am aware, by any other Act. A child is given the same exemption as a wife and is defined in the Act broadly to include persons to whom the deceased stood *in loco parentis*. The Act shews an intention, on the part of the Legislature, to relieve from succession duty gifts by a testator to those who were dependent upon him. By the interpretation clause the singular is to include the plural, so that there is no difficulty because of the use of the singular in the Act. It was argued that the Legislature must be presumed to have had in mind a wife by Christian marriage only, but the true presumption is that the Legislature knew the state of the law and legislated in the light of it. For the above reasons, I would allow the appeal and declare both legacies entitled to exemption from succession duty to the extent declared by the Act.

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MARTIN, J.A.: This is a question arising under the Succession Duty Act, Cap. 217, R.S.B.C. 1911. The deceased, Lee Cheong, was a subject of the Republic of China, domiciled in that country, and the lawful husband of two wives, citizens of China, whom he married there in accordance with its laws. He died in Victoria, in this Province, on the 6th of September, 1910, leaving considerable property here, and his will was admitted to probate on the 25th of November, 1911. By the following certificate of the Chinese Consul General for Canada, in evidence before us, it appears that

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"At the time of the said death and probate of the said Lee Cheong it was lawful by the common law of China for a citizen of China to have more than one wife and each such wife has the same civil *status*. If there were children of the second marriage, all such children occupied and held the same *status* as those of the children of the first marriage, except that the eldest son by the law of China takes two shares to the

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others' one, and by the said law the sons only take interest in the property of the deceased."

By his will Lee Cheong gave an annuity of $1,000 to each of his said lawful wives, but a dispute has arisen between them and the executors and the Crown, represented by the Minister of Finance, respecting the amount of succession duty payable, the Minister having decided to treat both of the wives as mere strangers to their lawful husband and therefore claiming a much higher rate of duty than if they are to be each regarded as a single wife in the ordinary way in this country; there are three children of the first marriage and six of the second.

The question before us, then, is a clear one, and is whether or no these alien lawful wives are to be regarded as such for the taxation purposes of the Succession Duty Act when they take the interest that their husband left them in that portion of his property which happened to be within this Province.

It will be observed that this question has really no moral or religious aspect and no "consequent effects upon the position of the wife and legitimacy of the children," or prosecution for "polygamy which our law forbids" as a felony, as pointed out by Darling, J., in *Rex* v. *Hammersmith Registrar of Marriages* (1916), 86 L.J., K.B. 210 at p. 216, but is simply a business matter of the collection of a tax for revenue purposes. This primary aspect must be kept clearly in mind because it is that which distinguishes this case from all those which have been cited to us or which I have been able to find after an exhaustive search, and doubtless it was to guard against the undue extension of judgments delivered upon radically different facts and circumstances that Lord Penzance said, nearly 60 years ago in a suit for divorce from a Mormon marriage, *Hyde* v. *Hyde and Woodmansee* (1866), L.R. 1 P. & D. 130, 138:

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"In conformity with these views the Court must reject the prayer of this petition, but I may take the occasion of here observing that this decision is confined to that object. This Court does not profess to decide upon the rights of succession or legitimacy which it might be proper to accord to the issue of the polygamous unions, nor upon the rights or obligations in relation to third persons which people living under the sanction of such unions may have created for themselves. All that is intended to be here decided is that as between each other they are not entitled to the remedies, the adjudication, or the relief of the matrimonial law of England."

On p. 135 he said:

"Now, it is obvious that the matrimonial law of this country is adapted to the Christian marriage, and it is wholly inapplicable to polygamy. The matrimonial law is correspondent to the rights and obligations which the contract of marriage has, by the common understanding of the parties, created. Thus conjugal treatment may be enforced by a decree for restitution of conjugal rights. . . . ."

But the case at bar is apart from such matrimonial complications as that Divorce Court was invoked to remedy, the limited question before it being, as Lord Penzance pointed out at page 133, "the sense in which these words [husband and wife] must be interpreted in the Divorce Act."

It is conceded by the Crown counsel that where, as here, the *lex loci contractus* and the *lex domicilii* concur, the general rule is that a marriage between persons *sui juris* is to be decided by the law of the place where it is celebrated and that if valid there it is valid everywhere, but he submits that this rule is subject to a few exceptions one of which is that marriages involving polygamy and incest are not recognized in Christian countries, in support of which submission he cited a number of authorities on the meaning "Christian marriage" as viewed by certain Courts in England.

In several of those decisions, particularly in the earlier, much stress is laid upon the element of "Christianity" in English marriages (as to the exact meaning of which various views are taken) and the judges have been, clearly, not a little affected thereby, but in the new light of the recent decision of the House of Lords in *Bowman* v. *Secular Society, Limited* (1917), A.C. 406, holding that Christianity is not now and never was part of the law of England, the former ecclesiastical conception of "Christian marriage" must be altered to conform to later decisions and the wider and more modern view of international and Imperial relations and necessities. As judicial ideas expanded in the course of time it was pointed out, *e.g.,* in *Brinkley* v. *Attorney-General* (1890), 15 P.D. 76, 80, that the phrase "Christian marriage" or "some equivalent phrase" was merely one of convenience to express the idea of one wife, and it was held to include the marriage in Japan of a British subject to a Japanese woman in accordance with the laws of the Empire of Japan. And I may say here, *en passant,* that

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I share the opinion of Mr. Justice Monk in his learned judgment in the celebrated case of *Connolly* v. *Woolrich and Johnson et al.* (1867), 11 L.C.J. 197 (which I shall consider later), that it is hard to discover any element of "Christian marriage" in those earlier notorious matrimonial performances, consisting only too often in the abduction of heiresses, infants of tender years, with the express intention of evading the marriage laws of England and in defiance of the wishes of their parents and guardians or the Court of Chancery in the case of wards of Court, which were participated in by runaway couples from England at Gretna Green, in Scotland, to the extent of many thousands per annum, whereat, as he says, p. 221:

"A blacksmith has supplied the place of a priest or magistrate,"

and which he contrasts unfavourably with the marriage custom of the aboriginal Cree tribe in question before him as follows, pp. 320-1:

"I apprehend that it is not much more loose or immoral than the well known laws of Gretna Green, which not only require no regular religious ceremony, but even dispense with the consent of parents; a marriage according to this usage of the Crees would, in the opinion of the Court, be as solemn and as binding in the eye of the law, as many which the greatest English judges have declared valid."

These disgraceful "Christian marriages" at Gretna Green were nevertheless upheld by the Courts of Great Britain till 1856, when they were abolished by statute, and an account of them will be conveniently found in Eversley on Domestic Relations, 3rd Ed., 30, 106, at which latter page is to be found this instructive note:

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"The Gretna Green marriages afford a clear and unmistakable instance and proof that the English Courts recognized as valid marriages celebrated abroad and satisfying the requisites of the foreign country. The parties who went across the Border could not, and did not, conceal that they went to Scotland for the sole purpose of evading the law of England, which required the consent of the proper parties to a valid marriage. When they had made themselves man and wife by the ceremony *per verba de præsenti*, valid enough in Scotland, though not in England, they turned back, and their marriage was never questioned, or if questioned, upheld. See *Gardner* v. *Attorney-General* [(1889)], 60 L.T. 839."

I have examined the whole of the Act in question to see if it affords any clue to the meaning it attaches to the word "wife," but in sections 4, 5, and 7, which define the property to be taxed and the amount of duty payable, the relevant language

merely refers to that "property situate within the Province" which passes "to or for the use of the father, mother, husband, wife, child, daughter-in-law, or son-in-law of the deceased," and by section 25 (2) of the Interpretation Act, R.S.B.C. 1911, Cap. 1:

"Words importing the singular number or the masculine gender only shall include more persons, parties, or things of the same kind than one, and females as well as males, and the converse."

The statute itself, therefore, presents no obstacle to the petitioner, but it is not unimportant to note that it is framed in so liberal and humane a way as regards children that by section 2 in the definition of "child," it dispenses with the necessity of marriage of any kind in the case of children who though not "lawful" or "adopted" yet come within the class of "any infant to whom the deceased for not less than ten years immediately prior to his death stood in the acknowledged relationship of a parent." This provision is, to me at least, an indication that the Legislature is not approaching the domestic relations of the deceased in a narrow, but in a broad and modern spirit.

The more I have considered the unusually important and far-reaching question before us the more am I impressed with the necessity, in attempting its solution, of applying the two propositions laid down by Lord Chancellor Halsbury in *Quinn* v. *Leathem* (1901), A.C. 495, 506, *viz.*: that "every judgment must be read as applicable to the particular facts proved, or assumed to be proved" since "general expressions" must be "governed and qualified by the particular facts"; and that, "a case is only an authority for what it actually decides." Bearing this guide in mind, the danger of relying on general expressions to be found in suits for divorce, or separation, or legitimacy, or guardianship of infants, based, *e.g.*, upon different domicil of the parties, or an English domicil, becomes apparent, and such decisions really tend to mislead unless the fundamental difference between them and this case, where the *lex loci contractus* and the *lex domicilii* concur, is kept constantly in mind. Definitions of "marriage" in matrimonial suits, *e.g.*, in the *Hyde* case, *supra* (that of a domiciled Englishman, married in Salt Lake City), or in *Brinkley's* case, *supra* (that of a domiciled Englishman married in Japan to a Japanese), or in *In re*

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Bethell (1888), 38 Ch. D. 220 (that of a domiciled Englishman married in Bechuanaland, outside the British Dominion, to a Baralong woman), or *Harvey* v. *Farnie* (1880), 6 P.D. 35; (1882), 8 App. Cas. 43 (that of a domiciled Scotchman married to an Englishwoman in England), are of little, if any, assistance, shewing rather what is to be avoided than followed. There are some expressions, however, in the House of Lords in *Brook* v. *Brook* (1861), 9 H.L. Cas. 193, which are to the point as being part of the *ratio decidendi*. That was a case arising out of the marriage (of a deceased wife's sister) in Denmark between domiciled British subjects, who were prohibited by an English statute from contracting such a marriage in England as being "contrary to God's law," as incestuous (pp. 232-3-4), and it was held that such a marriage, though valid in Denmark and duly celebrated there, was absolutely void in England. But at pp. 212-3, Lord Campbell made the following important observations, the last paragraph of which is specially applicable to the particular facts of this case:

"It is quite obvious that no civilized state can allow its domiciled subjects or citizens, by making a temporary visit to a foreign country to enter into a contract, to be performed in the place of domicile, if the contract is forbidden by the law of the place of domicile as contrary to religion, or morality, or to any of its fundamental institutions.

"A marriage between a man and the sister of his deceased wife, being Danish subjects domiciled in Denmark, may be good all over the world, and this might likewise be so, even if they were native born English subjects, who had abandoned their English domicile, and were domiciled in Denmark. But I am by no means prepared to say, that the marriage now in question ought to be, or would be, held valid in the Danish Courts, proof being given that the parties were British subjects domiciled in England at the time of the marriage, that England was to be their matrimonial residence, and that by the law of England such a marriage is prohibited as being contrary to the law of God. The doctrine being established that the incidents of the contract of marriage celebrated in a foreign country are to be determined according to the law of the country in which the parties are domiciled and mean to reside, the consequence seems to follow that by this law must its validity or invalidity be determined.

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"Sir FitzRoy Kelly argued that we could not hold this marriage to be invalid without being prepared to nullify the marriages of Danish subjects who contracted such a marriage in Denmark while domiciled in their native country, if they should come to reside in England. But on the principles which I have laid down, such marriages, if examined, would be held valid in all English Courts, as they are according to the law of the

country in which the parties were domiciled when the marriages were celebrated."

And see Lord Cranworth (who concurred, p. 223) to the same effect, confining, at p. 224, his remarks to the acts of domiciled English subjects resident abroad, and at pp. 227-8, where Mr. Justice Story's language is also explained; and Lord St. Leonards, at p. 231, points out that the case turned upon the question of the British domicil of the parties, as does also Lord Wensleydale, at p. 239, "the sole question relates to British domiciled subjects," and also explaining Story at p. 241 *et seq.*

The interesting case of *Sottomoyor* v. *De Barros* (1877), 3 P.D. 1, is the converse complement of *Brook* v. *Brook,* because there the Court of Appeal held that a marriage in England, at a registrar's office, of domiciled Portuguese subjects who were within prohibited degrees of marital relationship (first cousins) and therefore incestuous by the law of Portugal, was null and void. In *In re Bozzelli's Settlement* (1902), 1 Ch. 751, the *Sottomayor* case was considered and distinguished because in *Bozzelli's* case the marriage in Italy between domiciled Italians, though with a deceased husband's brother, was held valid in England seeing that the necessary dispensation had been obtained in Italy to make it valid there, though it was prohibited as incestuous and "absolutely null and void" in England by Lord Lyndhurst's Act (5 & 6 Will. 4, c. 54), the Court, Swinfen Eady, J., saying, p. 757:

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"In this case I have to deal with a marriage which is valid by the law of the domicil, and which is not stamped as incestuous by the general consent of Christendom. I therefore declare that the marriage is valid. . . . ."

The case of *Re Ullee; The Nawab Nazim of Bengal's Infants* (1885), 53 L.T. 711; 54 L.T. (C.A.) 286, is a remarkable one, wherein a Mahommedan prince who already had more than one lawful wife in his own country (being entitled to four by Moslem law), went through, upon a visit to England (to prosecute his claims against the Government) a ceremony of marriage according to Mahommedan rites in London with a domiciled Englishwoman (who did not know that he had another wife), and the marriage was held to be invalid because, as Chitty, J., put it below, p. 712: "It was not a marriage

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binding on any spouse of English domicil, the reason being that it was not intended to be a marriage . . . ." but in adopting the observation of Lord Penzance in *Hyde* v. *Hyde and Woodmansee, supra,* that "marriage as understood in Christendom was the voluntary union for life of one man and one woman to the exclusion of all other connubial unions," he also repeats his warning, quoted *supra,* as to the restriction of his remarks to the question before him.

In *Chetti* v. *Chetti* (1909), P. 67, the Divorce Court took a long step forward to protect domiciled English wives from the consequences of marriage with polygamous East Indians, when at the instance of the wife on the ground of desertion, it declared that it had jurisdiction to decree a judicial separation from her Hindu husband, who though domiciled in India, and a British subject (but for the purposes of jurisdiction a foreigner, p. 87) had married her at a registrar's office in London while temporarily residing there, and resisted the proceedings on the ground that there had been in law no marriage because by Hindu religion and law, though he was entitled to an unrestricted plurality of wives, yet he was prohibited from marrying out of his caste (the Vaisya) or one who was not a Hindu by religion. But the Court held that whatever might be his personal incapacity in India he could not on that account repudiate a marriage in England which he had voluntarily entered into according to English law, and so granted the decree.

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A somewhat similar question arose in *Rex* v. *Hammersmith Registrar of Marriages, supra,* upon an application for *mandamus* to the registrar to issue a certificate and licence to the applicant, Dr. Mir-Anwaruddin, a native Mahommedan of Indian domicil, to marry one Violet Ling. He had married before another Englishwoman, Ruby Hudd, at a registrar's office in London in 1913, but she deserted him six weeks later, and after his return to India he instituted various legal proceedings in that country (wherein he was an advocate) and later in England, but finding them ineffectual for lack of jurisdiction, he made, in London, on 27th August, 1915, a written declaration of divorcement (called "Talak Nama") in due accordance with Mohammedan law divorcing her, and subsequently presented a petition to the Divorce Court to declare

dissolved, or to dissolve the marriage, which petition was refused because the petitioner was not domiciled in England. After that, on 16th August, 1916, he applied to the defendant registrar for a licence as aforesaid, which he was refused. It was decided by the King's Bench Division, and affirmed by the Court of Appeal, applying *Chetti* v. *Chetti, supra,* that the first marriage had not been dissolved in England by Talak because it was an English one. Lord Reading, C.J., said, p. 214:

"Neither authority nor principle can be found in English law to establish the proposition that a marriage contracted in England is dissolved according to the law of England by mere operation of the laws of the religion of the husband, and without decree of a Court of law."

And, *ib.*:

"Lord Selborne pointed out in *Harvey* v. *Farnie* (52 L.J., P. 33; 8 App. Cas. 43) that the recognition by English law of the dissolution by the law of the matrimonial domicil of a marriage contracted in England depends upon the principle of recognizing the law of the forum and the matrimonial domicil, when they both concur. In the present case the law of the forum—that is, of the Courts of the Empire of India—admittedly does not assist the applicant, and, in my view, that by itself decides the case against him. It was decided in *Armitage* v. *Att.-Gen.* (1906), (75 L.J., P. 42; (1906), P. 135) that the Courts of this country will recognize the binding effect of a decree of divorce obtained in a State where the husband was not domiciled, if the Courts of the country or State of his domicil would recognize the validity of the decree. That is the furthest extent to which recognition by our Courts has gone. In the present case there is not a decree of any Court, and therefore that question does not arise."

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Upon appeal, Lord Swinfen Eady said, p. 222:

"The marriage which was celebrated between the appellant and Ruby Hudd on March 18, 1913, has not been dissolved by any Court of competent jurisdiction—the appellant says that there is none—and it is not a marriage in the Mohammedan sense which can be dissolved in the Mohammedan manner. No question arises that, according to the Mohammedan law, if a member of that faith has taken several wives—within the limit allowed—and has entered into a union of that kind with those ladies according to his law, he may terminate that union by the writing of divorce, and such a union is so terminated. The appellant has adduced evidence to make it clear that the husband has that right without assigning any reason. Where to him, and him alone, it seems good to put her away, in those circumstances he can do it; but it is quite impossible to hold that such a writing of divorce could dissolve a marriage contracted here in England with an Englishwoman, because the husband is of that faith."

This decision goes very far and is a step in advance of

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Chetti v. *Chetti,* recognizing as it does the validity in England according to English law (not, as in the *Nawab Nazim's* case, *supra,* a marriage by Mahommedan law) of a marriage with a polygamous husband, whereby English Courts acquired jurisdiction to dissolve it in favour of his wife, though if she had accompanied her husband to India he could lawfully have married three other wives there and divorced her by Talak, of his own motion: it marks strikingly the progressive departure of the English Courts from that former religious conception of a "Christian marriage" enunciated by Lord Brougham in the House of Lords in the divorce case of *Warrender* v. *Warrender* (1835), 2 Cl. & F. 488 at p. 532, which has been so often repeated and relied upon, but his observations are not applicable to this case, first, because they are *obiter dicta* and apart from the "real question" which Lord Lyndhurst gives on p. 561; and second, they should be restricted to the particular facts according to the principle in *Quinn* v. *Leathem, supra.* Moreover, they were not approved by Lord Lyndhurst, who gave the only other judgment, in the course of which he to a considerable extent, disagrees, in effect, with Lord Brougham and restricts the scope of his observations. He points out in the following vivid and instructive manner some of the effects of the so-called "Christian marriages" which then existed in the British Isles, p. 560:

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"It must be admitted that the legal principles and decisions of England and Scotland stand in strange and anomalous conflict on this important subject. As the laws of both now stand, it would appear that Sir George Warrender may have two wives; for, having been divorced in Scotland, he may again marry in that country: he may live with one wife in Scotland most lawfully, and with the other equally lawfully in England; but only bring him across the border, his English wife may proceed against him in the English Courts, either for restitution of conjugal rights, or for adultery committed against the duties and obligations of the marriage solemnized in England: again, send him to Scotland, and his Scottish wife may proceed, in the Courts in Scotland, for breach of the marriage contract entered into with her in that country. Other various and striking points of anomaly, alluded to by my noble and learned friend, are also obvious in the existing state of the laws of both countries; but however individually grievous they may be, or however apparently clashing in their principles, it is our duty, as a Court of Appeal, to decide each case that comes before us according to the law of the particular country whence it originated, and according to which it claims our consideration; leaving it to the wisdom of Parliament to adjust the anomaly, or get rid of the discrepancy, by improved legislation."

The absence of the Lord Chancellor from the House of Lords in so important a case is explained by the fact that Lord Lyndhurst had resigned the Great Seal on the 23rd of April previous and it had been immediately put into commission, in which state it was when the judgment was delivered on 27th August, 1835. Perhaps the most unsatisfactory feature of Lord Brougham's observations is that the clear inference to be drawn from them is, in my opinion, that though insisting upon a "Christian marriage" he was nevertheless prepared to accept the first wife of a polygamous union; in other words, his objection was not to the system of polygamy but to the succession of new wives it entailed, because he says, p. 532:

"We clearly never should recognize the plurality of wives, and consequent validity of second marriages, standing the first, which second marriages the laws of those countries authorize and validate."

But, with every possible respect, this is an unsound view to take of the principle involved, because either the polygamous marriages are void *ab initio* or they are likewise valid; it cannot be that they must be regarded as valid for the first wife and then become invalid as more wives are taken. To so hold would mean that the power to invalidate the marriage would rest solely on the husband and depend upon his later taking more wives. Such a state of affairs would lead to unthinkable confusion of principles and imperilment of the *status* and rights of the first wife and her issue, which might all be swept away after years of enjoyment merely because the husband exercised his right of polygamy which, at the time he married the first wife, he may have had no intention of resorting to, and she had intermarried with him upon that understanding.

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Speaking with every possible respect, it cannot be overlooked that Lord Brougham's views on matrimonial questions have been subjected to weighty criticism, *e.g.*, in *Harvey* v. *Farnie, supra,* by Lord Chancellor Selborne, Lord Blackburn and Lord Watson, at pp. 52, 57, 58-61, and 63, which will well repay perusal.

The only other English case I shall refer to is *In re Goodman's Trusts* (1881), 17 Ch. D. 266, a decision of the Court of Appeal upon the right of certain foreign children, illegitimate

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by the laws of England but legitimate in their own country, to share in an estate under the Statute of Distributions, concerning which Lord Justice James said, p. 300, after repudiating the submission that "children . . . . must mean children who would be lawful children if they were English children":

"It must be borne in mind that the Statute of Distributions is not a statute for Englishmen only, but for all persons, whether English or not, dying intestate and domiciled in England, and not for any Englishman dying domiciled abroad. And it was to provide for what was thought an equitable distribution of the assets, as to which a man had, through inadvertence, not expressed his testamentary intentions. And, as the law applies universally to persons of all countries, races, and religions whatsoever, the proper law to be applied in determining kindred is the universal law, the international law, adopted by the comity of states. The child of a man would be his child so ascertained and so determined, and, in the next degree, the lawful child of his brother or sister would be his nephew or niece."

He had preceded these observations by saying, on pp. 296-8:

"This is a question of international comity and international law. According to that law as recognized, and that comity as practised, in all other civilized communities, the *status* of a person, his legitimacy or illegitimacy, is to be determined everywhere by the law of the country of his origin—the law under which he was born. It appears to me that it would require a great force of argument derived from legal principles, or great weight of authority clear and distinct, to justify us in holding that our country stands in this respect aloof in barbarous insularity from the rest of the civilized world. On principle, it appears to me that every consideration goes strongly to shew, at least, that we ought not so to stand. The family relation is at the foundation of all society, and it would appear almost an axiom that the family relation, once duly constituted by the law of any civilized country, should be respected and acknowledged by every other member of the great community of nations. England has been for centuries a country of hospitality and commerce. It has opened its shores to thousands of political refugees and religious exiles, fleeing from their enemies and persecutors. It has opened its ports to merchants of the whole world, and has by wise laws induced and encouraged them to settle in our marts. . . . . Take the case of a foreigner resident abroad with such a [legitimated] child. If that child were abducted from his guardianship and brought to this country, can any one doubt that the Courts of this country would recognize his paternal right and guardianship, and order the child to be delivered to any person authorized by him? But suppose, instead of sending, he were to come himself to this country in person, would it be possible to hold that he would lose his right to the guardianship of the child in this country because of the historical or mythical legend that the English barons and earls many centuries ago cried out in Latin, *Nolumus leges Angliæ mutare?* Can it be possible that a Dutch father, stepping on board a steamer at Rotterdam with his dear and lawful child, should on his arrival at the

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port of London find that the child had become a stranger in blood and in law, and a bastard, *filius ullius?*

"It may be suggested that that would not apply to a mere transient visit or a temporary commorancy, during which the foreign character of the visitor and his family would be recognized, with all its incidents and consequences, but that it would only apply to a man electing to have a permanent English domicil. But what could, in that view, be more shocking than that a man, having such a family residing with him, perhaps for years, in this country as his lawful family, recognized as such by every Court in the kingdom, being minded at last to make this country his permanent domicil, should thereby bastardize his children; and that he could re-legitimate them by another change of domicil from London to Edinburgh? And why should we on principle think it right to lay down a rule leading to such results? I protest that I can see no principle, no reason, no ground for this, except an insular vanity, inducing us to think that our law is so good and so right, and every other system of law is naught, that we should reject every recognition of it as an unclean thing."

I have quoted the learned Lord Justice's most instructive observations at some length because of the spacious, sound and lofty international spirit in which they are conceived, and they embody the principle involved herein and the point of view from which this case should be approached upon this statute, which is even more open to their application because it does not relate in any way to a conflict between heirs, etc., but simply to the payment of a tax to the State.

The general principle respecting the *status* of lawful children that the Lord Justice had so forcibly put had been even more strikingly and tersely laid down by the Court of Session of Scotland, affirmed by the House of Lords in *Shedden* v. *Patrick* (1803), 1 Macq. H.L. 535, 538, 568, thus: MARTIN, J.A.

"The . . . . question is, Whether the *status* of a lawful child has been constituted? The rule, then, of ascertaining this personal quality by the law of his own country, not only is consistent with the general principles of jurisprudence, but is also highly expedient; for nothing could be more absurd than for a person to be a bastard in one country, and lawful in another, merely by passing a river, or crossing a mountain, the boundary of their respective territories."

May I not also ask what, in the comity of international jurisprudence "could be more absurd than" to refuse to recognize here the lawfully wedded and domiciled subjects of the admittedly civilized state of China when they merely seek to obtain that part of their domiciled Chinese husband's estate which happens to be in this, to them, foreign country, after

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paying the appropriate tax? As Lord Justice James said, I should require "clear and distinct" authority to justify me in taking a course so opposed to common sense and international justice. Can it be the law, for example, that if that Mohammedan Indian prince, the Nawab Nazim of Bengal, in *Ullee's* case, *supra,* had three lawful wives domiciled in British India, and died leaving property in that country, in China, and in England, and had left all his property in each of the three countries to one of his wives, yet nevertheless though the wives who received the British Indian and Chinese property would be recognized as lawful, yet the one who got the English property would be beyond the marital pale and a stranger in blood to her lawful husband under the Succession Duty Act? Merely to state such a question is, I apprehend, to answer it in favour of the lawful polygamous wives of British Indian domicil, of whom there are many millions in that portion of the Empire. This view is fortified by the final quotation, *supra,* from Lord Chancellor Campbell's judgment in *Brook* v. *Brook,* if (as he said in meeting the argument of counsel) a certain marriage of domiciled Danish subjects in Denmark would be recognized as valid when they came to reside in England though it was by English statute declared to be "contrary to God's law" as incestuous there, then I am quite unable to see what obstacle there is, morally or legally, to our recognition of the rights of these lawful wives domiciled and resident in China. The difficulty in the case at bar that has arisen below is caused by the fact that this purely taxing statute, and the official proceedings thereunder to collect the tax, has, with all due respect, been erroneously approached as though it was the English Divorce Act, or some statute of a similar nature, under which conflicting litigants had invoked the jurisdiction of the Court to assert their domestic rights, hence the cases invoked by the Crown have no application to the fundamentally different question we have to deal with.

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Much was said during the argument about the decision in *Connolly* v. *Woolrich and Johnson et al.,* above referred to, wherein it was, in part, decided by the Superior Court of Quebec that the marriage of a Christian white man domiciled in Lower Canada, with a Cree Indian woman in the Indian

Territories of British North America, remote from civilization, according to the laws and customs of her tribe, was a valid marriage and would be recognized as such by the Courts of Lower Canada despite the fact that polygamy and divorce at will formed part of the said tribal laws. The judgment is an able and exhaustive one and the reasoning very largely supports the conclusion I have arrived at, going further indeed, in the different circumstances, than is necessary to support this judgment. I only, as a matter of historical and jurisdictional exactitude, point out that the marriage occurred in the Athabaska country in the Indian Territories, as appears by the locality defined on p. 199, and not in the Hudson's Bay Company's territory (*i.e.,* Rupert's Land), properly so called—see my articles on "The Rise of Law in Rupert's Land" (1890), 1 West. Law T. 49, 73 and 93. Speaking as a whole the learned judge came, I think, to the right conclusion, and a judgment given nearly 60 years ago which is peculiarly adapted to the social requirements of the development of our great country, vast portions of which are still in a wild state, should not be lightly disturbed, and I would not be a party to its disturbance, particularly and justly bearing in mind how many families of pioneers are affected by the marital principles it lays down as appropriate to the country, based upon sound sense, law, and morality, and being consistent in general with the decisions of the Courts of the United States, which have had to deal with the same social question of Indian marriages, such as *Johnson* v. *Johnson's Administrator* (1860), 77 Am. Dec. 598 (notes at p. 606); 30 Mo. 72; *Earl* v. *Godley* (1890), 44 N.W. 254 (Minnesota) and *Kalyton* v. *Kalyton* (1903), 74 Pac. 491 (Oregon). Moreover, I note something of favourable weight that the learned judge appealed from does not allude to in his criticism of *Connolly's* case, *viz.,* that in *In re Bethell, supra,* the Court said, in referring to *Connolly's* case and *Johnson's* case, *supra,* p. 237:

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"I am not sure that the learned judges who decided those cases took the same view of the law as is expressed by Lord Penzance, by which I consider myself to be bound; but in both cases the facts were very different from those in the present case; and circumstances were proved which might, in my judgment, well lead to the conclusion, consistently with the doctrine laid down in *Hyde* v. *Hyde and Woodmansee* [(1866), L.R. 1 P.

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& D. 130], that the marriages there under consideration were valid according to the law of England."

It follows that, for all the foregoing reasons, I am of opinion that the two domiciled Chinese wives of the deceased should be regarded in this Province as his lawful wives for the purposes of the statute under consideration.

GALLIHER, J.A.

GALLIHER, J.A.: While I am not free from doubt in this matter, I will not dissent from my learned brothers.

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MCPHILLIPS, J.A.: This appeal brings up for consideration a very important point, the international law has to be considered and, in my opinion, must be applied. In launching into the enquiry it is necessary to give careful consideration to *Udny* v. *Udny* (1869), L.R. 1 H.L. (Sc.) 441. At p. 457, Lord Westbury said:

"The political *status* may depend on different laws in different countries; whereas the civil *status* is governed universally by one single principle, namely, that of domicil, which is the criterion established by law for the purpose of determining civil *status*. For it is on this basis that the personal rights of the party, that is to say, the law which determines his majority or minority, his marriage, succession, testacy, or intestacy, must depend. International law depends on rules which, being in great measure derived from the Roman law, are common to the jurisprudence of all civilized nations."

Here the question is as to whether the testator's two wives, admitted to have been lawfully married in China to the testator, the testator (the husband), throughout his life, being domiciled in China, are entitled to be recognized as the wives of the testator and entitled to the beneficial provisions of the Succession Duty Act as applicable to a wife taking under a will or by succession? With domicil admitted and the legality of the marriages in the country of domicil, the succession having relation to movables, as a matter of first impression one would immediately conclude that the matter was not one of difficulty or complexity. The learned counsel for the Crown, however, strenuously contends that owing to the fact that China is a country admitting of polygamy, that in England the marriage of even a domiciled Chinaman, a native of that country, would be looked at as invalid and that it follows, as we have the law of England, that the wives cannot be accorded that civil *status* in British Columbia. It will be observed that Lord Westbury

does not say "Christian nations" in the language above quoted, but "civilized nations." I hardly think it can be successfully contended that China is not to be deemed a civilized nation (Hall's International Law, 7th Ed., 42), that the civilization differs in many particulars from that of Western Europe is not pertinent, nor can it, in my opinion, be successfully contended that international law is incapable of being relied upon in these proceedings. I might say that it was further admitted in the Court below that at the time of the execution of the testator's will and at the time of his death it was lawful for a domiciled Chinaman to have more than one wife, and that each wife had the same civil *status* in China. In Eversley & Craies's Marriage Laws of the British Empire, the learned authors, at p. 1, make use of this language:

"Marriage as understood in Chistendom is the voluntary union for life of one man and one woman, to the exclusion of all others."

The foundation for this proposition is *Hyde* v. *Hyde and Woodmansee* (1866), L.R. 1 P. & D. 130, 133. That was the case of a Mormon marriage and was a decision of the English Matrimonial Court and had no relation to the succession to property, which is the present case, and may be entirely differentiated; and I would draw attention to what The Judge Ordinary said at p. 138:

"In conformity with these views the Court must reject the prayer of this petition, but I may take the occasion of here observing that this decision is confined to that object. This Court does not profess to decide upon the rights of succession or legitimacy which it might be proper to accord to the issue of the polygamous unions, nor upon the rights or obligations in relation to third persons which people living under the sanction of such unions may have created for themselves. All that is intended to be here decided is that as between each other they are not entitled to the remedies, the adjudication, or the relief of the matrimonial law of England."

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In *Warrender* v. *Warrender* (1835), 2 Cl. & F. 488, Lord Brougham said at pp. 530-32:

"Therefore the Courts of the country where the question arises, resort to the law of the country where the contract was made, not *ex comitate*, but *ex debito justitiæ;* and in order to explicate their own jurisdiction by discovering that which they are in quest of, and which alone they are in quest of, the meaning and intent of the parties.

"But whatever may be the foundation of the principle, its acceptance in all systems of jurisprudence is unquestionable. Thus a marriage, good by the laws of one country, is held good in all others where the question

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of its validity may arise. For the question always must be, did the parties intend to contract marriage? And if they did that which in the place they were in is deemed a marriage, they cannot reasonably, or sensibly, or safely, be considered otherwise than as intending a marriage contract. The laws of each nation lay down the forms and solemnities, a compliance with which shall be deemed the only criterion of the intention to enter into the contract. If those laws annex certain disqualifications to parties circumstanced in a particular way, or if they impose certain conditions precedent on certain parties, this falls exactly within the same rule; for the presumption of law is in the one case that the parties are absolutely incapable of the consent required to make the contract, and in the other case, that they are incapable until they have complied with the conditions imposed. I shall only stop here to remark, that the English jurisprudence, while it adopts this principle in words, would not perhaps, in certain cases which may be put, be found very willing to act upon it throughout. Thus we should expect that the Spanish and Portuguese Courts would hold an English marriage avoidable between uncle and niece, or brother and sister-in-law, though solemnized under papal dispensation, because it would clearly be voidable in this country. But I strongly incline to think that our Courts would refuse to sanction, and would avoid by sentence, a marriage between those relatives contracted in the Peninsula, under dispensation, although beyond all doubt such a marriage would there be valid by the *lex loci contractus*, and incapable of being set aside by any proceedings in that country.

"But the rule extends, I apprehend, no further than to the ascertaining of the validity of the contract, and the meaning of the parties, that is, the existence of the contract and its construction. If indeed there go two things under one and the same name in different countries—if that which is called marriage is of a different nature in each—there may be some room for holding that we are to consider the thing to which the parties have bound themselves, according to its legal acceptance in the country where the obligation was contracted. But marriage is one and the same thing substantially all the Christian world over. Our whole law of marriage assumes this; and it is important to observe, that we regard it as a wholly different thing, a different *status*, from Turkish or other marriages among infidel nations, because we clearly never should recognize the plurality of wives, and consequent validity of second marriages, standing the first, which second marriages the laws of those countries authorize and validate. This cannot be put upon any rational ground, except our holding the infidel marriage to be something different from the Christian, and our also holding Christian marriage to be the same everywhere. Therefore, all that the Courts of one country have to determine is, whether or not the thing called marriage, that known relation of persons, that relation which those Courts are acquainted with, and know how to deal with, has been validly contracted in the other country where the parties professed to bind themselves. If the question is answered in the affirmative, a marriage has been had; the relation has been constituted; and those Courts will deal with the rights of the parties under it according to the principles of the municipal law which they administer. See *Story, Confl. Laws*, § 114; *Wightman* v. *Wightman*, 4 Johns. Ch. (N.Y.) 343."

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It will be seen that Lord Brougham, in 1835, said, as above quoted, that in England the plurality of wives would not be recognized, but again the question was not in relation to succession to property. But he said:

"This cannot be put upon any rational ground, except our holding the infidel marriage to be something different from the Christian, and our also holding Christian marriage to be the same everywhere."

It will be seen that Lord Brougham proceeds upon the basis that the law to be applied is the law of Christian marriage, although he balks at that *in toto* by indicating that in England certain marriages in the Peninsula, a Christian country, under the sanction of the law there and approved by the Church, would be deemed invalid in England. I venture to wholly disagree from this *dicta,* and I, with great respect to the great Lord Chancellor, do not believe it to be the present law of England, nor does it comport with the principles of international law. It may be said that many decisions of the Courts throughout long years were based upon the view that Christianity was a part of the fundamental law of England. An error illuminantly displayed away by the decision of the House of Lords in *Bowman* v. *Secular Society, Limited* (1917), A.C. 406. That was a case of a bequest to a company, it being an anti-christian company, and it was held that assuming that the object of the company was the denial of Christianity, yet "it was not illegal in the sense of rendering the company incapable in law of acquiring property by gift and that a bequest 'upon trust for the Secular Society Limited' was valid." The *Bowman* case, in the language of Sir Frederick Pollock (Pollock on Contracts, 9th Ed., 378, note (*o*)), has had the effect of "overruling some decisions and many *dicta,*" and it is evident that many of the decisions relied upon by the learned judge in the Court below cannot now be given effect to. Further, in the main, with great respect to the learned judge, they have no application to a case of succession to property, but relate to questions of matrimonial law in England. In the present case, the testator provided for annual annuities to each of his wives, Lee Loo Sze and Lee Seto Sze, in amount the sum of $1,000 to each of them. Of course, there is no contention here of the invalidity of the bequests made, but in effect the contention

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made, and so far upheld, has the effect of very materially reducing the annuities going to the testator's wives and denies their civil *status*. The case upon which the Crown may be said to be most relying is *In re Bethell* (1888), 38 Ch. D. 220. In view of the *Bowman* case, I cannot now consider that case of any validity, certainly not one in any case binding upon this Court. Here the bequest was to the testator's wives and the *status* of the wives is determined by the law of China, the admitted country of domicil. How, then, is it possible to dispute in British Columbia that civil *status?* The *lex actus,* is the controlling law. Previous to the *Bowman* case there was perhaps little room for doubt, and *Hyde* v. *Hyde and Woodmansee, supra; Brinkley* v. *Attorney-General* (1890), 15 P.D. 76, 78, 79, 80; *Rex* v. *Hammersmith Superintendent Registrar of Marriages* (1917), 1 K.B. 634, and *Rex* v. *Naguib, ib.* 359, might be considered as determining the law. Even giving full effect to the cases last referred to, Dicey in his Conflict of Laws, 3rd Ed., says at p. 289:

"To what extent the law of England will recognize rights, *e.g.*, of inheritance, depending upon the institution of polygamy, is doubtful; but it is clear that the rule in question does not apply to polygamous marriages."

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It will be seen that Dicey (see p. 289, note (*y*)) considers that private international law is only applicable among civilized States, and presumptively as China admits of polygamy, it would not be a civilized State, and the effect of the judgment here under appeal is to so hold. It is to be remarked that Dicey does not refer to the *Bowman* case, nor was it cited to the learned judge below, and most probably was not considered by the learned judge. It is to be further remarked that in *Hyde* v. *Hyde and Woodmansee, supra,* at p. 138 we have it stated that,—

"The Court . . . . does 'not profess to decide upon the rights of succession or legitimacy which it might be proper to accord to the issue of polygamous unions, nor upon the rights or obligations in relation to third persons which people living under the sanction of such unions may have created for themselves. All that was decided is that, as between each other, they are not entitled to the remedies, the adjudication, or the relief of the matrimonial law of England.'"

The present case is not of that nature, *i.e.,* a question of the matrimonial law of British Columbia. No question requiring

adjudication or relief in respect to the matrimonial law arises. I cannot agree, as argued and advanced by the Crown, that the holding that a union formed between a man and a woman in a foreign country is not a valid marriage according to English law unless it be the voluntary union for life of one man and one woman, to the exclusion of all others, or that it is determinative of this case. *In re Bethell* (1888), 38 Ch. D. 220, proceeded upon the foundation that marriage was to be determined on the same basis as marriages throughout Christendom (but see *Grenal* v. *Grenal* (Sikh Marriage Case) (1907), The Times, August 1), and it is to be noted that in the *Bethell* case the domicil of Bethell was English. Here we have Chinese domicil in the case of the testator and both his wives. As I have already pointed out, the present case is not one of the determination of the matrimonial law, it really is one affecting succession and it is not disputed that the domicil is that of China. In Halsbury's Laws of England, Vol. 6, p. 224, par. 337, it is stated that:

"The law of the domicil determines every question as to who is entitled to succeed to the movables of the deceased. Thus, the rights of a widow in respect of the movables of an intestate are governed by the *lex domicilii* of the latter. Similarly, the right of the heir to share in the movable estate cannot be affected by any provision of the *lex loci rei sitæ* of immovables belonging to the deceased, and if children, whether legitimate or illegitimate, are by the *lex domicilii* entitled to succeed in any case to a part of the deceased's movables, their claim will be enforced in this country (*Balfour* v. *Scott* (1793), 6 Bro. P.C. 550; *Brodie* v. *Barry* (1813), 2 V. & B. 127, 131; *Doglioni* v. *Crispin* (1866), L.R. 1 H.L. 301)."

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Lord Sumner in his speech in the *Bowman* case, *supra,* said at pp. 464-5:

"My Lords, with all respect for the great names of the lawyers who have used it, the phrase 'Christianity is part of the law of England' is really not law; it is rhetoric, as truly so as was Erskine's peroration when prosecuting Williams: 'No man can be expected to be faithful to the authority of man, who revolts against the Government of God.' One asks what part of our law may Christianity be, and what part of Chistianity may it be that is part of our law? Best, C.J. once said in *Bird* v. *Holbrook* (1828), 4 Bing. 628, 641 (a case of injury by setting a spring-gun): 'There is no act which Christianity forbids, that the law will not reach: if it were otherwise, Christianity would not be, as it has always been held to be, part of the law of England'; but this was rhetoric too. Spring-guns, indeed, were got rid of, not by Christianity, but by Act of Parlia-

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ment. 'Thou shalt not steal' is part of our law. 'Thou shalt not commit adultery' is part of our law, but another part, 'Thou shalt love thy neighbour as thyself' is not part of our law at all. Christianity has tolerated chattel slavery; not so the present law of England. Ours is, and always has been, a Christian State. The English family is built on Christian ideas, and if the national religion is not Christian there is none. English law may well be called a Christian law, but we apply many of its rules and most of its principles, with equal justice and equally good government, in heathen communities, and its sanctions, even in Courts of conscience, are material and not spiritual."

I cannot see that there is any compellable law which disentitles it to be said, where the domicil is foreign, that the right to the succession to movables is other than in accordance with the law of the foreign domicil, and it is not permissible in such case to question the admitted civil *status* in the country of domicil. We are not without authority in Canada bearing upon the question in *Connolly* v. *Woolrich and Johnson* (1867), 11 L.C.J. 197. Mr. Justice Monk in that case delivered a very learned judgment and held that a marriage was valid notwithstanding that amongst the Cree Indians polygamy existed, *i.e.*, that an Indian marriage between a Christian man and a woman of that nation or tribe was valid, notwithstanding the assumed existence of polygamy and divorce at will, afforded no obstacle to the recognition of the marriage contracted according to the usages and customs of the country.

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It will be noticed that in all the English cases where it is found that the *lex loci contractus* allows polygamy (which is the case in China) the marriage will not in England be looked upon as valid; the decisions have relation to the matrimonial duties arising under the marriage, and they will not be enforced or any divorce or other relief granted for breach of them (Westlake's Private International Law, 6th Ed., pp. 68-69).

Westlake says at pp. 69-70:

"The doctrine which descended from the mediæval post-glossators was that the effect of marriage on immovables was governed by the *lex situs*, and that on movables by the *lex domicilii*. . . . ."

Here we have a case of movables and admittedly both of the wives of the testator have the civil *status* of wives in China, the country of domicil, and in *Hyde* v. *Hyde and Woodmansee*, *supra*, the Court did "not profess to decide upon the rights of succession or legitimacy": see Dicey at p. 290. Here it is

a case of succession, and we have the decision of Mr. Justice Monk in the *Connolly* case, a most erudite judgment which has stood unchallenged and unreversed for half a century and more. I must say that, in the absence of any controlling decision to the contrary, that I propose to follow it. The certificate of the Chinese Consul General for Canada was admitted as evidence to determine the civil *status* of the petitioner, and that reads as follows: [already set out in the judgment of MARTIN, J.A.].

It is not questioned that there was marriage according to the law of China, *i.e.*, the *lex loci actus*, and that being admitted, the marriage is, in my opinion, valid according to the law of England and valid in British Columbia, of course, as well (Westlake, p. 57). To indicate the distance to which the Courts have lately gone in recognizing the *lex domicilii* it has been held that a marriage in which the personal law of each party, as regards capacity is satisfied, the marriage is valid in England, notwithstanding by English law it would be incestuous. *In re Bozzelli's Settlement* (1902), 1 Ch. 751 (also see *Ogden* v. *Ogden* (1908), P. 46). In view of the *Connolly* case it does not seem at all unreasonable to hold that each of the wives of the testator, Lee Cheong, *viz.*, Lee Lew Sze and Lee Seto Sze, is entitled to be recognized as his lawful wife and that succession duty under the Succession Duty Act, as in force at the time of the death of the testator, is payable only at the rate then payable. To hold otherwise would seem to me to be flouting the international law; further, would be contrary to natural justice, and I am not constrained or prevented from so holding by any controlling or binding authority, as I view the cases. In truth, the *Connolly* case is an express authority admitting of coming to this conclusion. To illustrate that the present case is not in all respects unique or that in this vast British Empire like or analogous cases do not arise, I would refer to the case of *Cheang Thye Phin* v. *Tan Ah Loy* (1920), A.C. 369, a case which went on appeal to the Privy Council from the Supreme Court of the Straits Settlements (Settlement of Penang). The head-note of the case reads as follows:

MCPHILLIPS, J.A.

"According to the Chinese law of marriage, which is applied in Penang in the case of Chinese residents, a Chinaman may have secondary wives

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(sometimes called 't'sips') who have the *status* of wives and whose children are legitimate. Although some sort of ceremony is usual when a 't'sip' is taken, proof of the performance of a ceremony is not essential to establish the relationship.

"The deceased respondent for twenty-six years lived and was maintained in the house of a Chinese merchant in Penang, and bore him children. One child who survived the father was referred to in his will as 'my daughter,' and her name appeared upon his tombstone. The respondent had been recognized by the Chinaman and by his primary wife as occupying in his household the position of a secondary wife:—

"*Held*, that the deceased respondent was a secondary wife, whether or not the performance of a ceremony was proved, and that under the practice in Penang (which was not questioned in the appeal) she was entitled, upon the death of the Chinaman partially intestate, to share as a widow."

The judgment of their Lordships of the Privy Council was delivered by Viscount Finlay. The following is an excerpt from the judgment and indicates that the case has features analogous to the present case (pp. 372-3):

"This is an appeal from a decision of the Supreme Court of the Straits Settlements (Penang). The question is as to succession to the estate of a Chinaman named Cheang Ah Quee, who resided and carried on business in the Straits Settlements. The Supreme Court, reversing the decision of Sproule, J., who had confirmed the registrar's certificate, held that a Chinese woman, Tan Ah Loy, was a secondary wife of the deceased, and that her daughter by him, Ah Soo, was legitimate.

"With regard to Chinese settled in Penang, the Supreme Court recognizes and applies the Chinese law of marriage. It is not disputed that this law admits of polygamy. By a local ordinance the Statute of Distributions has been applied to Chinese successions, and the Courts have treated all the widows of the deceased as entitled among them to the widow's share under the statute. No question has been raised on the present appeal as to the propriety of this practice; the only question is whether Tan Ah Loy was one of the widows.

MCPHILLIPS, J.A.

"Cheang Ah Quee, the deceased, was married early in life in China to Lim Ah Chen, with the elaborate ceremonies appropriate to marriage with a 't'sai' or principal wife; she remained in China and survived him. After his removal to the Straits Settlements he married, in accordance with a practice which has there been recognized as legal, three other women successively as 't'sais,' one of whom, Tan Gek Im, survived him. While residing at Penang he had by Tan Ah Loi, who resided in his house, three children. Two of them died early, but one survives, Cheang Ah Soo. In the will of the deceased he mentions by name Lim Ah Chen and Tan Gek Im as his wives, and refers to sons and daughters named in the will, 'or who may hereafter be born by either of my said wives or by any concubine who now is or who may be hereafter living with me.' This will was in English, and contains a bequest 'to my daughter Cheang Ah Soo, now an infant, dollars two thousand absolutely; provided that if she is still an infant at the time of my death the same shall be paid to

her mother, Ah Loy, in trust for her; but provided also that if she should die without attaining twenty-one or marrying under that age, the said Ah Loy shall be entitled to keep the said dollars two thousand ($2,000) for her own use.'"

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In the statement of the case at p. 370, we have this set forth:

"By the letters patent of 1855 the Courts of the colony have and exercise jurisdiction as an Ecclesiastical Court, so far as the several religious manners and customs of the inhabitants of the colony permit. The practice that has been adopted by the Courts of the Straits Settlements with reference to the devolution of the estate of a deceased Chinese on an intestacy has been to assign the one-third share of the widow under the Statutes of Distributions to such persons as in the judgment of the Courts have established their claim to be considered as widows of the deceased and to distribute the remaining two-thirds among all the children of such women as are proved to have married the deceased. The Courts of the Straits Settlements in adopting this practice have taken the view that more than one woman might be married at the same time to a Chinese man."

MCPHILLIPS, J.A.

We have, of course, no local law, but, as I view it, the international law prevails, and the *lex domicilii* controls, and as the wives have the civil *status* of wives in China, they must be so recognized here in all matters of succession to property in respect of movables and so treated in the application of the Succession Duty Act. I would allow the appeal.

EBERTS, J.A. would allow the appeal.

EBERTS, J.A.

Appeal allowed.

Solicitors for appellant: *Pooley, Luxton & Pooley.*
Solicitor for respondent: *J. W. Dixie.*

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MILLER v. KERLIN

MILLER v. KERLIN.

Practice—Judgment—Whether final or interlocutory—Time for appealing.

In an action against a former partner for goods supplied and money lent, the defendant counterclaiming for an order for the taking of accounts, a garnishee under an order having paid into Court before the trial $754.93, it was found by the trial judge that there had been an *interim* settled account between the partners and he proceeded to take the accounts of the balance of the partnership finding a total indebtedness of $597.05 from the defendant to the plaintiff but subject to the following, *i.e.*, that of the moneys in Court $399.73 belongs to the plaintiff and $355.20 to the defendant, that the parties are jointly and severally indebted to a creditor in $527 that is to be paid out of the moneys in Court each party's share of the moneys in Court to bear one-half of said debt; that from the balance in Court the solicitor's costs of each party including the costs of taking accounts be paid; that the defendant is entitled to the costs of the action up to the time of the amendment of the statement of claim and the plaintiff to the costs of the action after the amendment, said costs to be set off one against the other, any balance in favour of either of them to be paid from what remains in Court (if any) to the credit of the other, and that any balance after the above adjustments remaining in Court be paid the plaintiff on account of defendant's debt to the plaintiff and that the plaintiff be entitled to sign judgment against the defendant for such balance as is still due. On the hearing of an appeal by the plaintiff counsel for the respondent contended that the appeal was from an interlocutory judgment and therefore out of time.

Held, MCPHILLIPS, J.A. dissenting, that although the form followed was not a happy one, there was, in fact, nothing further to be done but the taxation of costs and they, when taxed, are added to the judgment which must be regarded as final.

APPEAL by plaintiff from the decision of RUGGLES, Co. J. of the 6th of July, 1923, in an action for goods supplied and money lent or in the alternative $350 money advanced to the defendant and $314.70 paid by the plaintiff for the defendant at the defendant's request or in the further alternative for $664.70 due on a settled account. Plaintiff and defendant were in partnership in the hand-logging business from January, 1921, until the 18th of November, 1922, when it was dissolved by mutual consent, the defendant taking over the business. No final partnership accounts were taken and the defendant counterclaimed for an order declaring the partnership dissolved

Statement

and an order directing that the accounts of the partnership be taken. The Sidney Logging Company Limited as garnishees paid into Court $754.93. The trial judge found there had been an *interim* settled account on the 7th of May, 1922, between the parties and he proceeded to take an account of the subsequent partnership dealings finding a balance due from the defendant to the plaintiff of $597.05 subject to the following, *i.e.* that the $754.97 paid into Court be divided on a basis of $399.73 to the plaintiff and $355.20 to the defendant; that there was joint and several debt of the parties to Mrs. H. E. Kerlin of $527, that should be paid from the moneys in Court, each paying one-half of this amount from his share; that from the balance in Court the solicitor's taxed costs of both parties including costs of taking partnership accounts be paid, each party's share bearing half of such costs; that the defendant be entitled to the taxed costs of the action up to the time of the amendment of the statement of claim and that the plaintiff be entitled to all costs after the said amendment, said costs to be set off one against the other, any balance in favour of one to be paid from the balance (if any) due the other in Court. That there being a balance of $597.05 in favour of the plaintiff on the partnership accounts after the above accounts are settled any balance in Court to which the defendant was entitled be paid out to the plaintiff on account of said balance and that he be entitled to sign judgment against the defendant for the balance of the debt still due. Judgment was delivered on the 6th of July, 1923, and the plaintiff gave notice of appeal on the 2nd of August, 1923.

Statement

The appeal was argued at Vancouver on the 15th of October, 1923, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Jeremy, for appellant.

Griffin, for respondent, raised the preliminary objection that the appeal was out of time as this was an interlocutory appeal. That this is an interlocutory judgment see *In re Page, Hill* v. *Fladgate* (1910), 1 Ch. 489 at p. 494. Although finally determining the rights of the parties it may still be inter-

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locutory: see also *Pheysey* v. *Pheysey* (1879), 12 Ch. D. 305; *In re Lewis. Lewis* v. *Williams* (1886), 31 Ch. D. 623; *Chilliwack Evaporating & Packing Co.* v. *Chung* (1917), 25 B.C. 90; (1918), 1 W.W.R. 870; *Cummins* v. *Herron* (1877), 46 L.J., Ch. 423; *Standard Discount Co.* v. *La Grange* (1877), 3 C.P.D. 67.

Argument

Jeremy, contra: The judgment finally disposes of the rights of the parties. There is nothing further to be done but tax costs and adjust the figures accordingly: see *Collins* v. *Vestry of Paddington* (1880), 5 Q.B.D. 368 at p. 379.

MACDONALD, C.J.A.: I would overrule the objection, so far as it is directed to the adjudication upon the claims of Mrs. Kerlin. It is not an interlocutory matter at all. The judge was considering what liabilities the partnership was under. It was not the case of creditors proving claims as in a winding up matter. That would really be an interlocutory matter, but in a case like this a creditor has no right at all. He is a witness, merely, and nothing is decided as between the debtor and the creditors.

MACDONALD, C.J.A.

Then as to whether or not the judgment as entered is final or interlocutory—taking it as a whole. The only thing relied upon is the last paragraph of it which seems to me to be analagous to the case of a judgment for the amount at trial with costs to be taxed. What is to be done, and what is actually provided for in the judgment is a formality. The costs are taxed and added to the judgment, and in that sense it is a final order. We must look at the substance of the thing. Perhaps the form followed here was not a happy one but it is the same as I have just mentioned and therefore I think the judgment must be regarded as a final judgment.

MARTIN, J.A.: I am of the same opinion. It is very difficult in certain cases to say whether a judgment is final or interlocutory for the purpose of appeal. We experienced that difficulty in the case of *Chilliwack Evaporating & Packing Co.* v. *Chung*, which is incompletely reported in (1917), 25 B.C. 90, but which is fully reported so far as the judgment is concerned in (1918), 1 W.W.R. 870. I have no intention of

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referring further to that case, because it is one which is in essential respects different from this. I quite agree with what the Chief Justice has said that upon the facts of the case before us, from any point of view, what has been done here must be regarded as a final disposition of the matter; and therefore it is unnecessary to say anything on the case of *Cummins* v. *Herron* a decision of the Court of Appeal in England (1877), 46 L.J., Ch. 423. I see a difference between that case and this, apart from the element which I have already referred to on finality; and therefore I reserve any further expressions on that case, regarding it as being inappropriate to the case we are considering. MARTIN, J.A.

GALLIHER, J.A.: I agree. The Chief Justice has expressed the view I intimated a minute ago, and it is unnecessary to say anything further, and I agree in overruling the objection. GALLIHER, J.A.

MCPHILLIPS, J.A.: With regard to the preliminary objection I consider the appeal is out of time. I am impressed by this fact that the Rule Committee in England found it necessary to amend the rules to cover this point owing to variance of opinion in the Court of Appeal. The *Cummins* v. *Herron* case is in point. There the chief clerk allowed a sum of two thousand pounds to a person on the taking of accounts. There followed a summons to vary the allowance of the payment of this sum and instead of that summons being heard by a judge in Chambers and being disposed of, it was enlarged into the Court, and in the Court the judge refused to disturb the chief clerk's certificate. It was held that the appeal would have to be within the interlocutory period or time for appeal. In this particular case the substratum of it all was the garnishing order. The judgment here originated with the garnishing order and the money was achieved in that way; and that certainly was interlocutory. MCPHILLIPS, J.A.

The question of the disposition of the money by an order made in this way (I look upon it as interlocutory) could not decide whether the action should be dismissed, or whether the action should succeed. It would be highly inconvenient that these questions should be prolonged in this way. Ordin-

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arily an order would be taken out it would be a distinct order, and there would be no question about it. The Master of the Rolls said, in the above-quoted case, "just because this order is written in the final order makes no difference," and that seems to me to be common sense.

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

Objection overruled, McPhillips, J.A. dissenting.

Solicitor for appellant: *J. E. Jeremy.*
Solicitors for respondent: *Griffin, Montgomery & Smith.*

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MONTREAL TRUST CO. v. SOUTH SHORE LUMBER CO.

MONTREAL TRUST COMPANY v. SOUTH SHORE LUMBER COMPANY LIMITED AND THE KING.

Revenue—Taxation statutes—Strict construction—Costs—R.S.B.C. 1911, Cap. 222, Sec. 11; Cap. 61—B.C. Stats. 1917, Cap. 62, Sec. 13; 1921 (Second Session), Cap. 48, Sec. 90; 1922, Cap. 75, Secs. 143 and 146.

The defendant Company, incorporated in British Columbia, in pursuance of its powers created an issue of $50,000 first mortgage bonds secured by a trust deed dated the 18th of November, 1915, to the plaintiff Company covering all the assets of the defendant Company. Shortly after their issue the bonds were pledged to the Royal Bank to cover indebtedness in the way of advances from the Bank. The defendant Company getting into difficulties a debenture holders' action for administration and execution of the trusts was commenced on the 29th of November, 1922, and judgment was signed on the 7th of February, 1923. The Provincial tax on income of the defendant Company for 1921 being $2893.80, and the taxes on personal property for 1922 and 1923 were not paid. The registrar in taking accounts found that the lien of His Majesty in the right of the Province was subsequent in point of charge to the debenture holders and this finding was reversed by the trial judge.

Held, on appeal, reversing the decision of MURPHY, J. as to the tax on income for 1921, that under section 11 of the Taxation Act, R.S.B.C. 1911, it is the duty of the Government to claim the tax as between income and personal property as to which is the larger and as the

larger appears to be the income tax it cannot be considered on a strict construction, which applies to this Act, that the tax was levied on personal property. This tax therefore is not within the provisions of section 90 of the Income and Personal-property Taxation Act, B.C. Stats. 1921 (Second Session), and there is no lien giving priority over the debenture holders.

Held, further, that this action is not within the provisions of section 146 of the Taxation Act of 1922 and the Crown Costs Act applies.

APPEAL by plaintiff from the decision of MURPHY, J. of the 26th of May, 1923, in an action for administration and execution of the trusts of an indenture of the 18th of November, 1915, and made between the defendant Company and the plaintiff as trustee, whereby the property and assets of the defendant Company were vested in or charged in favour of the plaintiff as trustee, and that all necessary inquiries and directions be taken. A receiver of the defendant Company was appointed on the 12th of December, 1922, writ was issued on the 29th of November, 1922, and judgment was signed on the 7th of February, 1923. The debentures aggregating $50,000 were held by the Royal Bank to secure advances to the Company, the Bank claiming there was due them $32,015.25. The Provincial Government claimed that taxes on income for 1921 being $2,893.80; taxes on personal property for 1922 being $885.74, and taxes on personal property for 1923 being $885.74 were not paid and the registrar by his certificate declared the Government charge for taxes was subsequent to the charge of the Royal Bank. On appeal it was held by MURPHY, J. that the taxes were a prior charge.

Statement

The appeal was argued at Vancouver on the 31st of October, and 1st of November, 1923, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Alfred Bull, for appellant: The only tax to be considered is the 1921 tax on income amounting to $2,893.80. This was a tax on income and the question is whether this comes within the ambit of personal property and a lien attaches as provided in section 13 of the Act of 1917. Our contention is that there must be a literal construction in which case it would apply only to a personal-property tax: see *Attorney-General* v. *Milne*

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(1914), A.C. 765 at p. 772; *Lumsden* v. *Inland Revenue Commissioners, ib.* 877 at p. 896. The rule governing in construction of taxation Acts is set out in *Tennant* v. *Smith* (1892), A.C. 150. As to costs section 146 of the Act of 1922 does not apply as they are not suing for taxes as a debt; this is a debenture-holder's action to which the Crown was added as a party and the Crown Costs Act applies.

Argument

Killam, for respondent: Even if there is no lien we are entitled to priority. Under section 216 of the Act in the Revised Statutes we have the right of distress: see Simonson on Debentures, 4th Ed., 338; *Pegge* v. *Neath District Tramways Company* (1895), 2 Ch. 508. On the question of crystallization see *Evans* v. *Rival Granite Quarries, Limited* (1910), 2 K.B. 979; 79 L.J., K.B. 970. The right of distress was not exercised but the lack of taking action does not deprive the Crown of its rights. Section 13 of the Act of 1917 says "there shall be a lien for any tax." The debt existed when the Act came into force. As to costs we contend section 146 of the Act of 1922 overrides the Crown Costs Act.

Bull, in reply:

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MACDONALD, C.J.A.: I think the appeal should be allowed. I think Mr. *Bull* is right in his construction of the Act which gives the Government the right, in fact it is their duty to claim as between the income tax and personal-property tax that which is the larger, and as in this case the larger amount is the income tax it cannot be considered, on strict construction at all events, which is the construction which must be applied to this statute, that the tax was levied on the personal property.

With regard to the other several claims made by Mr. *Killam* on behalf of the Government, I would not give effect to them. I do not think they are well founded.

Then as regards the costs: I think the costs fall within the Crown Costs Act.

MARTIN, J.A.

MARTIN, J.A.: I only add that the principle of construction of taxing statutes is well defined in *Tennant* v. *Smith* (1892), A.C. 150, wherein Lord Halsbury laid down the principle that should guide us.

GALLIHER, J.A.: The only point which causes me any hesitation is that as to income or personal property under that section of the Act but the better construction when you apply the rule which should govern in consideration of taxation Acts is I think sufficient to bring it within the submission made by Mr. *Bull*.

MCPHILLIPS, J.A.: In my opinion the appeal should be allowed. The scheme of taxation seems to me to be very plain and in regard to the particular matter which is now before us it was optional of course for the Crown to impose a tax as income tax or impose a tax as personal-property tax. I cannot assent to the argument by counsel for the Crown who says these two taxes are in any way blended. The statute itself says they are to be distinct. It is an alternative right which the Crown exercises to impose an income tax or to impose a personal-property tax. Imposing either certain incidents follow. There is a clear distinction. The taxation is not limited to personal property or the profits derivable from that personal property; if so the illustration I gave during the argument would be effectual; that is, you may have personal property of very little value but nevertheless you may have an income of a very considerable amount which bears no relation whatever to the personal property. Take a salary, for instance, payable irrespective of any property and largely in excess of the rateable value of any personal property that a man may have. It is the duty of the Crown to assess on the greater and having elected as in this case to assess for income there is nothing in the statute which admits of it being said because there is delinquency as to income tax there shall be a right to a lien upon the personal property for that income tax. In conformity with the principle in regard to taxation the law is to be looked at strictly, that is if there are not apt words imposing the consequences and which are said to give rise to a lien, certainly the Court is not entitled to legislate and give a lien. I fail to see how it can be done, or how it can be effectively argued that the legislation could justify a lien in the present case.

MCPHILLIPS, J.A.

In regard to costs: We have time and again in this Court

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strictly applied the Crown Costs Act, and undoubtedly it must be applied in this case. I do not have any hesitation in saying that it is not a case within the exception. The onus in that regard is upon the Crown. Where there is an exception in the statute that exception must be proved to the hilt to entitle the Crown to claim costs. That proof is not forthcoming.

EBERTS, J.A.: I have nothing further to say than that I also believe the Crown Costs Act applies in this case. There will be no costs.

Appeal allowed.

Solicitors for appellant: *Tupper, Bull & Tupper.*
Solicitors for respondent (the Crown): *Killam & Beck.*

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EASTLEY v. CHARLESTON

EASTLEY v. CHARLESTON.

Wages—Minimum Wage Act—Photography—Plaintiff engages as expert finisher—Incompetent—Continues in employment as probationer—Right to week's wages in lieu of notice—B.C. Stats. 1918, Cap. 56—Rules of minimum wages.

The defendant, a photographer, advertised for a first-class finisher. The plaintiff applied, and was given the position, but two days' employment proved her to be unfitted for that work. She continued on, however, in the outer office of the studio at other work as a probationer from the 1st of April and was paid $12 a week for the first month with a slight increase in each of the two following months and on the last day of June the defendant asked her to return to the studio for half a day on the 1st of July. She refused to do this, left the studio and did not return. In an action under the Minimum Wage Act:—

Held, that she was not entitled to wages for the first two days as she presented herself as a first-class finisher when she was not competent for the work, that as a probationer in the outer office she was paid sufficient to comply with the Act and as she refused to return to the studio on Dominion Day and remained away altogether she was not dismissed and was not entitled to any wages in lieu of notice of discharge.

Statement ACTION for wages under the Minimum Wage Act. The facts

are set out in the reasons for judgment. Tried by CAYLEY, Co. J. at Vancouver on the 8th of November, 1923.

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G. L. MacInnes, for plaintiff.
Oughton, for defendant.

9th November, 1923.

CAYLEY, Co. J.: This is an action for wages claimed under the Minimum Wage Act under the following circumstances:

The plaintiff applied for a position in the defendant's photographic studio in answer to an advertisement asking for a finisher. The advertisement plainly stated that no other than a first-class finisher need apply. The plaintiff answered the advertisement and claimed to be a first-class finisher. Her own evidence was that she was employed as a finisher for two days but was never employed as a finisher again during the period that she stayed with the defendant. The defendant stated that she was quite incompetent as a finisher. I have concluded from this that the plaintiff obtained the position of finisher under an imaginary idea that she was a first-class finisher, but as a matter of fact she was not competent to do the work in the manner required in this studio. The two days' work she did was simply to prove her out, and I do not think she was entitled to any wages whatever, having applied under what is practically a false pretence. She was then told that she might be employed in the outer office doing other work, and she was so employed. During the period of her stay with the defendant, which was from the 28th of March, 1923, to the end of June, the defendant claimed that she was in the outside office as a probationer and the rules of the minimum wages permit probationers to be engaged at $12 a week. The plaintiff in this case was paid $10 for the first week, including the two days referred to above, when she was trying to shew her skill as a finisher. For the rest of her engagement, she was paid first, $12 a week, second, $12.75 and lastly $13 a week. As I consider she was not entitled to anything for the first two days she was there, I think $10 for the first week, which includes those two days, was in compliance with the Act. According to the order of the Board submitted by counsel for plaintiff she was only entitled to probationers'

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wages, which would be $12 per week, but it was argued for the plaintiff that she was entitled to overtime and to $14 a week. The question of $14 a week is settled by the order referred to that she, as a probationer, was only entitled to $12 a week. The question of overtime is something very different. It was argued by plaintiff's counsel that the plaintiff's hours were from eight in the morning until six at night. The defendant's evidence on this point was that they rarely worked the employees so late—that half past four or five was their usual time for getting through work, but in reality an employee was supposed to stay with the work from eight in the morning until the work was finished. Plaintiff's counsel argued from this that every hour that the plaintiff worked over eight hours was overtime and they had a right to claim wages for overtime. The argument was as follows: The Factories Act provides that eight hours constitutes a day. Taking this as a day into the Minimum Wage Act makes every hour over eight hours overtime. In a sense that might be, but the penalty for working over eight hours is provided for in the Factories Act and it is a penalty specified in the Act. The right to a civil action is not granted in the Factories Act and the only right granted under the Minimum Wage Act is found in section 14, Cap. 56, B.C. Stats. 1918, where it says:

Judgment

"If any employee is paid less than the minimum wage to which she is entitled under this Act, the said employee shall be entitled to recover from her employer, in a civil action, the balance between the amount of the minimum wage and the amount paid."

So that the only civil action an employee has is to recover the difference between the minimum wage and the amount actually paid her. She is not given a right to a civil action for working over eight hours a day. I cannot find that eight hours a day is fixed by the Minimum Wage Act. A "day" is not defined in the Minimum Wage Act, and to take the definition of a "day" from the Factories Act, in order to bolster up a claim under the Minimum Wage Act, I do not think can be allowed.

There is a further claim for one week's wages in lieu of notice. On the 30th of June the defendant told the employees to come back next day (Dominion Day, a holiday) because there would be half a day's work for them to do. The plaintiff

immediately told the defendant she would not come back. The defendant had to hire another girl for Dominion Day. In her evidence she considered this a dismissal and she never went back to the defendant to work at all nor never made any explanation to the defendant why she did not go back. This is not dismissal and, therefore, cannot be allowed. Judgment for the defendant with costs.

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Action dismissed.

REX v. KILMARTIN.

HUNTER, C.J.B.C. (At Chambers)
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REX v. KILMARTIN

Criminal law—Prohibition—Information—Signature of informant—Warrant—Arrest in another county—Not backed by local magistrate—Effect on jurisdiction.

An information under section 13 of the Summary Convictions Act must be in writing and signed by the informant.

Given a valid information and the presence of the accused before a magistrate of the district where the offence is alleged to have occurred the jurisdiction of the magistrate to try attaches at once and he is not concerned with informalities or irregularities which may have occurred in connection with the execution of an otherwise valid warrant.

Where, therefore, an accused charged with an offence under the Government Liquor Act was arrested at Fernie on a warrant issued by the magistrate at Port Alberni and brought back to Nanaimo for trial, the fact that the warrant was not backed by a justice at Fernie having jurisdiction to do so, does not affect the jurisdiction of the magistrate at Nanaimo to hear and dispose of the charge.

APPLICATION for a writ of *habeas corpus*. The accused being charged with the unlawful sale of intoxicating liquor, was arrested on a warrant issued by J. A. McIntyre, police magistrate, at Port Alberni. The warrant was defective in that it did not state the county it being directed "to all or any constables or other peace officers in the said county of . . . . " the space for the name of the county being left blank. The prisoner was arrested at Fernie but the warrant was not backed.

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The information was not signed by the informant although it appeared to have been sworn to by him before the magistrate. The question then arose as to whether or not there was an information before the magistrate. Heard by HUNTER, C.J.B.C. at Chambers in Vancouver on the 13th of November, 1923.

Mayers, for the application: The warrant was not backed and there is nothing to shew to whom it was directed as the county is not stated. This is sufficient to set aside all proceedings thereon. Because he is brought before the magistrate who had jurisdiction over the subject-matter makes no difference: see *Rex* v. *Pollard* (1917), 29 Can. Cr. Cas. 35. The information was not signed by the informant so there was nothing before the magistrate: see *Campbell* v. *Walsh* (1910), 18 Can. Cr. Cas. 304 in which two judges were of opinion the information should be signed and one thought it unnecessary.

Argument

Wood, contra: If the man has been arrested and brought before the magistrate who has jurisdiction over the subject-matter the irregularities as to his arrest are of no effect: see *Rex* v. *Marks* (1918), 26 B.C. 73; *Reg.* v. *Hughes* (1879), 48 L.J., M.C. 151; *Reg.* v. *Shaw* (1865), 34 L.J., M.C. 169; *Rex* v. *Whiteside* (1904), 8 Can. Cr. Cas. 478. As to the necessity of the informant signing the information it is to be noted that the forms both in the Code and in the Summary Convictions Act do not indicate any signature except the signature of the magistrate; and the same is true of the form in Short's Crown Office Rules and Forms, 1886, p. 178 (Form 30). In *Reg.* v. *Millard* (1853), 22 L.J., M.C. 108 (see Roscoe's Nisi Prius Evidence, 17th Ed., 679) it was held that unless the statute required it an information need not be upon oath or even in writing.

Mayers, in reply.

Judgment

HUNTER, C.J.B.C.: This is an application by way of *habeas corpus* to discharge the accused who was charged with an offence against the Government Liquor Act, and who was arrested at Fernie on a warrant issued by a magistrate at Alberni and brought back to Nanaimo for trial. The warrant was not backed by a local magistrate having jurisdiction to do so and it is

objected that for this reason the magistrate at Nanaimo had no jurisdiction. I think he had so far as this objection is concerned. It is an irregularity only and does not go to the root of the jurisdiction. Given a valid information and the presence of the accused before a magistrate of the district where the offence is alleged to have occurred, the jurisdiction of the magistrate to try attaches at once and he is not concerned with any informalities or irregularities which may have occurred in connection with the execution of an otherwise valid warrant.

The other objection is more formidable. It is that the information was not signed by the informant. The Summary Convictions Act requires the information to be in writing but does not in terms require the signature of the informant, and the form in the schedule does not provide a blank for the signature of the informant although it does for that of the justice who takes the information; hence the difficulty. In the only decision cited on a similar state of affairs two judges thought it must be signed while one thought not. I think the former the better view. In the first place to "lay an information" which the statute requires to be in writing and sworn to seems to connote the idea that he who "lays" the information shall attest it by his signature. At any rate, justice to the accused requires it, as otherwise, in the event of civil proceedings, upon it turning out that there was no foundation for the complaint, it might be open to the accuser to claim that the justice either misunderstood or misrepresented him either as to the charge in its entirety or as to some detail thereof, and in the event of the justice having died or left the Province it might be a matter of some difficulty to prove the information. I therefore think it is reasonable to conclude that the Legislature intended that an information under the Act which may lead to grave penal consequences should be authenticated by the signature of the person responsible, although it has not so expressly provided.

Judgment

Application granted.

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IN RE SUCCESSION DUTY ACT AND ESTATE OF JOSEPH HECHT, DECEASED

IN RE SUCCESSION DUTY ACT AND ESTATE OF JOSEPH HECHT, DECEASED.

Revenue—Succession duty—Personal property within and without Province—Deceased's domicil in United States—R.S.B.C. 1911, Cap. 217, Secs. 2 and 7—B.C. Stats. 1921, Cap. 58, Sec. 2.

Under section 2 of the Succession Duty Act Amendment Act, 1921, all movable property of a deceased person, no matter where situate, shall be deemed for the purposes of the Act, to be situate within this Province.

The proper course to find the tax on the personalty within the Province is to take the gross value of the estate from which is deducted the debts wherever incurred, then follow section 7 of the Act by charging 1½ per cent. on the first $100,000, 2½ per cent. on the second $100,000 and 5 per cent. on the balance amounting in all in this estate to $6,064 as the total duty. Ten thousand dollars of the estate being in this Province it is charged with an equal proportion of the duty.

Held, further, GALLIHER, J.A. dissenting, that the surtax is charged on the same basis.

APPEAL by the Minister of Finance from the order of MURPHY, J. of the 19th of June, 1923, on a motion to determine the amount of duty payable on Joseph Hecht's estate in British Columbia under the Succession Duty Act. Deceased was an American citizen who died in the United States. He had a total estate in personalty of $1,573,382 of which his personalty in British Columbia was $10,345.95. The question was on what principle the British Columbia estate should be assessed under the Succession Duty Act.

Statement

The appeal was argued at Vancouver on the 13th of November, 1923, before MACDONALD, C.J.A., MARTIN and GALLIHER, JJ.A.

Killam, for appellant: The question is whether the whole of the property can be taken into consideration. Section 2 of the amending Act of 1921 is outside *Royal Trust Company* v. *Minister of Finance* [*Van Horne's* case] (1922), 1 A.C. 87, and was not considered in the Privy Council judgment, as the amendment was not to apply to pending litigation: see also *Re Renfrew* (1898), 29 Ont. 565 at p. 569.

Argument

Griffin, for respondent: Our contention is the saving clause as to pending litigation applies to this case and *Royal Trust Company* v. *Minister of Finance* (1922), 1 A.C. 87 applies here.

Killam, in reply.

MACDONALD, C.J.A.: I think the appeal should be allowed. I have already expressed my opinion upon the construction of the Act, that is to say, the Act of 1921, but shortly I say that that Act declares all movable property of a deceased person no matter where situate, shall be deemed for the purposes of the Act, to be situate in this Province.

Now, then, we have all the estate of this deceased present in the Province in contemplation of the law, and when we have that the matter is comparatively simple—very much more so than in the *Van Horne* case. We find that the gross value of the estate is so much, that all the debts, wherever incurred, are so much, we deduct one from the other, in order to ascertain the net amount upon which succession duty may be levied, then we apply the provisions of section 7. In this case the amount is very large and subsection (*c*) applies. We charge 1½ per cent. on the first $100,000, 2½ per cent. on the second $100,000,—that gives us $4,000 for the two items, then we deduct the $200,000 from the net taxable estate, leaving the balance subject to the rate of 5 per cent. Adding the two together, in this case we get, as I make it, $6,064 as the total amount of duty payable. It happens that only about $10,000 of it is actually within the Province. Then the question arises, What proportion of that duty of $6,064 ought properly to be taken by the Province? I think the proper way is to charge the $10,000 with its proportion of the duty.

With regard to the surtax, I think it is in the same position; I think it falls exactly within the same category as the other —all properties deemed to be in the Province are all subject to rates mentioned in the Act, not only in connection with section 7, but surtax as well. They are all intended to be imposed on the property which passed under the intestacy or under the will, as the case may be. I therefore think the judg-

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GALLIHER, J.A.

ment below must be set aside, and judgment given for the amount calculated on the basis I have indicated.

MARTIN, J.A.: I agree. I think that is the reasonable and obvious manner in which the statute should be construed and also that the same line of reasoning applies to the surtax, which is deemed to be on the estate within the Province as well as the other.

GALLIHER, J.A.: I agree with my learned brothers on the first question, but, with respect, on the second (that is the surtax) I take a different view. I accede to what Mr. *Griffin* has urged and in short it seems to me, speaking as at present advised, that there is a difference. It is true the property is deemed to be all within the Province, but on account of the part of the Act which states that the surtax—before the surtax can be imposed at all it is laid down that there must be an amount exceeding $50,000. That being so, it seems to me we have got to find within the Province before you can impose a surtax at all, something in the Province which exceeds $50,000, therefore, my view would be that Mr. *Griffin's* argument should prevail.

Appeal allowed,
Galliher, J.A. dissenting in part.

Solicitors for appellant: *Killam & Beck.*
Solicitors for respondents: *Griffin, Montgomery & Smith.*

REX v. HUGER.

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

1923

Nov. 20.

REX v. HUGER

Criminal law—Sale of liquor—Conviction—Warrant of commitment—Not sealed—Habeas corpus—B.C. Stats. 1915, Cap. 59, Sec. 54(3); 1921, Cap. 30, Sec. 26.

A warrant of commitment upon a conviction under the Summary Convictions Act must be authenticated by the seal of the magistrate.

APPLICATION for discharge of prisoner on the return made by the Crown to a writ of *habeas corpus*. Prisoner was committed to Oakalla prison upon conviction by the police magistrate of Prince Rupert on the 31st of October, 1923, for an infraction of section 26 of the Government Liquor Act and was sentenced to six months' imprisonment. On the return of the writ of *habeas corpus* the Crown produced a warrant of commitment signed but not sealed by the police magistrate. Heard by HUNTER, C.J.B.C. at Chambers in Vancouver on the 20th of November, 1923.

Statement

Bray, for the application: The warrant of commitment is bad in that the seal of the magistrate was not affixed as required by section 54, subsection (3) of the Summary Convictions Act and Form 44A. In England it is now specifically required by statute but even before this statutory requirement the seal was necessary: see Paley on Summary Convictions, 8th Ed., 357. A circular line or brackets enclosing the letters L.S. do not amount to a seal, it is a mere indication of the place where the seal should be put: see *Re Balkis Consolidated Company Limited* (1888), 58 L.T. 300.

Argument

Wismer, contra.

HUNTER, C.J.B.C.: The warrant of commitment is bad. A form is provided for warrants of commitment in the schedule to the Summary Convictions Act, form 44A reading as follows: "Given under my hand and seal," obviously requiring that the warrant should be authenticated by the seal of the magistrate. The letters L.S. within brackets do not amount to a seal but extended mean *locus sigilli, i.e.*, the place for the seal. This

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being a commitment following a conviction under the Government Liquor Act I am precluded from examining the depositions to see whether this is a proper case for allowing an adjournment to permit the Crown making a proper return by substituting a valid warrant. Section 91 of the Liquor Act disables the Court from doing complete justice by taking away the common law right of the accused to have the proceedings examined and if I were to allow the return to be amended I might unwittingly be affirming an invalid conviction.

Application granted.

COURT OF APPEAL

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Nov. 27.

REX v. LEE PARK.

REX v. LEE HING LEONG.

Practice—Prisoners released on habeas corpus—Appeal by Crown—Service of notice of appeal—Unable to find prisoners for service—Order for substitutional service.

Where prisoners (Chinamen) were released on *habeas corpus* proceedings and an appeal was taken by the Crown but the solicitors for the accused in the Court below refused to accept service of the notice of appeal and after diligent search the officers of the Crown were themselves unable to locate the accused for personal service, the Court of Appeal granted an order for substitutional service, by sending a copy of the notice to the solicitors who appeared in the Court below and publishing the notice twice in the Chinese newspaper in Vancouver; and it was further ordered that it appearing that one of the accused had gone back to Kingston where he was first convicted, that notice should be sent to him at Kingston and to his solicitor who acted for him there.

REX v. LEE PARK

REX v. LEE HING LEONG

Statement

MOTION to the Court of Appeal for substitutional service of notice of appeal. The respondents had, on *habeas corpus* proceedings being taken, been discharged from custody and the Crown filed notice of appeal, but the solicitors who appeared in the Court below refused to accept service of the notice of appeal in each case, although it appeared that diligent search having been made for the accused the officers were unable to locate them. Lee Hing Leong was employed as a cannery man in or about Vancouver. Lee Park was convicted in Kingston, Ontario, of having drugs in his possession and after deportation proceedings were taken by the department of

immigration he was liberated by an order of the Court in Vancouver.

The motion was heard by MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A. at Vancouver on the 27th of November, 1923.

Meredith, for the motion.

The judgment of the Court was delivered by

MACDONALD, C.J.A.: In this matter there should be service on the persons who appeared for the accused in the Court below, that is, notice should be sent to them,—and notice should be published twice in the Chinese newspaper here; and as to the one who has gone back to Kingston, notice should be sent addressed to him at Kingston, and also to the solicitor who acted for him at Kingston.

Application granted.

COURT OF APPEAL

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LANCASTER v. VAUGHAN.

HOWAY, CO. J. (At Chambers)

1923

Nov. 30.

LANCASTER v. VAUGHAN

Practice—Infant—Discovery—Right of examination—County Court Order VIII., rr. 17 and 21.

Under County Court Order VIII., r. 17, an infant, a party to an action, may be examined by the opposite party for discovery before the trial.

APPLICATION for an order that the defendant submit himself for examination or in the alternative that his dispute note which had been entered by his guardian *ad litem* be struck out. The action was against the alleged father of an illegitimate child for the price of necessaries given by the plaintiff to the mother of the child. The plaintiff's solicitor took out an appointment for the examination for discovery of the defendant. Counsel for the defence refused to produce the defendant for examination on the ground that he, being only 19 years old and a minor, was not subject to examination. Heard by

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HOWAY, CO. J. (At Chambers)

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LANCASTER v. VAUGHAN

HOWAY, Co. J. at Chambers in New Westminster on the 26th of November, 1923.

Kent, for the motion: Order VIII., r. 17, is wide enough to cover the case of an infant defendant even where he is defended by a guardian. Under Order VIII., r. 21, he is the person for whose benefit the action is defended and must be regarded as a party for the purpose of examination.

Argument

Sullivan, contra: By the old practice in the Court of Chancery in England, discovery could not be obtained against an infant although under the Supreme Court Rules power was expressly given to administer interrogatories to infants and although there is a similar rule in our Rules of Court the right to discovery does not extend to examination.

30th November, 1923.

HOWAY, Co. J.: This application raises the interesting question: Can an infant be examined on discovery in an action in the County Court? The rules relating to discovery are modelled upon the Ontario rules; no such practice prevails in England. Our rule (Order VIII., r. 17) says "a party to a cause or matter, whether plaintiff or defendant, may, without order, be orally examined before the trial," etc. This on its face is wide enough to include an infant plaintiff: see *Arnold* v. *Playter* (1892), 14 Pr. 399. But Mr. *Sullivan* wishes to interject into the consideration of the meaning of this rule, the Supreme Court rule (Order I., r. 2). In this connection he cites and relies upon *Mayor* v. *Collins* (1890), 24 Q.B.D. 361. I do not see how that rule can be invoked; for by section 77 of the County Courts Act the rules, procedure and practice of the Supreme Court may only be applied in matters "not specifically provided for." This matter of examination for discovery being phrased in these sweeping words is "provided for"; and hence there is no ground on which the Supreme Court rule could stand.

Judgment

The application is allowed, but as the point is novel and difficult, the costs will be in the cause.

Application granted.

IN RE ESTATE OF FRANK EMIL LARSON, DECEASED.

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

1923

Nov. 16.

IN RE LARSON, DECEASED

Administration—Intestate—Personal estate—Distribution—R.S.B.C. 1911, Cap. 4—B.C. Stats. 1919, Cap. 1, Sec. 3.

Where one dying intestate is survived by his father, one brother and the children of two deceased brothers and one deceased sister (the father dying before distribution of the estate) the whole of the real estate and one half of the personalty goes to the estate of the father and the other half of the personalty in equal shares to the three brothers and sister, the children of the two brothers and sister who predeceased their brother who died intestate taking equal shares of their parent's portion in each case.

APPLICATION by the Official Administrator for the district of Lillooet for directions as to the distribution of the estate of Frank Emil Larson, deceased, who died a bachelor on his ranch in the County of Cariboo on the 6th of July, 1922. He died intestate leaving the following heirs: his father, who lived in Nebraska, U.S.A., one brother named Gust W. Larson, five sons of a deceased sister named Christine, three daughters of a deceased brother named Swan, and one daughter of a deceased brother named Oscar. Since the death of Frank E. Larson, and on the 22nd of March, 1923, his father died leaving all his estate by will to his son Gust W. Larson. The estate consisted of 80 acres in the Lillooet district valued at $1,200, and personal property that realized $1,373.07. Heard by HUNTER, C.J. B.C. at Chambers in Vancouver on the 16th of November, 1923. Statement

Earle, for the application.

HUNTER, C.J.B.C.: Frank Emil Larson, a bachelor, died in the Cariboo County on the 6th of July, 1922, intestate. He was survived by his father, one brother, the children of two deceased brothers and of one deceased sister. His father died in March, 1923. The estate should be distributed as follows: Real estate and one-half of the proceeds of the personal estate to the estate of the father, now deceased; one-quarter of the remaining half to the surviving brother Gust W. Larson; one- Judgment

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quarter of the said one-half to be divided equally among the five Johnson nephews the sons of his deceased sister Christine; one-quarter of said one-half to be divided equally among his three nieces, the daughters of his deceased brother Swan; and the remaining one-quarter of said one-half to his niece Hildur, the daughter of his deceased brother Oscar.

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

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Nov. 16.

IN RE BALL

IN RE JESSE WARREN BALL.

Husband and wife—Desertion by husband—Petition by wife for liberty to remarry—Presumption of husband's death—Evidence.

On the petition of a wife on the 22nd of October, 1923, for a declaration that her husband be presumed dead and that she be at liberty to remarry, it appeared that after living 13 months together in Vancouver the husband left her in the month of January, 1912, going to the United States. She never heard from him afterwards. The only tidings she had of him were in a letter from an unknown woman in El Centro, Texas, in 1915, in which it was stated her husband was living there under an assumed name.

Held, that the petitioner was entitled to the declaration.

PETITION of Florence May Ball for a declaration by the Court that her husband Jesse Warren Ball be presumed dead and that she be at liberty to remarry. J. W. Ball and the petitioner were married at Ashcroft on the 6th of December, 1910, and they lived together in the City of Vancouver until the 12th of January, 1912, when J. W. Ball left the petitioner, going to Seattle in the State of Washington and she has not heard from him since that date. Petitioner then returned to her home in Ashcroft where her parents lived and in the month of March following a daughter was born. From the time her husband left her petitioner lived by her own exertions with some assistance from her parents. In July, 1915, petitioner received a letter from a woman in El Centro, Texas, stating petitioner's husband was living there under an assumed name, and this was the only information she ever received as to

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his whereabouts. J. W. Ball was 23 years old at the time of his marriage to the petitioner and worked as a garage mechanic. Petitioner and her solicitor made diligent search and inquiry with a view to obtaining information as to the whereabouts of the husband but they were unable to obtain any information whatever. The petition was heard by HUNTER, C.J.B.C. at Chambers in Vancouver on the 16th of November, 1923.

Earle, for petitioner.

Judgment

HUNTER, C.J.B.C.: It appears that this man left his wife in January, 1912, after they had been married for about thirteen months, and that he never communicated with her afterwards. It further appears that the wife had made every reasonable effort to locate her husband but has been unable to obtain any credible information as to where he is or whether he is alive. There will be leave granted to presume death.

Petition granted.

HANLEY v. THE CORPORATION OF THE ROYAL EXCHANGE ASSURANCE (OF LONDON).

MACDONALD, J.

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Nov. 25.

HANLEY v. CORPORATION OF THE ROYAL EXCHANGE ASSURANCE (OF LONDON)

Insurance, fire—Oral arrangement to protect property—Agency—Policy issued subsequent to fire.

The insurance on the plaintiff's property being about to expire, he interviewed T. a local agent on the 15th of June, 1922, who represented four companies other than the defendant. D. M. & Co. were at the time the general agents of the defendant Company on Vancouver Island and desiring a local agent in the plaintiff's locality asked a friend C. who lived there to recommend an agent. C. interviewed T. on the 15th of June, who agreed to act as local agent and from his conversation with C. he assumed to act as agent for the defendant although not actually appointed until the 4th of July when a member of the firm of D. M. & Co. visited him. On the first interview T. assured the plaintiff his property would be protected and on the

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27th of June, he visited the premises to obtain the necessary particulars that he subsequently on the 4th of July embodied in an application form of Commercial Union Assurance Co. but he scratched out "Commercial Union" and inserted in lieu "Royal Exchange." He then took the application to the general agents in Victoria where he was advised the policy would be issued in due course. There was no writing such as a protecting slip or *interim* receipt and the premium was not paid. The property was destroyed by fire on the 7th of July and a policy was issued by the general agents at Victoria subsequent to the fire.

Held, that the policy was properly issued as in the circumstances the plaintiff was insured in the defendant Company at the time the loss occurred.

Held, further, that the issuing of the policy of insurance by the Victoria agents after the fire did not of itself create a binding contract as the agents had no authority to bind their principals by entering into such a contract after the fire occurred.

ACTION to recover $2,500 on an insurance policy upon certain buildings and contents near Merville in the Courtenay district, Vancouver Island, which were destroyed by fire on the 7th of July, 1922. The facts are set out fully in the reasons for judgment. Tried by MACDONALD, J. at Vancouver on the 21st of June, 1923.

Statement

Clearihue (*W. T. Straith,* with him), for plaintiff.

Hossie, for defendant.

November 25th, 1923.

MACDONALD, J.: Plaintiff seeks to recover from the defendant $2,500, under a policy of insurance, dated 24th June, 1922, upon buildings and their contents, situate near Merville in the Courtenay District, Vancouver Island. In the alternative, a like recovery is sought, under an oral agreement for insurance, made by plaintiff with the defendant Company, acting through one E. F. Thomas, alleged to be its duly-authorized agent for that purpose.

Judgment

The plaintiff had the property in his possession, already insured in a mutual insurance company, for the benefit of the Land Settlement Board and was anxious to renew and increase such insurance, then about to expire, and so applied to said Thomas, an insurance agent at Merville, B.C. The interviews, in which the position of affairs was fully discussed between the plaintiff and Thomas, took place about the 15th of June, 1922.

At that time, Thomas was local agent for four insurance companies, but did not represent the defendant Company. It is evident that the plaintiff in applying to Thomas for insurance was not intending to select any particular company, but was solicitous that Thomas should place his insurance in a Board Company of good standing. Thomas could have done so immediately but, about this time, Douglas, Mackay & Co. general agents for the defendant Company on Vancouver Island, being anxious to obtain representation for their Company in the Courtenay District, communicated with Mr. Clinton at Cumberland, B.C. as to recommending an agent at Merville. Mr. Clinton, on his part, about the 15th of June, interviewed Thomas as to acting as an agent. He was asked whether he would act and agreed to do so. While Thomas may have formed an opinion, from the conversation, that his appointment had virtually been made, still, I think that it was not until a visit of Mr. T. O. Mackay of Douglas, Mackay & Co., on the 4th of July, that Thomas was actually appointed to represent Douglas, Mackay & Co. and became agent for the defendant Company. Thomas probably had in mind, prior to the 4th of July, that the insurance placed with him by the plaintiff, and to which he was in duty bound to give attention and protect the plaintiff, might be allotted to the defendant Company, for which he expected, that he would, in due course, be an agent, fully empowered to act. He had assured the plaintiff that any loss by fire would be covered by insurance although the particular insurance company that was to afford the indemnity was not selected by the plaintiff nor discussed between them. It was not contended by the defendant that such a course was unusual, on the part of a person resident in a country district, desiring to obtain insurance through a local agent. Thomas, to get the insurance in shape, visited the premises of the plaintiff on or about the 27th of June and obtained the necessary particulars to incorporate in a policy of insurance. These particulars, in the first instance, were only rough notes but were subsequently on or about the 4th of July outlined in detail in an application form of the Commercial Union Assurance Co. and shew the property intended to be insured, together with the cash value

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and amount of insurance sought to be obtained, with the rate fixed and premium required to be paid by insured. Then, on the 4th of July, 1922, said Mackay visited Merville and confirmed the action of Mr. Clinton, by appointing Thomas as local agent of the defendant Company. This, I believe, created a situation, as to insurance business in the Courtenay district, in which both Mackay and Thomas considered that insurance might be effected by Thomas immediately in the defendant Company. This conclusion is borne out by the fact, that the "particulars" referred to, were made applicable to the defendant Company by scoring out in the application form the words "Commercial Union" and inserting "Royal Exchange." This shewed that Thomas, in covering the plaintiff by insurance, intended to allot the risk to defendant Company. Plaintiff having suffered loss by fire on the 7th of July, 1922, the first question is, did Thomas by his allotment and other actions, prior to the fire, insure the plaintiff against such loss in the defendant Company? His appointment was communicated to the head office of the defendant Company at Montreal and the board of underwriters for the Province was also duly notified by Douglas, Mackay & Co. by letter under date the 4th of July, 1922, of such appointment. I think that the general agents of the defendant Company had the power of appointing local agents on Vancouver Island, and that such an appointment would not, to be effective, require confirmation from the head office at Montreal, though doubtless it had the power of cancelling an appointment or directing such general agents to do so. In the meantime, the appointment would stand and, in the ordinary course of insurance business, would entitle the local agent to grant insurance. That this attitude was assumed by defendant is evident from its telegram to such general agents under date July 13th, 1922, in which instructions were given not to underwrite anything further in the Courtenay or other districts subject to bush fires and hazard, and "to cancel any such appointments by telegram today." The general agents did not seem to have any doubt, as to their power to appoint Thomas as a local agent, as they informed the defendant of having done so in their letter under date 4th July, 1922. It is apparent that

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this telegram of 13th July applied to the appointment of Thomas, from the further correspondence that ensued and particularly by a later telegram between the same parties under date August 28th, 1922, in which the general manager of the defendant instructs the general agents to take no action whatever on its behalf "regarding Thomas" and then adds: "Must confirm our telegram 13th ultimo to cancel such appointments."

After Thomas had thus allotted the insurance to the defendant, he took the application, so termed, containing his written approval, with two other applications for insurance, to Victoria and deposited them with Mr. Pitts in the office of the general agents. He was in charge and said that the policies would be issued in due course. Thomas thus did all that he possibly could to effect the insurance. He had discussed one of these applications for a large amount of insurance with Mackay on the 4th of July and they were all acted upon by his firm and policies issued, though the one in favour of plaintiff was disputed, after the loss by fire, which occurred on the 7th of July, 1922. Did Thomas then, as a local agent, have power and, after selecting the defendant Company to bear the risk, so act, as to accomplish his purpose and insure the plaintiff in such Company? While no writing, such as a protecting slip, or *interim* receipt, was given to the plaintiff indicating the insurance, still, notwithstanding this fact, was he not insured? He received assurance, though verbal, from the local agent, that his application for insurance was accepted and that he would be protected. Leaving in abeyance, for the moment, the question of authority or verbal insurance, was he not, as to the insurance being unconditional, in a similar position to the plaintiff in *Thompson* v. *Adams* (1889), 23 Q.B.D. 361? Or was he in the dangerous position of not being insured until some company should assume the risk by issuing a policy of insurance? Mathew, J. in that case, refers to the slip, signed by the underwriters, being effectual to protect the plaintiff from loss and discusses the implied condition, sought to be attached thereto by the defendant, to escape liability, as follows (p. 366):

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"Assuming that this slip is to be treated as a protecting note, like that which is ordinarily issued by an insurance company (for insurance companies recognize the necessity for prompt insurance, and before the policy

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is issued they will issue a protecting note which will have all the effect of a policy until the document has been prepared), still [it is contended] there ought to be read into this slip an implied condition. An implied condition is a condition to be proved by circumstantial evidence, not by anything that passes in a particular case in terms between the plaintiff and the defendant, but a contract to be inserted because the conduct of the parties shews that it is the basis of the whole arrangement."

Here, I do not think that either the plaintiff or Thomas considered that there was an implied condition, as to his being insured, dependent upon any contingencies, *e.g.,* upon whether the general agents of any Company should accept or reject the proposed insurance. In the case just referred to, the defendant was held bound because there was no implied condition to this effect. It was decided that until the issuance of the policy, plaintiff was insured and defendant was "on the risk" and liable, through having signed the protecting slip, as one of the underwriters. This was the case of a principal being bound, and if Thomas, as a local agent, had authority to bring about the same result, and so acted, then, unless one of the other defences should prevail, the defendant would be liable for the loss, occurring before the policy of insurance was issued.

In considering the extent of an agent's authority Holt's Insurance Law of Canada p. 495, refers to the decisions in the United States and the desirability, in considering the relations between the Company and its agents of having regard to the point, at which the agent may be acting, as follows:

Judgment

"If he is remote, his usefulness and efficiency might be impaired if he were obliged to refer all questions to head office; it is fair to presume that a more liberal exercise of discretion is permissible to him than to an agent having the same general powers, but residing so near to his principal that reference may be practicable and consistent with the success of the agency."

Insurance Company v. *Wilkinson* (1871), 13 Wall. 222 and *Eames* v. *Home Ins. Co.* (1876), 94 U.S. 621 are cited in support of this proposition. In this connection, an authority for endeavouring to follow American decisions, in insurance actions, is found in the remarks of Brett, L.J., in *Cory* v. *Burr* (1882), 9 Q.B.D. 463 at p. 469 as follows:

"If I thought that there were American authorities clear on this point, I do not say I would follow them, but I would try do so, for I agree with Chancellor Kent that, with regard to marine insurance law it is most advisable that the law should, if possible, be in conformity with

what it is in all countries. I must further add, that although American decisions are not binding on us in this country, I have always found those on insurance law to be based on sound reasoning and to be such as ought to be carefully considered by us and with an earnest desire to endeavour to agree with them."

Oral insurance and the authority of agents to bind the company are both dealt with in *Westminster Woodworking Co.* v. *Stuyvesant Insurance Co.* (1915), 22 B.C. 197. There the insurance company was held liable under a preliminary agreement to insure, and protect from loss in the meantime, although orally made. MCPHILLIPS, J.A. in his judgment at p. 203, refers to such verbal contracts of insurance being enforceable and the necessity for such a course being pursued in order to expedite the insurance business as follows: [The learned judge quoted from the judgment of MCPHILLIPS, J.A., at p. 204 and continued]:

Holt on Insurance, p. 494, states that:

"It may be said, generally, that the local agent of an insurance company must be treated as their officer to communicate with persons effecting insurances, and what he says or does in that capacity, within the proper bounds of his authority, must be held binding on the company: Badgley, J., in *Goodwin* v. *The Lancashire Fire and Life Ins. Company* (1873), 18 L.C.J. 7."

A portion of the head-note to this case reads as follows:

"That upon a fire insurance company's local agent, acting within the scope of his powers and according to usage with such company, receiving the premium for an insurance and granting an *interim* or deposit receipt, subject to the approval of the chief officer of such company, and the conditions of the company's policies, the applicant is insured until he has notice that the risk is declined."

Judgment

In *Summers* v. *The Commercial Union Ins. Co.* (1881), 6 S.C.R. 19, the judgment of the Court below was affirmed and the company held not liable where a person, not an agent, had issued an *interim* receipt for insurance, without authority from the general agents of the defendant company. This case draws a clear distinction between a broker or canvasser, acting for a local agent, issues an *interim* receipt, and a case where a local agent himself affords insurance to a customer. Strong, J. at pp. 27-8 says:

"It may well be implied that the general agents in this Province of an English insurance company have, as part of their general authority, power to appoint local agents with authority to sign *interim* receipts in accordance with the usual course of insurance business as carried on in this country."

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Here the power to appoint does not exist by implication but is founded on direct evidence.

Then further as to a contract of insurance being entered into orally, McCardie, J., in *Murfitt* v. *Royal Insurance Company, Limited* (1922), 38 T.L.R. 334 at p. 335 says:

"There was nothing in English law to prevent the formation of an oral contract of insurance as to fire or burglary, although the position as to marine insurance was different owing to statutory requirements. There was nothing, therefore, to prevent the plaintiff from recovering under this oral bargain, if the bargain was established."

After discussing the evidence and the local agent's statement as to "covering" plaintiff until the company accepted or rejected the insurance, the judgment adds:

"Before the case he (his Lordship) had not realized the great extent to which the method of oral cover had become established in insurance business."

There is no doubt that in effecting insurance good faith is required between the parties. The honesty of the plaintiff was not, during the trial, questioned and in fact counsel for the defendant expressly stated that "there is no attack upon the plaintiff's good faith at all." This attitude relieved me from considering the effect, if any, of the discrepancy between the evidence of the plaintiff and that of Thomas as to the making of the promissory note for the premium of insurance. Then if good faith be required on the part of the assured, it is also incumbent upon the insurance company to pursue a like course in its business. This was referred to by Malins, V.C. in *Mackie* v. *The European Insurance Society* (1869), 21 L.T. 102 at p. 104 as follows:

"It is of the highest importance, not only to the public generally, but to that class interested as shareholders in these companies, that this kind of business should be conducted on principles of integrity and no trickery had recourse to when the risk has gone against the insurers."

Then at p. 105:

"Nothing could be more fatal to the interests of the public in fire and life assurances, which are carried on to such an enormous extent through agencies, than for the Court to sanction the idea that the assured is to run the peril of the agent strictly performing his duty."

Even if Thomas had eventually full power to effect insurance for the plaintiff and bind the defendant, still, it was contended that at the time plaintiff applied for insurance, he could not have placed such insurance in the defendant Company and that it

was thus relieved from liability within the period in which he was required to so act. Was he not, however, in a position to protect the plaintiff by effecting the insurance in the defendant Company? It was also submitted that as the plaintiff expressed no intention of insuring in the defendant Company, but left the selection of the particular company in which the insurance might be placed to Thomas, that no contract was created. While plaintiff did not express any preference in the first instance, still if Thomas eventually effected insurance for plaintiff in the defendant Company, when he had authority to do so, I do not think the original intention is material. This situation did not affect the result in *Giffard* v. *The Queen Insurance Company* (1869), 12 N.B.R. 433 even where the agent of another company obtained insurance from the defendant company. Ritchie, C.J., at pp. 437-8, in this connection, says:

"This is a very peculiar case, as the policy was clearly not issued by the defendants at the instance of the plaintiff, but at the instance of the agent of The London and Liverpool Company."

Then in *Mackie* v. *The European Assurance Society, supra,* plaintiff applied to Waddell as the agent of the Commercial Union Co. for insurance in that company. The latter had, without the plaintiff's knowledge, ceased to be agent for the Commercial Union Co. and become an agent for defendant company. Waddell gave the plaintiff a receipt for premium of insurance in the defendant company and the plaintiff did not discover until later on, that such receipt did not purport to insure him in the Commercial Union Co. as desired but in the defendant Company. Plaintiff wrote to Waddell, inquiring as to the responsibility and standing of the company in which he had, without his request, become insured. Before the policy was issued the premises covered by insurance were burned and the defendant company repudiated the contract and refused to pay. Notwithstanding the fact that the plaintiff did not intend to enter into this contract of insurance with the defendant, it was held that the *interim* receipt afforded him protection and the defendant company was liable. The selection by the agent of the defendant as insurer "covered" the plaintiff.

Judgment

In *Rossiter* v. *The Trafalgar Life Assurance Association* (1859), 27 Beav. 377 where an agent in Australia repre-

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senting a London insurance company, had accepted a life policy obtained through the medium of a sub-agent, the insurance was held binding on the company, although the agent in Australia had no authority to appoint a sub-agent and although there were some informalities:

"A general manager or other officer whose authority involves the management of the general business of the company within a large territory may appoint sub-agents, who are agents of the company. By general custom known to and approved by the company a general agent may have authority to appoint sub-agents":

22 Cyc. pp. 1431-2 and cases there cited.

In Porter's Laws of Insurance, 6th Ed., p. 440 the effect of *Rossiter* v. *The Trafalgar Life Assurance Association, supra,* and *Mackie* v. *The European Assurance Society, supra,* as to contracts of insurance by sub-agents being valid until rejected, is referred to as follows:

"If an agent has power to enter into contracts of insurance which may or may not be approved at headquarters, they are valid till receipt of notice of rejection and return of the premiums paid, and it seems to make no difference if the agent employs sub-agents in getting assurances. If he does, their receipt for premiums binds the agent as much as if signed by him."

Judgment

Here Thomas while not receiving cash for the premium gave credit for the amount to the plaintiff. He rendered himself personally liable to the general agents and plaintiff was in the same position as if he had actually paid the premium for insurance, before the loss occurred. This conclusion is supported by the oral and documentary evidence. Further, the general agents of defendant apparently considered that plaintiff was really insured before the fire occurred and that nothing further was required to be done by plaintiff by way of payment or otherwise and so issued and forwarded the policy of insurance following the particulars supplied by Thomas. Plaintiff contends that even if the circumstances prior to the loss by fire did not warrant a finding that he was then insured in defendant Company, still that the issuance of the policy by the general agents, with knowledge of the loss, created a valid contract. *Mead* v. *Davison* (1835), 3 A. & E. 303; *Earl of March* v. *Pigot* (1871), 5 Burr. 2802; and *Bradford* v. *Symondson* (1881), 7 Q.B.D. 456 are cited by plaintiff in his argument as supporting the contention, but all these cases

pertain to marine insurance. There is a difference between fire and marine insurance in this respect:

"The doctrine in marine insurance that the contract of insurance may be ratified after knowledge of the loss does not apply to life insurance, nor, indeed, to any other contract of insurance":

Halsbury's Laws of England, Vol. 17, p. 550.

In *Grover & Grover, Limited* v. *Mathews* (1910), 2 K.B. 401, Hamilton J., at p. 404, says:

"That a rule which would permit a principal to ratify an insurance even after the loss was known to him was an anomalous rule which it was not, for business reasons, desirable to extend, and which, according to the authorities, had existed only in connection with marine insurance."

American authorities support this distinction, but *Giffard* v. *The Queen Insurance Company, supra,* is relied upon as an authority to the contrary. I do not think this decision, in view of the facts involved, is of assistance to the plaintiff. In that case the plaintiff had applied for, and obtained, renewal insurance from a local agent of the London & Liverpool Company before 2nd October, 1866, but the general agent of such company declined the risk and paid the premium to the defendant company on the 15th or 16th of October. A policy was then issued dated 16th October, 1866, but insuring from October 2nd, 1866, to October 2nd, 1867. The premises were destroyed by fire on October 13th before the policy was issued. While plaintiff did not know that he was insured by the defendant until he received the policy from the sub-agent, still, he was held entitled to recover. It would appear that the transaction was treated as a reinsurance by defendant company of a risk then being carried by the London & Liverpool Company. There was good faith to support the transaction outlined in the case just referred to. Had it been absent a different conclusion likely would have been reached. See Bunyon on Fire Insurance, 5th Ed., p. 119:

Judgment

"Perfect good faith must be displayed; and, in an old case, when an order for an insurance was given by letter, but during the interval, before it was posted, the property was burnt to the knowledge of the writer, an acceptance by an insurance office, in ignorance of the fact, was held void (*Fitzherbert* v. *Mather* (1785), 1 Term Rep. p. 12)."

So I am of the opinion that the policy of insurance issued after the fire by Douglas, Mackay & Co. did not of itself create a binding contract. I do not think the general agents had

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authority to bind their principals by entering into such a contract of indemnity after a loss has occurred. They could, however, properly issue a policy to cover the risk intended, in order to implement insurance already affected by an application in due course of business. I consider that this was the position of the matter after the fire and that, under the circumstances, the policy was properly issued. It contains the terms of the contract which plaintiff expected to obtain as a protection from loss. In other words, I think the plaintiff was insured in defendant Company at the time he suffered loss, even though the policy, with knowledge of such loss was issued afterwards. Is he then deprived of his redress against defendant on other grounds?

The defendant contends that plainitff cannot recover for his loss, because he did not disclose fully the nature of his ownership of the property to be insured. I do not think there was any misrepresentation on this point. He was well aware that Thomas knew the true situation. He properly described his position, as being an owner under an agreement for sale. He was the equitable owner of the property subject to performance of the agreement. He thus had insurable interest which he was justified in protecting.

Judgment

As to the contention of the defendant, that there were fires in the locality which should have been disclosed in the so-called application and so affected the insurance, I do not think this ground tenable. The plaintiff did not sign the "particulars" or "application" and if he were notwithstanding bound by its contents there was no misrepresentation. Both plaintiff and Thomas were equally cognizant of the dangers attaching to the risk especially as Thomas personally inspected the property. Mackay when he fully appointed Thomas was in the locality and presumably thought there was nothing abnormal in the risk to be incurred. He was apparently anxious, through Thomas, to transact business and discussed the insurance of the local creamery. At any rate there was no evidence to indicate any effort or intention to suppress any facts from the defendant. I have no doubt that plaintiff applied *bona fide* for insurance and that defendant and its agents were not deceived in the matter.

As the insurance was applied and placed verbally then the policy subsequently issued "is deemed to be in accordance with such [verbal] application or instructions unless," etc.: see 5th statutory condition. Such latter part of this condition applies, as the plaintiff did not sign the so-called application. Assuming, however, that the "verbal application or instructions" for insurance are contained in the particulars and the "application" form delivered to the defendant then the policy establishes that there was no extra premium paid or to be paid by plaintiff and that other concurrent insurance was permitted.

In my opinion, the plaintiff had the property mentioned in the policy of insurance properly insured in defendant Company and while so insured the major portion was destroyed by fire.

As to the amount recoverable under such insurance, the defendant, in addition to contending that plaintiff has no insurable interest in the property, submitted that in any event the plaintiff was not the owner of the furniture covered by the insurance, but did not advance any argument as to the values stated in Exhibits 4, 5 and 6 being incorrect.

Plaintiff thought the policy of insurance in favour of the Land Settlement Board for $1,000 covering the building would expire on 1st July, 1922, but was mistaken, as it still remained in force at the time of the fire. The expiration of this policy was contemplated by the parties and being so intended this condition became part of the contract of insurance sought to be effected by plaintiff. While such insurance for $1,000 was not in the name of plaintiff, still, it was for his benefit and, not being disclosed, I think the 3rd statutory condition becomes operative and plaintiff is only entitled to recover 60 per cent. of the loss on the building. I accept the valuation of plaintiff fixing his loss in this respect at $1,600 and of this amount 60 per cent. would be $960. The insurance, however, for $1,000, being in force at "time of the happening of the loss" the 4th statutory condition applies and defendant should only bear its rateable proportion of this particular loss, which would amount to $470. The loss on the barn built by plaintiff is allowed at $700.

Judgment

As to insurance on the "furniture" the term thus used

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covered insurance on property in the house not strictly furniture and whether owned by the plaintiff "or any member of the assured's family" and the loss amounted to $500. Adding the sums of $470, $700 and $500 together they would amount to $1,670. Plaintiff claims interest on this amount and I think it should be allowed. See *Green* v. *Manitoba Assurance Co.* (1901), 13 Man. L.R. 395; *Ross* v. *Scottish Union* and *National Insurance Co.* (1918), 58 S.C.R. 169; *Webster* v. *British Empire Mutual Life Assurance Co.* (1880), 15 Ch. D. 169 and *City of London* v. *Citizens Insurance Co.* (1887), 13 Ont. 713, 723. The amount to cover the loss was payable in 60 days after the completion of proofs of loss but defendant waived such proofs being given by disputing liability. Giving defendant the benefit of further time, before it could be required to pay the loss, it should pay interest on $1,670 from 1st November, 1922.

There will be judgment for the plaintiff for $1,751 and costs.

Judgment for plaintiff.

REX v. CHANG SONG *ALIAS* AH SING.

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Criminal law—The Opium and Narcotic Drug Act—Conviction—Sentence of imprisonment with hard labour—Beyond penalty provided by Act—Application for writ of habeas corpus while prisoner is serving his sentence—Rule absolute obtained after termination of sentence—Appeal—Can. Stats. 1919, Cap. 25, Sec. 17; 1920, Cap. 31, Sec. 5A; 1922, Cap. 36, Secs. 2 and 5.

On a conviction for having a narcotic drug in his possession in contravention of The Opium and Narcotic Drug Act the accused was sentenced to a term of nine months in prison with hard labour. An application for a writ of *habeas corpus* was made on the grounds (a) that accused was domiciled in Canada; (b) that his imprisonment was illegal as the penalty clause in the Act did not include hard labour. A rule *nisi* was granted while the prisoner was serving his sentence, but the rule absolute was not made until four days after his sentence expired.

Held, on appeal, reversing the decision of HUNTER, C.J.B.C. (MCPHILLIPS, J.A. dissenting), that although the magistrate had no power to impose hard labour, his term of sentence having expired before the rule absolute was made the Court has no power to go back and enquire into the legality or illegality of the sentence imposed and neither the application for *habeas corpus* which was made during the time the sentence was being served, nor the granting of the rule *nisi* before expiry, could preserve a *status* of detention under the sentence up to the time the rule was made absolute.

Held, further, that being domiciled in Canada accused is not subject to deportation under section 43 of The Immigration Act, but the deportation here is under The Opium and Narcotic Drug Act and the reference in section 10B of that Act to section 43 of The Immigration Act is directed only to the procedure to be followed in deportation.

APPEAL by the Crown from the order of HUNTER, C.J.B.C. of the 9th of November, 1923, discharging Chang Song from custody under commitment on order for deportation made by reason of his conviction by the police magistrate at Prince Rupert for having in his possession without lawful authority a narcotic drug (morphine) without first having obtained a licence from the minister contrary to section 5A, subsection (2) (*e*) of The Opium and Narcotic Drug Act as enacted by Can. Stats. 1920, Cap. 31, Sec. 1(6). On the 15th of March, 1923, he was sentenced to a term of nine months' imprisonment with hard labour and a fine of $200 in default of payment of which he was to serve a further term of three months' imprisonment with hard labour. An application for a writ of *habeas corpus* was made to MORRISON, J. on the 9th of October, 1923, on the grounds (a) that Chang Song was domiciled in Canada; and (b) that his imprisonment was illegal as there is no provision in the Act for punishment with hard labour and he granted a rule *nisi* returnable on the 5th of November, 1923. With allowance for good conduct the prisoner's sentence expired on the 5th of November, when he was handed over to the immigration authorities for deportation. On the 9th of November, 1923, HUNTER, C.J.B.C. made the rule absolute and ordered the discharge of the prisoner. Statement

The appeal was argued at Vancouver on the 22nd and 23rd of November, 1923, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

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E. Meredith, for appellant: He served his notice for a writ before the prisoner's term of imprisonment expired but the order absolute from which this appeal is taken was made by HUNTER, C.J.B.C. after his term expired and when he was in the hands of the immigration department for deportation. As held in the *Loo Len* case [*post,* p. 213] he had served his sentence and any question as to its validity cannot now be raised.

Argument

Mellish, for respondent: He has Canadian domicil, and is not subject to section 43 of The Immigration Act as amended in 1919. The magistrate imposed hard labour both in the first instance and as an alternative in case the fine was not paid. This penalty is not within the Act. We have a right to review the proceedings because the order for deportation is founded on an illegal conviction: see *In re Immigration Act and Mah Shin Shong* (1923), 32 B.C. 176; *Reg.* v. *Bolton* (1841), 1 Q.B. 66. The order from the minister of justice to the deputy minister of immigration is made without jurisdiction: see *Rex* v. *Cuhule* (1923), 3 D.L.R. 465; (1923), 2 W.W.R. 336.

Meredith, in reply: The controlling statute is section 10B of The Opium and Narcotic Drug Act found in the 1922 amendment.

Cur. adv. vult.

13th December, 1923.

MACDONALD, C.J.A.

MACDONALD, C.J.A. concurred in the judgment of GALLIHER, J.A.

MARTIN, J.A.

MARTIN, J.A. agreed with the reasons for judgment of GALLIHER, J.A.

GALLIHER, J.A.

GALLIHER, J.A.: On March 15th, 1923, Chang Song was convicted before Thomas McClymont, a police magistrate at Prince Rupert, B.C., for having in his possession without lawful authority a narcotic drug, to wit, morphine, and was ordered to be imprisoned in the common gaol at Oakalla, B.C. for the term of nine months, with hard labour, and was also adjudged to pay a fine of $200, and $11.25 costs, and in default of payment, to serve a further term of three months' imprisonment with hard labour.

On October 29th, 1923, an application was made to

MORRISON, J. in Chambers, who granted a rule *nisi* returnable before the judge in Chambers on November 5th, 1923, and directed to the keeper of the Oakalla Prison Farm, or to the controller of Chinese immigration, or other officer having charge of the immigration building in Vancouver, B.C., commanding them to have before the said judge the body of Chang Song and to shew cause why a writ of *habeas corpus* should not issue for his discharge on the grounds (a) that the said Chang Song was domiciled in Canada, and (b) that his imprisonment was illegal under an illegal and void commitment.

On November 5th, 1923, by reason of the prison rules, Sec. 9, R.S.B.C. 1911, Cap. 180, the prisoner's sentence expired by allowance for good conduct, and on the same day he was handed over to the immigration authorities for deportation. On November 9th, HUNTER, C.J.B.C. made the rule absolute and ordered the discharge of the prisoner, the order being directed to the warden of Oakalla Prison, and the controller of immigration at Vancouver, or other officers having the custody of the prisoner. The Crown appealed.

On the second point raised by counsel, it is conceded that the convicting magistrate had no jurisdiction to impose hard labour as a part of the sentence. In the circumstances of this case, this brings up a nice point for consideration.

GALLIHER, J.A.

Although *habeas corpus* proceedings were instituted before the term of imprisonment expired, it was not until four days after the sentence had been worked out that the order for his discharge was granted. The term having ended before the *habeas corpus* proceedings took effect, then so far as the keeper of the gaol is concerned, the prisoner had passed out of his custody and was in the custody of the immigration authorities and any order made could only affect the latter, and the order is worded so as to apply to them as well.

If the prisoner was still in the custody of the gaoler under the conviction, the Court could inquire into the validity of his imprisonment, but if the sentence had been served and he was no longer in custody under that sentence, it would be futile to do so, and I take it that the Court would not do so. If this is established we would have to consider it from the point of view

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of detention by the immigration authorities, which involves an entirely different question.

It seems to me when the term had once expired, that neither the application for *habeas corpus* which was made during the time the sentence was being served, nor the granting of the rule *nisi* before expiry could preserve a *status* of detention under the sentence up to the time the rule was made absolute. The warden could, on a return to the rule *nisi* answer "no longer in my custody," and produce the order on which he had been handed over to the immigration authorities, and that would leave only the second branch of the judge's order for consideration, *viz.*, was he lawfully held by the immigration authorities for deportation?

Section 10B of The Opium and Narcotic Drug Act, Can. Stats. 1922, Cap. 36, is the section under which it is sought to deport the accused. The words are:

"Notwithstanding anything to the contrary in The Immigration Act, any alien who . . . . is convicted under subsection two of section 5A of this Act [it is common ground that he was so convicted] shall, upon the termination of the imprisonment imposed by the Court upon such conviction, be kept in custody and deported," etc.

The term of imprisonment so imposed has terminated and the prisoner was, since the 5th of November, not in the custody of the gaoler but of the immigration authorities until released under the order of 9th November.

GALLIHER, J.A.

There is no question raised as to his being wrongly convicted, but it is urged that the sentence imposing hard labour was beyond the magistrate's jurisdiction, and he was at all times wrongly in prison and the Act does not contemplate other than lawful imprisonment. If I am right in holding that when the order absolute was granted, the prisoner was no longer in the custody of the gaoler (he certainly was not physically, nor do I think in any sense) the order absolute could only apply to and take effect as to his detention by the Immigration authorities. This being so, all that we can now look at is the papers and proceedings under which he is so detained, and I think we have no power to go back and inquire into the legality or illegality of the sentence imposed. If this is correct, we have only to consider the first question raised, *viz.*, "domicil."

It is admitted he was domiciled in Canada since 1907, and if it is The Immigration Act, section 43, which is to govern, then he is not a subject for deportation. But the short answer to this contention is, that the deportation is under The Opium and Narcotic Drug Act, and the reference in section 10B of that Act to section 43 of The Immigration Act, is, as I view it, directed to the procedure to be followed in deportation.

GALLIHER, J.A.

I would order Chang Song (*alias* Ah Sing) to be again taken into custody for deportation by the immigration authorities.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I would dismiss the appeal in this case for the same reasons given by me in *Rex* v. *Loo Len* [*post*, p. 213].

Appeal allowed, McPhillips, J.A. dissenting.

Solicitors for appellant: *Congdon, Campbell & Meredith.*
Solicitor for respondent: *A. J. B. Mellish.*

IN RE SUCCESSION DUTY ACT AND ESTATE OF EDWARD H. GRUNDER, DECEASED.

Succession duty—Interest in loan secured by mineral claims—Foreign executors — Action to recover — Affidavit of value and relationship—Bond to secure payment of succession duty—Security proves valueless —Succession duty payable—R.S.B.C. 1911, Cap. 217, Secs. 21 to 52.

G. an American citizen, loaned $16,000 to V. and his wife in British Columbia, secured by two mortgages on certain mineral claims within the Province. Upon G.'s death, his executor brought action in British Columbia to recover said sums and for foreclosure. Before ancillary letters probate could be obtained in order to prove title on the trial, it was necessary to pay the probate and succession duties, but a bond to secure payment of the succession duty was accepted by the Crown upon the executors filing an affidavit of value and relationship which included a claim against V. and his wife of $16,000 secured by an interest in 14 mineral claims. Upon obtaining ancillary letters the executors proceeded with the action, obtained judgment, and issued execution which was returned *nulla bona*. The mineral claims could

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not be sold and proving to be worthless were later sold for taxes. On petition by the executors it was held that no duties became payable from the petitioners under the Succession Duty Act.

Held, on appeal, reversing the decision of MORRISON, J. (MARTIN and MCPHILLIPS, JJ.A. dissenting), that the executors having in their affidavit of value and relationship valued the estate of the deceased within the Province at $16,000 for which a bond to secure the succession duty payable on that sum was given to and accepted by the Crown, the value of the estate within the Province has been determined in a manner that binds the parties and cannot be reopened by reason of the executors' failure to realize on their security.

United States Fidelity and Guaranty Co. v. *The King* (1923), A.C. 808 followed.

Held, further, MARTIN and MCPHILLIPS, JJ.A. dissenting, that the Legislature used the expression "a judge of the Supreme Court" in section 43 of the Succession Duty Act as meaning the representative of the Court itself, and not a *persona designata*.

APPEAL by the Crown in the right of the Province of British Columbia from the decision of MORRISON, J. of the 9th of March, 1923, whereby he declared that no duties were payable by the executors of the estate of Edward H. Grunder, who died in April, 1920. E. H. Grunder with one E. T. Beck, both of whom were domiciled in the State of Pennsylvania, U.S.A., loaned to Emil V. Voigt of Princeton, B.C., and his wife, two sums of money, $5,000 on the 10th of December, 1915, and $14,000 on the 24th of April, 1916. On the 20th of December, 1920, Grunder's executors brought action in the Supreme Court of British Columbia against Voigt and his wife to recover said sums or in the alternative to foreclose the interest of the defendants in certain mineral claims charged with the repayment of said sums. The estate was on agreement valued at $16,000, and a bond was accepted to secure payment of succession duty and probate of the will of the late Mr. Grunder was taken out. In December, 1921, the executors obtained judgment against Voigt and his wife. Execution was issued and returned *nulla bona* and the mineral claims held to secure payment of the moneys lent could not be sold and proved worthless and in October, 1922, they were sold for non-payment of taxes. No property belonging to the deceased in British Columbia came into the hands of the executors. It was held by the trial judge that the estate was not liable for duty.

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The appeal was argued at Victoria on the 22nd of June, 1923, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS, and EBERTS, JJ.A.

D. Donaghy, for appellant: We say (1) the material does not shew the estate is of no value; (2) it does not shew the value at the time of deceased's death; (3) there is the affidavit of the executors at the time they applied for probate. The second point was decided in *The King* v. *The United States Fidelity & Guaranty Co.* (1922), 30 B.C. 440; and on appeal 64 S.C.R. 48. There is no evidence to say the estate is of no value. The affidavit of the executor puts it at $16,000. This was agreed to by the minister and is supported by *The King* v. *The United States Fidelity & Guaranty Co.*

Mayers, for respondent: The only asset he had was a right of action against Voigt. We had to bring action, but preliminary to this we had to get probate and file a bond. The bond was to cover what would eventually be due. We were successful in our action but there were no assets from which we could realize anything. The estate has nothing in this Province: see *The King* v. *The United States Fidelity & Guaranty Co.* (1922), 64 S.C.R. 48, particularly the judgment of Idington, J. at p. 53; see also *Rex* v. *Roach* (1919), 3 W.W.R. 56.

Argument

Donaghy, in reply.

Cur. adv. vult.

13th December, 1923.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The foreign executors applied for ancillary letters probate. Our laws require the applicants to pay or secure the payment of succession duty before the grant shall issue.

The applicants complied with these provisions, after giving the requisite proofs of valuation and relationship, in which they valued the estate of the deceased in this Province, at $16,000. They gave a bond to the Crown to secure the succession duty payable upon that sum.

If they had any doubt about the value of the assets, means were provided by the Act for deciding that question. The

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Crown took the executors' own valuation and accepted a bond signed by the executors and a trust company, guaranteeing payment of the succession duty upon the sum above mentioned. When the value of the property has been determined upon by agreement, as in this case, or as otherwise provided under the Act, no question, I think, can afterwards be raised as between the parties to the bond and the Crown of the valuation of the property, unless indeed fraud or mistake be alleged. The mere fact that the property was afterwards found to be of less value than that agreed upon is no ground, in my opinion, for resisting payment upon the valuation made at the time of the giving of the bond.

The petitioners in this proceeding set forth that since the bond was given they find themselves unable to realize upon the estate in this Province and that it is practically worthless, and that certain property upon which they held security had been sold for taxes; they therefore pray that it may be declared that no property of the deceased in this Province has come to their hands, and therefore that no duties have become payable. In the alternative, they pray that the time for payment of the duty should be extended until they are able to realize on the judgment which they obtained against their debtors.

MACDONALD, C.J.A.

The procedure for the enforcement of payment of succession duty is set forth in the Act, chapter 217, of the Revised Statutes of British Columbia, sections 21 to 52 both inclusive. That procedure shews that when the parties are agreed upon the valuation and the duty, the duty is to be paid in cash or a bond given to secure payment.

Other sections of the Act give remedies to the Crown and to executors in respect of other matters. They are, I think, intended to apply to cases where the duty has neither been paid nor secured, as for instance, when no letters probate or letters of administration have been granted. In such events the Act makes provision for the collection of the duty. It also protects the executors or administrators who have either paid the duty or have given security for it. The executors are also given a power of sale over the deceased's property, to provide for the payment of the duty.

It was strongly pressed upon us that section 43 indicates that the value of the property and the amount of duty fixed at the time of the grant of probate is not final. I cannot agree with that contention. The meaning of that section is, I think, that the judge shall have jurisdiction to determine the several matters therein specified when they have not already been determined in a manner which binds the parties to the application.

A beneficiary under the will might dispute with the personal representative, the correctness of the value of his share, and of the amount of duty payable in respect of it. Other examples might be given where without disturbing the settlement that had been made between the Crown and the executors, the parties entitled to benefits under the will, and the executors might have recourse to that section for the determination of their own disputes in connection with the duty, but as to reopening the valuations agreed upon between the Crown and the executors, that section, I think, has no applicability. I think the decision of the Privy Council in the recent case of *United States Fidelity & Guaranty Co.* v. *The King* (1923), A.C. 808, lends some support to this conclusion.

MACDONALD, C.J.A.

The appeal, I think, should be allowed.

The question was raised by one of my learned brothers, as to whether or not the judge appealed from was acting as a *persona designata.*

After reargument upon this point, I am convinced that he was not. It was conceded by counsel for the respondent that to so hold would involve a construction of the Act which would give the expression "Judge of the Supreme Court" two different meanings. Under some sections of the Act, he would be acting judicially as the Court, and under section 43, he would be acting as a *persona designata.* After considering all the sections bearing upon the point, I think it is manifest that the Legislature used the expression "a Judge of the Supreme Court" in section 43 as meaning the representative of the Court itself, and not a *persona designata.*

MARTIN, J.A.: This is an appeal from a "determination" (in the form of a declaratory order) of a judge of the Supreme

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Court (MORRISON, J.) upon a petition presented under section 43 of the Succession Duty Act, Cap. 217, R.S.B.C. 1911, in the following words:

"It is hereby declared that no duties have become payable from the petitioners under the above mentioned Act."

Section 43 provides:

"A judge of the Supreme Court shall also have jurisdiction, upon motion or petition, to determine what property is liable to duty under this Act, the amount thereof, and the time or times when the same is payable, and may himself or through any reference exercise any of the powers which by sections 29 to 31, both inclusive, of this Act are conferred upon any officer or person."

After a careful perusal of all the material before the learned judge I take his "declaration" (*i.e.*, "determination," to use the statutory equivalent expression) to mean (and it can only mean, in the circumstances) that he had reached the conclusion that there was no duty "payable" upon the property of the deceased up to that time and for the very good reason that it had been proved to his satisfaction that there was no property of any "market value" (*Cf.* Sec. 3, Schedule A, Form 1, Affidavit of Value and Relationship) upon which any duty could be imposed. Having regard to all the very unusual circumstances, as appears from the official correspondence set out in the petition, this is just the sort of special case of a necessarily provisional nature, that section 43 was passed to deal with in an expeditious and inexpensive manner. That section, be it noted, comes under the appropriate heading "Additional Remedies," and section 52 declares that:

MARTIN, J.A.

"The remedies provided in the preceding sections 42 to 51, both inclusive, shall be in addition to those provided by the other provisions of this Act."

This conclusion can be arrived at without any prejudice to the rights of the Crown, present or future, because if any property of "market value" is discovered it would be liable to the lien imposed by sections 5, 20 and 50, and there are general and special (*e.g.*, sections 34 and 40, as well as 43) provisions in the Act to which the Crown may resort to protect itself.

Having satisfied myself that the learned judge below had jurisdiction to make the "determination" under section 43 that is an end of the matter, because there is no appeal from his adjudication since he is nominated "to determine" the "motion

or petition" before him as "a Judge of the Supreme Court," and is therefore *persona designata* and his decision is final, as has been repeatedly decided by this Court, following the decision of the old Full Court in *In re Vancouver Incorporation Act* (1902), 9 B.C. 373, wherein the well-known distinction in phraseology is thus pointed out, p. 376:

"It is not as though the appeal were given to this Court or a judge thereof, in which case the question of *persona designata* would not arise."

In this group of "Additional Remedies" the distinction is drawn in several sections between "Court" and "a judge," *Cf.* 42, 44 and 49, in which last "the Court may declare the duty" as therein provided; and in the preceding group, in contrast, section 33 gives in terms an appeal to this Court, as in "the case of an ordinary appeal," from the report of the commissioner made under section 31 on the "fair market value" of the property.

A careful comparison of all the relevant sections shews, to my mind, that the Act does not use the expression "a judge" or "the Court" as the case may be, in different ways but as appropriate to quite distinct classes of proceedings, in some of which an appeal lies but not in this one, which, as I read the statute, it intends to leave to the sole and final determination of "a judge of the Supreme Court," and I am unable to discover any real conflict between the proceedings before him to determine what the duty really should be and those proceedings taken under the preceding group of sections, from 21-41 inclusive, entitled "Procedure to enforce Payment of Duty," the costs of all of which are by section 41 "in the discretion of the Court or judge." The whole Act is entirely workable and prevents such an injustice as we have before us (where a large amount of duty is sought to be assessed upon fictitious property) if it is approached in that spirit of equity and remedial elasticity to meet special and progressively varying conditions (like those at bar) in which it was conceived; and it is at once the interest of the Crown and of the subject that this should be so, because thereby difficult questions of changing values, before final adjudication, may be considered and equitably adjusted, so that justice may ultimately be completely done.

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I have not overlooked section 48, but that only gives an appeal "wherever an appeal would lie if the action were between subject and subject," which excludes a case of *persona designata*. It follows that, in my opinion, the appeal should be dismissed.

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GALLIHER, J.A.: The valuation was submitted by the petitioners, was accepted by the department, and a bond given and accepted on that basis. That the estate may prove valueless is not in law, an answer to the demand for duty.

I would allow the appeal.

Since writing the above, my brother MARTIN raised the question as to whether the judge, under section 43 of the Act, was not a *persona designata,* and the Court heard further argument on that point. Of course, if he were, there would be no appeal to this Court. In my opinion, there are three methods pointed out in the Act by which the property is liable to duty tax. The valuation, the amount of duty and the time when payable, can be fixed. First: The administrator and the department may agree upon this, which was done in the case before us and the bond given. Second: In case the parties cannot agree a commissioner my be appointed and from his decision there is an appeal to this Court; and third: A judge of the Supreme Court may, upon application, fix the amount, etc., and they are all, as we might say, bodies of first instance, and once it is settled by one or other of these bodies, neither of the others are clothed with power to alter it.

GALLIHER, J.A.

If this conclusion is right, then the Court below had no jurisdiction, but, if this is a wrong conclusion, I would still say that although section 43 as it stands by itself, might, under our decisions in this Court, constitute the judge a *persona designata,* yet when we read the whole Act, it appears to me that the Legislature had no such intention in view, and I think the wording of section 43 in the last three lines thereof, is indicative of this as well as other sections of the Act referred to. Then, if the judge is not a *persona designata,* there is an appeal to us and I would answer that appeal as above expressed. It may be that under the peculiar circumstances of this case, the Government might consider it on its own facts, but with that we, of course, have nothing to do.

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McPHILLIPS, J.A.: I am in agreement with my brother MARTIN and concurring in his opinion, would dismiss the appeal.

EBERTS, J.A. would allow the appeal.

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

Solicitor for appellant: *Dugald Donaghy.*

Solicitors for respondents petitioners: *Mayers, Stockton & Smith.*

REX v. PERRO.

CAYLEY, CO. J.

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REX v. PERRO

Criminal law—Sale of beer—Summary conviction—Appeal—Application to amend charge—B.C. Stats. 1921, Cap. 30, Sec. 46; 1922, Cap. 45, Sec. 7.

On an appeal from a summary conviction by a magistrate the County Court judge has no power to grant an amendment to the indictment which charges an offence similar to but different as to its penalty from the offence on which the accused was convicted.

MOTION by counsel for the Crown to amend a charge for selling a "liquid known and described as beer" made on an appeal from a conviction by a police magistrate, by inserting the words "which is liquor within the meaning of the Government Liquor Act." The facts are set out fully in the reasons for judgment. Heard by CAYLEY, Co. J. at Vancouver on the 13th of December, 1923. Statement

W. M. McKay, for the motion.
Brougham, contra.

CAYLEY, Co. J.: This is an appeal from a conviction made by a police magistrate for selling what is described in the conviction as "a liquid known or described as beer." It is intimated by counsel for the appellant that he is willing to Judgment

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plead guilty to such conviction, but that such conviction should carry with it only the penalty provided under section 46 of the Government Liquor Act since it is not stated in the conviction that this liquid known or described as beer was that kind of liquid which is described as liquor. The difference between liquid described as beer and liquor is this, that liquor is a liquid (whether beer or anything else) which contains more than one per centum of alcohol.

In 1922 section 46 of the Government Liquor Act was amended by adding subsection (2) which stated that all liquid known as beer which contained more than one per centum of alcohol made that beer a liquor, and therefore punishable by imprisonment. Counsel for the Crown now asks the Court to be allowed to amend the preliminary proceedings which come before me in the form of what is called a charge, by inserting the words "which is liquor within the meaning of the Government Liquor Act." These words do not occur in the information of the informant when he swore to the information upon which the original conviction was founded, and the sole question which I have to decide is, whether on an appeal from that conviction I have the right to allow the Crown to amend.

Judgment

It is argued that this being a trial *de novo,* I have, under section 80 of the Summary Convictions Act, which is identical with section 754 of the Criminal Code, all the powers of the original magistrate to allow amendments. I am not satisfied that any case which has been cited to me decides precisely the point which I candidly confess I consider a difficult one, and that is, can you make an amendment which charges an offence similar to but different in its penalty from the offence, which on a strict construction of the information and the conviction, was originally charged? If it were not that the liberty of the subject is at stake, I would not be perhaps so cautious in assuming that I had the power to allow the amendment, but there is such a vast difference between a fine of $50 and being imprisoned for a month in gaol (and it might as well have been three months according to the amending Act of 1922), that I am especially cautious and would greatly prefer, if the Crown thinks it worth while, to see an appeal by

the Crown to another Court before I assume the authority to find a man guilty of what I cannot but consider a separate offence, although kindred to the offence known as selling beer. They are both beer, but one is beer under one per cent. alcohol and the other is beer, but beer over one per cent. alcohol. Now, to say that beer under one per cent., carrying a penalty of $50 is the same as beer over one per cent. carrying a penalty of imprisonment, to say that they are one and the same offence with only a difference in the penalties, does not seem to me a proper interpretation. I think the substitution of the words "Liquor within the meaning of the Government Liquor Act" describes a different article from the beer as originally contemplated under section 46, and therefore is a different offence.

Judgment

The application to amend, therefore, is refused.

Application refused.

IN RE ESTATE OF SAM BRIGHOUSE, DECEASED.

Covenant to pay annuity—Payments on death of covenantor—Will—Estate charged with payment — Certain payments in arrears — Interest on amounts overdue—3 & 4 Will. IV., Cap. 42, Secs. 28 and 29.

A testator covenanted to secure an annuity of £300, payable after his death to his niece in consideration of her giving up her business and devoting herself to him during his lifetime. Due provision was made in the testator's will for payment and the judgment in an action by the executors for probate charged the residuary estate with payment of the annuity. Payments of the annuity fell in arrears.

Held, that testator's niece was entitled to 5 per cent. interest on all deferred payments from the date of the judgment.

APPLICATION by the executors and trustees of Sam Brighouse, deceased, to vary the certificate of the deputy registrar at Vancouver allowing Ada Mary Aspinall interest on certain arrears of an annuity provided by a deed of covenant

Statement

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of the 27th of August, 1912, whereby Sam Brighouse had in consideration of natural love and affection for Ada Mary Aspinall (his niece) and of her giving up business and devoting herself to him for the balance of his life, covenanted to secure an annuity of £300 per annum, to commence from his death and charged all the estate of which he shall die possessed with payment. He died on the 31st of July, 1913, and by his will expressed his wish that his niece should be paid her annuity pending her decision whether she would take the benefits under the will or the said deed. She elected to take the annuity and in an action by the executor to probate the will judgment was given on the 4th of May, 1916, whereby it was ordered that the residuary estate of the testator be charged with payment to Ada Mary Aspinall during her life of an annuity of £300 granted to her by the testator under the deed. Payments were made on the annuity to a slight extent but arrears accumulated. The deputy registrar allowed interest at 5 per cent. per annum upon all arrears of annuity owing from time to time since the 4th of May, 1916. The executors and trustees contended she was only entitled to interest on arrears since the 11th of April, 1921. Heard by MACDONALD, J. at Chambers in Vancouver on the 30th of October, 1923.

Statement

Gibson, for the executors.
Gillespie, for Ada Mary Aspinall.

24th November, 1923.

MACDONALD, J.: In this matter, the executors and trustees of Sam Brighouse, deceased, seek to vary the certificate of the deputy registrar at Vancouver, allowing Ada Mary Aspinall, interest on certain arrears of an annuity, provided by a deed of covenant, dated 27th August, 1912. She has been allowed interest at the rate of 5 per cent. from the 4th of May, 1916, to the date of the certificate of the deputy registrar, upon arrears of such annuity owing from time to time. It is contended by the executors and trustees, that she should only be entitled to interest from the 11th of April, 1921, upon the arrears of her annuity which had then become due and payable.

Judgment

An action had been commenced by the executors under the

will of Sam Brighouse, deceased, to probate the will. On the said 4th of May, 1916, judgment was pronounced in the action, and a final order for judgment was entered in due course. After declaring, *inter alia*, that the will had been proved, and ought to be established, paragraph 4 of the judgment referred to the annuity payable to Ada Mary Aspinall, who was a niece of the deceased, but was not a party to the action, as follows:

"AND it appearing by a notice dated the 10th day of July, 1914, signed by Ada Mary Aspinall that she has in pursuance of the declaration contained in said will elected to take an annuity of £300 per annum granted to her by the said testator by a deed of covenant dated the 27th day of August, 1912, and secured upon his estate, and that the one-sixth share of the residuary estate bequeathed by the said will to the said Ada Mary Aspinall now forms part of the residuary estate of the testator: IT IS FURTHER ORDERED AND ADJUDGED that the residuary estate of the testator be and the same is hereby charged with the payment to Ada Mary Aspinall during her life of an annuity of £300 (Three hundred pounds) granted to her by the testator by the said deed."

By deed, dated the 27th of August, 1912, Sam Brighouse, the deceased, had, "in consideration of natural love and affection" for the said Ada Mary Aspinall, and her giving up a business then carried on by her, and devoting herself to him, in order to secure to her an annuity of £300 per annum, to commence from his death, covenanted to secure such annuity in quarterly payments and charged all his estate of which he should die possessed with the payment. He also declared the deed irrevocable and covenanted to do all such acts or deeds, as might be required to effectually charge and bind his estate, in the hands of his representatives with the due payment of such annuity. He died on the 31st of July, 1913, and according to the provisions of the deed of covenant, the annuity of £300 per annum then became payable. Payments were made only to a slight extent, and it is claimed that $9,910.54 had become payable to the said Ada Mary Aspinall for her annuity, up to 30th July, 1923.

Judgment

The intention of the testator to provide the annuity was thus not carried out. The testator had, by his will, expressed his wish that his niece should, upon his death, be paid her annuity, pending her decision as to whether she would, within twelve calendar months of his death, take the benefits under the will or the deed by providing that, "until such elec-

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tion she shall be entitled to receive the said annuity out of my estate." Miss Aspinall by the notice referred to in the judgment, elected to take the benefits under the deed executed in her favour, in preference to receiving the interest she might have obtained under the terms of the will. Considering the terms of the will, I doubt if the trustees were excused until her position was thus ascertained, from making payment of the annuity from time to time, still any ground of this nature disappeared when the judgment was rendered in the action. The trustees on behalf of the estate, should then, at any rate, have commenced paying the annuity in the quarterly instalments as provided by the deed of covenant executed by the testator, and which formed a charge upon all the property. They failed to do so and contend that notwithstanding such non-payment, they should not be required to pay interest even from the date of the judgment, upon the arrears which accumulated from time to time.

Broadly stated, the law of England does not allow interest except by statute, contract, or the law merchant, *In re Gosman* (1881), 17 Ch. D. 771. Here, the deed of covenant under which Miss Aspinall was entitled to her annuity created a charge upon the property, and while interest is not mentioned, still there is a time certain when the annuity became payable. Should not interest then be allowed for the delay, that has ensued in making the payments, intended by the testator to provide an annuity payable immediately after his death? At any rate, should not interest be payable from the time when the judgment declared that Miss Aspinall had a lien upon the property and confirmed the deed of covenant providing for the annuity?

Judgment

In *Green* v. *Manitoba Assurance Co.* (1901), 13 Man. L.R. 395 at p. 403, it was held that the provisions of sections 3 & 4 Wm. IV., Cap. 42, applied in the Province of Manitoba, and section 29 of the Act, though referring to a "jury," formed the basis for a decision by the Court, that the plaintiff was entitled to interest upon insurance moneys, from the time when it was ascertained that they became payable. Section 28 of this statute was referred to in *McCullough* v. *Newlove* (1896), 27

Ont. 627 at p. 629. It reads as follows:

"That upon all debts or sums certain, payable at a certain time or otherwise, the jury on the trial of any issue or on any inquisition of damages may, if they shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time, or if payable otherwise then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the time of payment; provided that interest shall be payable in all cases in which it is now payable by law."

Though this legislation refers to a "jury" allowing interest, still both sections, 28 and 29 of the Act, have been applied by a judge sitting without a jury. In *Mackie* v. *The European Assurance Society* (1869), 21 L.T. 102, it was so applied in an action for recovery under insurance. Malins, V.C., at p. 106, said:

"I fear I can only make a decree that they are bound to the terms of the policy, and must make reparation for all damages, with interest on the money. . . . . There must be a decree, with 5*l.* per cent. interest from the 10th Jan. after the fire. I would give 10*l.* per cent. if I could, with all costs of suit."

In *Sinclair* v. *Preston* (1901), 31 S.C.R. 408, affirming 13 Man. L.R. 228, section 28 of the statute would have been applied and interest allowed, if the sum claimed as bearing interest, had been certain and payable at a certain time, under a written instrument (p. 417):

Judgment

"If anything had to be done further than a mere calculation made upon a basis sufficiently defined in a written instrument then the case would not be within the statute, and interest would not be recoverable."

In *Merchant Shipping Co.* v. *Armitage* (1873), L.R. 9 Q.B. 99 at p. 114, Coleridge, C.J., said:

"We are of opinion that the plaintiffs are not entitled [under the statute] to judgment for the interest. We do not think the principal sum is payable at a time certain."

In *Hill* v. *South Staffordshire Railway Co.* (1874), L.R. 8 Eq. 154, Sir Charles Hall, V.C., in refusing to apply the statute, said (p. 170):

"I do not believe that any twelve men dealing with and considering all the circumstances of this case, would say that interest ought to be allowed; and, acting as a jury in this case, it appears to me that I cannot allow interest. . . . ."

Then in *In re Horner. Fooks* v. *Horner* (1896), 2 Ch. 188,

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a similar question arose for determination. The point to be decided upon a like application was whether any interest was payable by the estate of a testator, arising out of a covenant for payment of £2,000, which it was provided, was, upon his death, to be held in trust by his estate, to provide an income for his daughter. The facts were not very different to those here presented. Chitty, J., refers to them as follows:

"In this case the testator covenanted that his executors or administrators should pay a sum of 2000*l.* within six calendar months after his death, and the question is whether that is a sum 'payable at a certain time' within section 28, of 3 & 4 Will. 4, c. 42, so as to carry interest."

The case of *Knapp* v. *Burnaby* (1861), 9 W.R. 765, of a somewhat similar nature was referred to, and also that such decision has not been overruled nor questioned. Other cases were then discussed and distinguished by Chitty, J., and he concludes his judgment as follows:

"Death is not a contingent event—it is a certainty which must happen to all; and so many days after death is a time certain for the purposes of the statute. The statute does not require the exact day to be named, and it is rightly admitted that it makes no difference that the sum is to be paid, not on a particular day, but within a certain time. At law a covenant to pay within six calendar months after death is a covenant to pay on the last day of the six months. I therefore declare that the applicant is entitled to interest at 5 per cent. on the 2000*l.* from the expiration of the six months from the testator's death to the time of payment."

Judgment

In determining this question, Miss Aspinall should not be in a worse position than if she had taken action to recover under the deed so charged on the land. So I conclude that in any event, from the time when Miss Aspinall declared her intention to abide by the deed of covenant executed in her favour, and her election was emphasised by the judgment on the 4th of May, 1916, she is entitled to and should be allowed interest upon the payments of such annuity, as they became in arrears from time to time.

The calculation made by the deputy district registrar has not been questioned, and I do not think the certificate should be varied. The solicitors for Miss Aspinall are entitled to the costs of this application.

Application dismissed.

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Criminal law—Carnal knowledge of girl between 14 and 16 years old—Evidence—Corroboration—Nature of corroboration required—Criminal Code, Secs. 301(2) and 1002—Can. Stats. 1920, Cap. 43, Secs. 8 and 17.

On a charge of having had carnal knowledge of a girl betwen 14 and 16 years of age, under section 301(2) of the Criminal Code the only evidence in corroboration of the story of the girl upon whom the crime was alleged to have been committed was that of a young man who was at a dance in a public hall with the accused and the girl on the same evening but prior to the alleged commission of the crime. He testified that he saw them dancing together and at about 11.30 p.m. they left the hall separately, met outside the door and walked towards a park where the crime was alleged to have been committed. The jury having found there was sufficient corroboration of the girl's evidence brought in a verdict of "guilty" and accused was sentenced to one year's imprisonment.

Held, on appeal, affirming the decision of MURPHY, J. (MCPHILLIPS, J.A. dissenting), that the evidence of a third party that the two had been dancing together including the last dance, left the hall at such a late hour, one at a time, met outside, and proceeded towards the park was some corroboration of the girl's story. It is the duty of the Court to decide whether there was any corroboration at all and for the jury to find as to its sufficiency, and the jury having so found the appeal should be dismissed.

Held, further, that it is open to the judge to recall the jury and correct a misstatement of the law made to them in his charge originally (MCPHILLIPS, J.A. *dissentiente*).

APPEAL by accused from a conviction by MURPHY, J. and the verdict of a jury on the 16th of October, 1923, when he was sentenced to one year's imprisonment on a charge of having carnal knowledge of a girl between 14 and 16 years of age in contravention of section 301(2) of the Criminal Code. The girl's story was that on the night of the 2nd of June, 1923, she left her home in Victoria without her parents' leave and went to a dance at the Caledonia Hall where she was to meet a girl friend. She met the accused at the dance and had three dances with him. He asked her to allow him to take her home to which she assented. They left the hall separately and met outside. On the way home they entered the Athletic Park on Quadra Street, where she stated he had carnal knowledge of her. The only evidence in corroboration was that of a young

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man who was at the dance and saw the accused, and the girl, who testified, dancing together and saw them leave the hall separately at about 11.30 p.m. and meet outside the hall, when they walked away together towards the Athletic Park. On the charge the learned trial judge told the jury that even if the woman were the pursuer it would make no difference; he would still be guilty under the section if he had carnal knowledge of her. After the jury were out for a short time the learned judge called them back and stated he was in error in making the above statement and read to them section 17 of the Act of 1920 amending the Criminal Code which provides that "the judge may instruct the jury that if in their view the evidence does not shew that the accused is wholly or chiefly to blame for the commission of said offence, they may find a verdict of acquittal."

Statement

The appeal was argued at Vancouver on the 21st and 22nd of November, 1923, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

W. J. Taylor, K.C., for appellant: There is want of corroboration. The morning after the alleged crime the girl's mother said the girl was crying but she said nothing. There was evidence of their being seen dancing together in a public hall and going home together, but this is not sufficient upon which corroboration can be found. It must confirm in some material particular not only that the crime was committed but that the prisoner committed it: see *Rex* v. *Magnolo* (1915), 22 B.C. 359; *Rex* v. *Baskerville* (1916), 2 K.B. 658. The second point is the learned judge misdirected the jury. He called them back and told them of the error but the injury was done and he is entitled to a new trial.

Argument

Bass, for respondent: The evidence of the different incidents taken as a whole may be considered as sufficient corroboration. The learned judge was justified in concluding there was evidence on which the jury might find there was corroboration: see *Rex* v. *McGivney* (1914), 19 B.C. 22; *Rex* v. *Iman Din* (1910), 15 B.C. 476.

Taylor, in reply.

MACDONALD, C.J.A.: I think the appeal should be dismissed.

The only question which has been discussed by Mr. *Taylor* in his opening argument to the Court was the sufficiency of the evidence of McAdam as corroborative evidence of the girl's story. Now, it is perfectly clear to me that the evidence of McAdam that he saw the accused and the girl leave the dance hall at half past eleven at night under somewhat suspicious circumstances was some corroboration of her story of her seduction by him on their way home. They had been dancing together and danced the last dance together; they went out one at a time, met outside, and left the place at that time of night to go to her home and the seduction occurred on the way home according to the girl's story.

Now McAdam's evidence, if it has any relevancy at all to the offence, was such that the jury could give what effect they chose to do. They could consider it sufficient to turn their minds either one way or the other or they might consider it not sufficient to convince them that the prisoner was actually guilty. The sufficiency of the corroboration is not for us. What we have to decide is the question whether it can be considered as corroboration at all or not, and if we decide that question, we have discharged our duty. It was for the jury to weigh it.

In these circumstances there is nothing further to be said. I say nothing with regard to the other alleged corroboration, namely, the threat which was made by the accused against McAdam, that he was to keep his mouth shut or something might happen to him. That is too vague and indefinite, perhaps, to amount to corroboration but I make no finding upon that.

The second point seemed to me to be so clear that it was hardly necessary to mention it. It was this: That the learned judge told the jury that if they came to the conclusion that the offence had been committed the girl's consent did not nor did her conduct make any difference. Afterwards his attention was called to the recent statute, Cap. 43 of 1920, section 17, which ameliorated the law somewhat in favour of offenders of this class. Under it the jury were entitled to take into consideration the conduct of both of the parties, the conduct of the girl as

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well as of the man and, if they concluded that his conduct "did not contribute in whole or in part of the offence" they might take that into consideration and discharge the prisoner. Now his re-statement was a mere correction of a mis-statement of law he had made prior to that time. The misstatement of the law would not affect the minds of the jury in the same manner that the bringing before them of evidence, which afterwards was found to be inadmissible, might, and the correction was therefore a complete removal of the impression which had been made by the first statement.

MACDONALD, C.J.A.

There is no question in my mind that that ground of appeal is entirely ill-founded.

MARTIN, J.A.: I am of like opinion. There are two points raised upon this appeal. The first is as to misdirection. In regard to that, no authority whatever has been cited nor, I venture to say, can be cited in support of the proposition that on a question of law the learned trial judge cannot correct his charge to the jury, without that correction involving the discharge of the jury and the empanelling of a new jury or in any way invalidating the proceedings.

The second point is on the question of corroboration in some material particular by evidence implicating the accused under section 8 of the Criminal Code of 1920, chapter 23. All I have to say in regard to that is I am in accord with and shall follow the principles affirmed by this Court in the two cases cited, *Rex* v. *McGivney* (1914), 19 B.C. 22 and *Rex* v. *Iman Din* (1910), 15 B.C. 476; only adding that our view there is confirmed by subsequent decision of the Court of Criminal Appeal in England in *Rex* v. *Baskerville* (1916), 2 K.B. 658, wherein it was stated (p. 667):

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> "That evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed but also that the accused committed it. . . . . The nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged. It would be in high degree dangerous to attempt to formulate the kind of evidence which would be regarded as corroboration, except to say that corroborative evidence is evidence which shews or tends to shew that the story of the accomplice

that the accused committed the crime is true, not merely that the crime has been committed, but that it was committed by the accused."

Upon the case at bar I have no doubt whatever that it was open to the jury to say that the circumstances before them afforded that corroboration in a material particular which the statute contemplates and that the learned judge was quite right in refusing to take the case from the jury. I need only add that I think it would be unfortunate if, in such circumstances as we have before us, this Court were to in effect discourage the efforts, the proper and lawful efforts of the jury to protect the young women of this country.

MARTIN, J.A.

GALLIHER, J.A.: In my opinion there was sufficient corroboration to warrant the jury in coming to the conclusion that they did. On the other point, it cannot be said, as it was urged, that there was a prejudice by reason of the learned judge having omitted to take cognizance of a section of the Act. That, to my mind, was absolutely cured and removed from the jury's mind by what took place after they were called back. After referring to the amended section, after instructing the jury that he should read it to them, the learned judge did read the section to the jury and then again referred to it, and again, finally, in dealing with the question of corroboration, the learned judge said, "Even if you have it"—that is corroboration—"Even if you have it, you will remember what I told you, that if, in your view, the evidence does not shew that the accused is wholly or chiefly to blame, for the commission of the offence, you may find a verdict of acquittal." Now in view of the previous statements, and the distinct warning at the end, I fail to see, with every respect, how any jury could possibly have in their mind any lingering doubt as to what their duty was; to consider the case under the statute.

GALLIHER, J.A.

MCPHILLIPS, J.A.: I would quash the conviction and direct a judgment of acquittal. Admittedly in this case, unless there is corroboration, there can be no valid conviction. I am unhesitatingly of the view that there is no corroboration, and approaching that question as a matter of principle, I would like to refer to Powell on Evidence, 10th Ed., where the learned author, at

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the foot of page 453, states this, "As Sir Matthew Hale, C.J., said of a charge of rape"—and that is analogous here, and applicable, because here there must be corroboration, as there—

"'It is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, though never so innocent.'"

Then the learned author says (p. 454):

"This no doubt is why corroboration in some material particular is needed to support the evidence of the prosecutrix."

My brother MARTIN read the text of the statute itself and that same language is in our Act; it has to be corroboration in a material particular. I would consider, with great deference and respect to all contrary opinion, that there is no class of corroboration here, much less any corroboration in a "material particular." I never knew that there is a zone of crime, and a zone of innocence; that there is a zone of crime, because you are in the public highway; that there is a zone of crime in a park, nor, under present day conditions, do I think there is a zone of crime even in a park all night long, judging by the ways of our people, and the great majority of them are moral people. We see today no chaperonage at all; young people out all night, practically, the parents agreeing. If the State is to take up this duty and be truly *parens patriæ* then we should find some statute law which will inhibit this. We have had curfew laws, only to be abandoned and never carried out.

MCPHILLIPS, J.A.

There is one noticeable circumstance here which the youth of the country are faced with; a circumstance of temptation, in a very large sense. The young girl herself says she broke away from her home contrary to the orders of her parents, the parents thinking she was in bed. She is clothed apparently with a skirt and a pair of bloomers only, no underskirt, no petticoat. The dances of the present day are dances that a great deal can be said against. Close contact with the person, and that goes on into the small hours of the morning, and it is a circumstance to be considered whether or not it does not inflame passion, and bring about results harmful to the community.

Now, we cannot disregard this. I, sitting here as a judge, cannot disregard this, and when we find Parliament itself saying that in certain circumstances there should be an acquittal, referred to by my learned brother, the Chief Justice,

it is a circumstance that cannot be passed over. Now, the corroboration is no corroboration at all, in my opinion. And the view I have formed I consider to be fully supported by the opinion of legal text writers of eminence, and the opinion of one of the greatest judges that has ever lived in our time, and a decision in the Privy Council, which is binding upon this Court—the Lord Chancellor, Lord Halsbury, in this case of *Moore* v. *Bishop of Oxford* (1904), A.C. 283, which was an appeal by special leave from a decision of the Consistory Court convicting the appellant, the vicar of Cowley, of criminal intercourse with one Alice Maud Johnson as charged, and also of an immoral habit, which is not material here, said: (p. 284):

"Their lordships are of opinion that the main charge in this case has broken down."

And I consider the case before this Court has woefully broken down in every particular. The Lord Chancellor further said:

"The statements of the only witness who is relied upon for the purpose of proving the charge are, in the opinion of their lordships, uncorroborated by any conduct, act, or proof."

And I unhesitatingly say that the charges of this young woman in the present case are uncorroborated by any "conduct, act, or proof" implicating the prisoner, a young man of about eighteen years of age. The Lord Chancellor further said:

"And the charge rests entirely upon the evidence of this witness, who is the accuser herself. Their lordships do not think it necessary to consider more minutely the conduct of the witness, her account of the commencement of the relations between the appellant and herself being such as probably no Court would accept, and one which, so far as their lordships know, the Court below did not accept as true. All the Court below had to determine was whether or not immoral relations existed at any time, and in any circumstances, between the parties; and on that point their Lordships are unable to concur with the Consistory Court in thinking that there is any corroboration by the correspondence or otherwise in favour of the accusation which has been made."

MCPHILLIPS, J.A.

Where is the conduct in any material particular corroborated when all that is proved is that the young man takes the young woman from a hall where they were dancing and sets out to conduct her home? It is her testimony only that they went into the park, and in this case I have referred to, the witness dealt *seriatim* with all the acts and swore to them, but yet the Court said it was not sufficient, because there was no corroboration.

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This case is absolutely devoid of that which the law requires. The Lord Chancellor further said:

"Apart from any technical rule upon the subject, it would be a most dangerous thing for any Court to allow an accusation of this sort to prevail when there is no corroboration; and probably no Court would be induced to do so. If that observation is true, speaking generally of an accusation of that character, it is certainly not rendered less important in this case by the fact of the witness giving an account of the commencement of relations between herself and the accused clergyman, which (as has already been said) probably no Court would accept."

I cannot, in view of the evidence, come to any other conclusion than that the verdict of the jury should be set aside on the ground that it is unreasonable, and cannot be supported, having regard to the evidence. There is absolute failure to prove that which is a prerequisite, that is to say, corroboration. Further, I am of the opinion that in law two errors were made. One was admittedly made in directing the jury wrongly as to the law, with regard to what might constitute a right on the part of the jury to acquit. The mere fact that the learned judge afterwards told them differently, after he had allowed them to go out and deliberate and pass upon the case is not sufficient. It is with great respect to contrary opinion idle to say that such an error would not result in miscarriage of justice that the jury should be erroneously and improperly charged upon the law and later (although there was correction) the self same jury is to be allowed to go on and deliberate and pass upon the case. Therefore, I think, there was an error in law in this. It could not be corrected. It was past correction. The accused was entitled to have a jury empanelled, free from the contagion, you might almost say, of a wrong statement of law upon a material point. Why should the jury be assumed to have had their minds disabused of something so fatal to the true administration of justice? How many of us in the affairs of the world know that unfortunately, despite the most explicit explanations given by statesmen of great experience, and by orators of great capacity, yet they find that their auditors, whom, they thought, were of good comprehension and good intelligence went away with a false impression. How is it possible to be satisfied that the jury, once instructed erroneously could go on and safely discharge their duty? It was a proper

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case to have withdrawn from the jury, and an error took place there. I am of opinion that a substantial wrong and a miscarriage of justice arose by reason of those two errors in law.

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitors for appellant: *Taylor & Brethour.*
Solicitors for respondent: *Bass & Bullock-Webster.*

ELLIOTT v. GLENMORE IRRIGATION DISTRICT.

Negligence—Damages—Farm—Ditch used by licensees under Water Act—Crop damaged by water escaping from ditch—Liability—B.C. Stats. 1914, Cap. 81, Secs. 33 and 44; 1920, Cap. 102, Sec. 27.

Section 33 of the Water Act provides, *inter alia*, that "any person aggrieved by the failure or neglect of such licensee or person so to do [to repair] shall be entitled, within a reasonable time after such failure or neglect has been discovered, to serve the licensee with notice thereof, and if the licensee declines or fails to remedy any defect, insufficiency, or neglect, it shall be competent to such person to institute an action to recover damages in respect of any loss sustained by him in consequence thereof." The defendant, a body incorporated under Letters Patent pursuant to the Water Act, owned and operated a water ditch traversing the hillside immediately above the plaintiff's farm lands in Yale district. They commenced running water in the ditch in the early spring of 1921, and in June of that year the plaintiff finding his land flooded with water escaping from the ditch complained to the defendant verbally. The defendant made an examination of the ditch, made some repairs and continued to carry water through the ditch. On the 12th of August the plaintiff complained that the ditch still leaked and his crop was destroyed but offered a compromise if the defendant would make certain improvements. This was not acceded to and the defendant continued to carry water until August 25th when it was shut off permanently. The plaintiff later, through his solicitor, gave formal notice of his loss through the defendant's neglect to repair the ditch. In an action for damages he recovered $600.

Held, on appeal, affirming the decision of GREGORY, J. (EBERTS, J.A. dissenting), that section 33 of the Water Act should be interpreted as giving a complainant the right to recover damages for all injury sustained both before and after giving notice, and on the facts of this case which shews

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the crops were ruined by water from the defendant's ditch, the repairs being of no effect, the written notice that was given after the injury had occurred and after failure to repair was sufficient to entitle him to all damages suffered by him in respect of his crop.

Statement

APPEAL by defendant from the decision of GREGORY, J. of the 25th of March, 1923, in an action for damages for wrongfully allowing water to be discharged on the plaintiff's lands. The facts are that on the 31st of December, 1920, the defendant Irrigation District was incorporated by Letters Patent under section 27 of the Water Act Amendment Act, 1920. Under its letters, defendant was empowered to take over the assets of a company known as the Colonial Irrigation Company which was incorporated in 1910, built ditches for carrying water, for irrigation purposes and operated for some years. The defendant took the property over in 1920 and appointed as manager a man who had been in the old company and an experienced engineer named Groves. The plaintiff purchased certain property in March, 1921, for fruit and farming purposes. The source of the water supply taken through defendant's ditches was about 8 miles away from the plaintiff's farm and the ditch carried the water along the hillside immediately above his farm. The defendant had water running in the ditch in the spring of 1921. In June, 1921, water appeared on the plaintiff's land and he later verbally complained to the officers of the defendant. The trustees of the defendant then made a careful examination as to whether the seepage came from its ditch. It made certain repairs and then continued to run water in the ditch until the 25th of August, 1921, when it shut the water off. The plaintiff wrote a letter to the defendant on the 12th of August, complaining about the water seepage on his land and that his crop was destroyed, but made an offer of settlement by which the defendant was to make certain repairs, but the defendant never agreed to the proposals and finally, in February, 1922, through his solicitor he gave written notice of his losses through the licensee's neglect to repair and claimed $6,625 damages to crops on 17 acres, damage to land, damage to fruit trees and cost of carrying seepage water away. Judgment was given in favour of the plaintiff for $600.

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The appeal was argued at Victoria on the 13th, 16th and 17th of July, 1923, before MACDONALD, C.J.A., GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Harold B. Robertson, K.C., for appellant: By consent of counsel all the evidence was taken before the registrar at Vernon. The action is barred by section 44 of the Act. He brings his action on section 33. The water was shut off on the 25th of August, 1921, and no damage was done after that and no notice as required by section 44 was given. On the inconsistencies in the section see *Ebbs* v. *Boulnois* (1875), 10 Chy. App. 479 at p. 484; *Moss* v. *Elphick* (1910), 1 K.B. 465 at p. 468; *Meldrum* v. *District of South Vancouver* (1916), 22 B.C. 574; *Toronto Ry. Co.* v. *Paget* (1909), 42 S.C.R. 488 at pp. 497-500; *Tabernacle Permanent Building Society* v. *Knight* (1892), A.C. 298. The next point is no notice was given as required by section 33: see *Wilson* v. *Nightingale* (1846), 8 Q.B. 1034 at p. 1036; *Reg.* v. *Shurmer* (1886), 17 Q.B.D. 323. He claims on a demand made on the 12th of August, 1921, but this was not a notice as required: see *Schetky* v. *Cochrane et al.* (1918), 1 W.W.R. 821; *La Roche* v. *Armstrong* (1922), 1 K.B. 485. Next the plaintiff cannot prove we did not repair to the satisfaction of the water comptroller or the official district engineer. He has a right to compensation for damage owing to faulty construction and maintenance: see *The City of Toronto* v. *J. F. Brown Co.* (1917), 55 S.C.R. 153; *Gaunt* v. *M'Intyre* (1914), S.C. 43 at pp. 47-50. They can only maintain an action under the Act and then only when notice is given: see *Rowland* v. *The Air Council* (1923), W.N. 64; 39 T.L.R. 228. Next, even if the ditch is out of repair there is only *prima facie* evidence of negligence and it is a good defence if defendant shews that omission to repair has not arisen through its failure to observe reasonable precaution to avoid it: see *City of Sydney* v. *Slaney* (1919), 59 S.C.R. 232 at p. 236. We say this land was waterlogged. On the question of liability to repair see *Jamieson* v. *City of Edmonton* (1916), 54 S.C.R. 443. There is no negligence here: see *Sanitary Commissioners of Gibraltar* v. *Orfila* (1890), 15 App. Cas. 400 at pp.

Argument

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408-9. The next point is, the only remedy is by arbitration. Seepage was a benefit, as a rule there was not sufficient water: see *The City of Toronto* v. *J. F. Brown Co.* (1917), 55 S.C.R. 153 at pp. 180 and 190; *Corporation of Raleigh* v. *Williams* (1893), A.C. 540 at p. 549; *Boughton* v. *Midland Great Western Rail Co.* (1873), Ir. R. 7 C.L. 169. We are not liable for what our predecessors did: see *The City of Montreal* v. *Mulcair* (1898), 28 S.C.R. 458.

Brown, K.C., for respondent: They had full knowledge of conditions and made no attempt to repair until the 31st of July, 1921, except a little oakum here and there. They turned the water in the ditch knowing of the cracks. The "exercise of powers" referred to in section 44 apply to construction as opposed to operation: see *Zimmer* v. *Grand Trunk R.W. Co. of Canada* (1892), 19 A.R. 693; *Winnipeg Electric Railway Company* v. *Aitken* (1922), 63 S.C.R. 586. Construction and operation is different from "maintenance" alone: see *The City of Toronto* v. *J. F. Brown Co.* (1917), 55 S.C.R. 153 at p. 203: Maintenance is not a power at all, it is a duty: see *Palmer* v. *Grand Junction Railway Co.* (1839), 4 M. & W. 749. A right taken away by statute must be in the clearest language. The inference from the repeal of section 32 is that a claim for damages must be by action. We cannot bring action until we know what our rights are: see *The City of Quebec* v. *The United Typewriter Co.* (1921), 62 S.C.R. 241. "Operation" in section 172A as enacted by B.C. Stats. 1920, Cap. 102, Sec. 27, is independent of section 132 altogether: see *Gilbert* v. *Corporation of Trinity House* (1886), 56 L.J., Q.B. 85. If they did not know they ought to have known: see *McClelland* v. *Manchester Corporation* (1911), 81 L.J., K.B. 98; *Mersey Docks Trustees* v. *Gibbs* (1864), 11 H.L. Cas. 686. We have an action if there is seepage at all. As to the effect of partially doing the work see *Dunn* v. *Rural Municipality of St. Anne* (1914), 29 W.L.R. 197; *Geddis* v. *Proprietors of Bann Reservoir* (1878), 3 App. Cas. 430 at p. 438. They must act properly in the exercise of their powers. On the question of liability and onus see *Watt and Scott, Ltd.* v. *The City of Montreal* (1920), 60 S.C.R. 523.

Argument

As to notice, "notice" is "knowledge" and it does not say "written notice." The word "serve" is equivalent to "give": see Stroud's Judicial Dictionary, 2nd Ed., Vol. 3, p. 1835. Further, on the question of notice see *Bird* v. *Bass* (1843), 6 Man. & G. 143 at p. 147; *Robson* v. *Spearman* (1820), 3 B. & Ald. 493.

Robertson, in reply.

Cur. adv. vult.

6th November, 1923.

MACDONALD, C.J.A.: Section 44 of the Water Act, 1914, relied upon by appellant, has, in my opinion, no application to the questions involved in this appeal, it refers to damages caused by reason of entry on lands for the purposes of survey and has nothing to do with injuries suffered by reason of non-repair. Section 33 applies specifically to claims for damages resulting from non-repair. It is a peculiar section, and the latter part of it is, I think, ambiguous. Read one way it would appear to limit the claim of an injured person to damages for injuries which accrued after notice in writing to the licensee and after his failure to remedy the defect in his works which caused the injury. That is the construction contended for by the appellant's counsel. If that be the true meaning of the section, then it must follow that though the owner's crops were irreparably injured before the cause of the flooding was discovered, or could by reasonable diligence have been discovered, and before a written notice could be given, yet if the owners of the works promptly and effectually repaired their flume, the injured owner could recover nothing. Such a provision for damages would appear to me to be an illusory one.

MACDONALD, C.J.A.

The first part of section 33 places squarely on the shoulders of the defendant the duty to repair its flume; it then proceeds to declare the remedy which the injured person may have for neglect of that duty. This is the peculiar part of the section. It reads:

"Any person aggrieved by the failure or neglect of such licensee or person so to do [to repair] shall be entitled, within a reasonable time after such failure or neglect has been discovered, to serve the licensee with notice thereof, and if the licensee declines or fails to remedy any defect, insufficiency, or neglect, it shall be competent to such person to

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institute an action to recover damages in respect of any loss sustained by him in consequence thereof."

Does this not mean that any person aggrieved, shall, within a reasonable time after he has discovered the defect, serve upon the licensee, a written notice thereof, and if the licensee shall fail to remedy the defect, then the plaintiff may recover "any loss sustained by him in consequence of the defect"? That would appear to me to be the only logical construction of this part of the section. The licensee could, by repair, prevent further injury but the injured person was not deprived of his action for injury already suffered. Wherever there is ambiguity it is the duty of the Court to put that construction upon the language which will lead to a reasonable and not an absurd result. To construe the clause as giving to the injured person no right for an injury which occurred before it was discovered, or could, with reasonable diligence have been discovered, provided the licensee shall make effectual repairs, would be no satisfaction at all for an injury theretofore done, which might be the whole injury, as I think it was in this case. Such a construction would not only lead to an absurdity, or at all events to what one must regard as an injustice, but would, instead of facilitating the person injured, take away the right given to him by the first part of the section, which standing alone would undoubtedly entitle him to recover damages for his whole injury.

MACDONALD, C.J.A.

I think, therefore, on the facts of this case, which shew that the plaintiff's crops were ruined for the season by water from the defendant's flume; that the defendant's attempt to repair the flume proved abortive; and that a written notice was given after the injury had occurred and after the failure to remedy the defect, entitles the plaintiff to the whole damage suffered by him in respect of his crops.

There is a question as to whether the notice was given within reasonable time or not. The undisputed facts are that verbal notice was given to the Company by the plaintiff when he discovered that his crops were being injured; that some of the directors of the Company went out and viewed the flume which was alleged to have caused the damage; that thereupon an

endeavour was made by the Company to remedy the defects in the flume but that this proved unsuccessful. The crops were then, I think, irreparably injured and destroyed. When later the plaintiff came to consult a solicitor, he no doubt discovered that on the true construction of the statute, he was required to serve a written notice, not a verbal one. Thereupon the written notice was served. The question, therefore, is, was this written notice given within reasonable time? I think upon the facts above stated, that it was.

MACDONALD, C.J.A.

Upon the question of what caused the injury I have no doubt. Defendant's counsel contended that the water was not from the flume, though it was admitted that the flume leaked, but it was said that this of itself would not have caused the injury, but that there must have been water coming from other sources. I am unable to take that view of the facts. I think the water which caused the plaintiff's injury was water which escaped from defendant's flume.

I would therefore, dismiss the appeal.

GALLIHER, J.A.: I am in accord with the learned judge below on the findings of fact.

GALLIHER, J.A.

Section 33 of the Water Act has given me no little difficulty to construe, but after several consultations with the Chief Justice, I have finally concluded that his interpretation is the right one.

I have had the advantage of reading his reasons for judgment and will content myself with concurring therein.

MCPHILLIPS, J.A.

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

EBERTS, J.A.

EBERTS, J.A.: The appellant is a body corporate under Letters Patent, under the provisions of Cap. 81, B.C. Stats. 1914.

An action was brought under section 33 of the Water Act to recover damages against the defendant Irrigation District for the failure of the said Irrigation District to maintain and repair the works so that no damage shall occur to any road, property or work in the vicinity (see section 33), and a judgment for $600 was given in plaintiff's favour in a trial before Mr. Justice GREGORY. Hence this appeal.

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I am of opinion the appeal should be allowed and the action dismissed for the following reasons:

Sections 32 and 33 of the Act read as follow:

"32. Any licensee, when constructing, maintaining, or operating his works, or when entering upon any lands in connection with the rights granted him under this Act, shall do as little damage as possible, and shall make full compensation to all owners thereof for any loss, damage, or injury done when exercising the powers aforesaid, which compensation shall, failing agreement, be fixed by arbitration pursuant to the Arbitration Act.

"33. (1) Every licensee or other person lawfully diverting water by means of any works shall maintain and repair the said works in a good, proper, and workmanlike manner to the satisfaction of the Comptroller or Engineer of the water district, so that the same shall at all times be of sufficient strength and capacity for the fulfilment of the purposes for which they were constructed, and so that no damage shall occur to any road, property, or work in the vicinity; and any person aggrieved by the failure or neglect of such licensee or person so to do shall be entitled, within a reasonable time after such failure or neglect has been discovered, to serve the licensee with notice thereof, and if the licensee declines or fails to remedy any defect, insufficiency, or neglect, it shall be competent to such person to institute an action to recover damages in respect of any loss sustained by him in consequence thereof."

The head-note in *City of Vancouver* v. *McPhalen* (1911), 45 S.C.R. 194, is as follows:

"Where a municipal corporation is guilty of negligent default by non-feasance of the statutory duty imposed upon it to keep its highways in good repair, and adequate means have been provided by statute for the purpose of enabling it to perform its obligations in that respect (*v.g.*, 64 Vict. ch. 54 [B.C.]), persons suffering injuries in consequence of such omission, may maintain civil actions against the corporation to recover compensation in damages, although no such right of action has been expressly provided for by statute, unless something in the statute itself or in the circumstances in which it was enacted justifies the inference that no such right of action was to be conferred—*Coe* v. *Wise* [(1864)], 5 B. & S. 440; L.R. 1 Q.B. 711 . . . . distinguished."

EBERTS, J.A.

Section 33 of the Water Act imposes a statutory duty, therefore there is then a right of action for a breach of this duty "unless something in the statute itself . . . . justifies the inference that no such right of action was to be conferred." The statute gives a right of action only after notice, which in this case was not given. If it had been intended that there should be a right of action for any damage caused prior to the notice, why did the statute expressly give a right of action only after notice? The reason is that compensation for any damages caused prior to the notice is provided for by section 32 of the

Water Act, which gives a right to compensation to be paid by arbitration pursuant to the Arbitration Act for any damage caused by maintenance or operation of the works. The damage was caused by the maintenance and operation of works: *The City of Toronto* v. *J. F. Brown Co.* (1917), 55 S.C.R. 153 at pp. 190 and 205.

I am of opinion arbitration should have been resorted to.

Appeal dismissed, Eberts, J.A. dissenting.

Solicitors for appellant: *Norris & McWilliams.*
Solicitor for respondent: *R. G. Ritchie.*

REX v. LOO LEN.

Criminal law—The Opium and Narcotic Drug Act—Conviction under—Held for deportation on termination of imprisonment—Habeas corpus—Civil proceeding—Appeal—Res judicata—Can. Stats. 1910, Cap. 27, Sec. 43; 1911, Cap. 17, and amending Acts.

An application for a writ of *habeas corpus* by one held for deportation after having served his sentence for an infraction of The Opium and Narcotic Drug Act must be regarded as a civil proceeding and therefore within the ambit of the Provincial Legislature (MCPHILLIPS, J.A. dissenting).

A person who is restrained of his liberty is limited to only one application for a writ of *habeas corpus* and after an appeal is taken and disposed of it is conclusive (MCPHILLIPS, J.A. dissenting).

Per MACDONALD, C.J.A.: An applicant cannot hold back either intentionally or inadvertently any ground of relief and then found a new application to the same, or another judge, upon it.

APPEAL by the Crown from the order of HUNTER, C.J.B.C., of the 13th of November, 1923, for the issue of a writ of *habeas corpus*. The accused was convicted of an offence under The Opium and Narcotic Drug Act. The Act provides that a person imprisoned for an offence under the Act, if an alien, be deported on the termination of his imprisonment and the accused having served his sentence was detained pending deportation

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when he applied to MORRISON, J. who dismissed his application for a writ of *habeas corpus* with *certiorari* in aid on the 12th of October, 1923. Accused then applied for this order, which was dismissed by the Court of Appeal on the 2nd of November following. Accused then applied for and obtained the order from which this appeal was taken.

The appeal was argued at Vancouver on the 27th and 28th of November, 1923, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Statement

E. Meredith, for appellant: His detention was *res judicata* and the order was improperly made. The matter had been adjudicated upon by MORRISON, J. whose refusal of a writ was upheld by the Court of Appeal. The fact that accused was of Canadian domicil was not raised until the second application was made but this does not affect the principle that his right to a writ had already been adjudicated upon.

Mellish, for respondent: There is only one way to get the matter before the Courts and that is by commencing *de novo.* A right of *habeas corpus* is a fundamental common law right and carries with it the right to go from one judge to another of the same Court or to go from Court to Court. He has the right to make the application on new grounds: see *Cox* v. *Hakes* (1890), 15 App. Cas. 506 at p. 515. The right has not been taken away: see *Re Edna Davies* (1915), 9 W.W.R. 361; *In re McMurrer* (No. 2) (1907), 2 E.L.R. 466.

Argument

Meredith, in reply, referred to *In re Hall* (1883), 8 A.R. 135 at p. 151; *In re Tiderington* (1912), 17 B.C. 81; *In re Ryan* (1914), 19 B.C. 165.

Cur. adv. vult.

13th December, 1923.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The respondent, Loo Len, was convicted of an offence under The Opium and Narcotic Drug Act, which, *inter alia,* provides that a person imprisoned for such an offence, shall, if an alien, be deported on the termination of his imprisonment, unless the judge before whom he is tried shall otherwise order, which in this case he did not do. He was therefore detained pending deportation.

The respondent applied to MORRISON, J. for *habeas corpus.*

The learned judge, after considering the merits of the application, refused to release him. An appeal was then taken by him to this Court and was dismissed.

Notwithstanding this decision the respondent made application for another writ, to HUNTER, C.J.B.C., a judge of the Supreme Court, as was MORRISON, J. The Chief Justice ordered the writ to issue and it is from that order that the appeal is taken.

This appeal raises directly the question as to whether in *habeas corpus* proceedings the respondent is at liberty to go from judge to judge of the same Court in his quest of release.

We have but one Superior Court of original jurisdiction in this Province, *viz.*, the Supreme Court, and therefore, unless successive applications may be made to the several judges of that Court, the order made is final subject to an appeal, if any has been given or possibly to the order of the Supreme Court *en banc*. This case must now be regarded as a civil proceeding, and not one arising out of a criminal matter, and therefore within the ambit of the Provincial Legislature. *In re Immigration Act and Mah Shin Shong* (1923), 32 B.C. 176, and *Rex* v. *Loo Len* recently decided by this Court and not yet reported.*

It may be well to consider what the practice was before the Judicature Acts in England, and since. We have in this Province the common law in relation to *habeas corpus,* supplemented by the Habeas Corpus Act, 2 Car. 2, Cap. 2, and 56 Geo. 3, Cap. 100. We have no local legislation affecting *habeas corpus,* except section 6 of the Court of Appeal Act, and chapter 21 of the Act of 1920. Section 6 corresponds with section 19 of the English Judicature Act, and the Act of 1920 was intended to provide for the rearrest of a person who had been released from custody.

MACDONALD, C.J.A.

The practice before the Judicature Act has been defined in several cases, not always with strict accuracy, but sufficiently to shew what it was. In *Cox* v. *Hakes* (1890), 15 App. Cas. 506, Lord Herschell, at p. 527, said:

"It will be convenient, before proceeding to an examination of the section of the Judicature Act upon which this case turns, to state briefly

* Since reported (1924), 1 W.W.R. 733.

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the mode in which the Courts have administered the law in relation to that writ [*habeas corpus*]. It was always open to an applicant for it, if defeated in one Court, at once to renew his application to another. No Court was bound by the view taken by any other, or felt itself obliged to follow the law laid down by it. Each Court exercised its independent judgment upon the case, and determined for itself whether the return to the writ established that the detention of the applicant was in accordance with the law. A person detained in custody might thus proceed from Court to Court until he obtained his liberty."

Lord Watson and Lord Macnaghten concurred, and there does not appear to have been any dissent from this summary of the law. It is, of course, *obiter dicta,* but nevertheless indicates clearly enough what the old practice was. Some of Lord Halsbury's expressions might indicate that he thought successive applications could be made to judges of the same Court, but I apprehend that he meant what was more accurately expressed by Lord Herschell.

In Ontario, where they have a local Habeas Corpus Act somewhat similar to 56 Geo. 3, *supra,* an appeal is given in express terms. Patterson, J.A. in *In re Hall* (1883), 8 A.R. 135, after discussing the Ontario Act, and the Judicature Acts, goes on to say, at p. 150:

"There is therefore no longer the possibility of going from Court to Court, as all the proceedings are in the same Court, *viz.*, the High Court of Justice. There have been three writs of *habeas corpus* issued at the instance of this prisoner, not out of different Courts, but all out of the High Court of Justice, sealed with the seal of that Court, and tested in the name of its president."

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And at p. 151, he quotes with approval, the language of Lely and Foulkes on the English Judicature Acts, as follows:

"At the same time the 3rd and 16th sections of the Act, by constituting a single Court out of many, seem to extinguish the right which a remanded prisoner had before the Act of applying to one Court after another."

In *Taylor* v. *Scott* (1899), 30 Ont. 475, Armour, C.J., used language from which it might be inferred that he recognized the right of an applicant to go from judge to judge, but I think he meant from Court to Court, since the several cases to which he referred as authority for his observations are instances of applications successively made to different Courts, not to different judges of the same Court. That case, however, is authority for the proposition that where the Courts are merged and an appeal is allowed from an order of a judge in *habeas corpus,* that would necessarily preclude the right to make successive

applications. Referring to the effect of the decision in *In re Hall, supra,* the learned Chief Justice proceeds (p. 482):

"The effect of that decision I take to be that a person confined or restrained of his liberty is limited to one *habeas corpus* only to be granted by any judge of the High Court returnable before him or before the judge in Chambers for the time being, or before a Divisional Court, and from the judgment given upon the return of this *habeas corpus* remanding him, he is entitled to appeal to the Court of Appeal, and the judgment of that Court is conclusive upon all inferior tribunals."

These cases shew two things: that there never was the right to go from judge to judge of the same Court, and secondly, that where the Courts are merged and an appeal is given, that is the means by which redress, if any, is to be obtained. Moreover, these cases indicate what has always been thought to be one of the objects to be attained by the Judicature Acts, namely, finality and the avoidance of multiplicity of actions and proceedings. In ordinary civil actions, orders and judgments when once entered cannot be interfered with by the judges making them, and *a fortiori* by other judges of the same Court.

Taylor v. *Scott, supra,* also decided that an order of *habeas corpus* after an appeal has been taken and disposed of is conclusive.

Another question to which I ought to refer is that with respect to subsequent applications on grounds differing from the first. I do not think that an applicant can hold back either intentionally or inadvertently, any ground of relief and then found a new application to the same or another judge upon it. I am not prepared, however, to say, though I do not express a final opinion upon the point, that subsequent events might not furnish ground for a fresh application founded on those events, but that question does not arise here, since it clearly appears from the material before us and the statement of the respondent's counsel, that the point now relied upon as a new ground, was open to him on the original proceedings, and that in fact it was included in the material then before MORRISON, J.

MACDONALD, C.J.A.

I have not overlooked the fact, though not relied upon by counsel for the respondent, that the learned judge had reserved his decision on the return to the writ, and has not yet pronounced judgment thereon. This does not affect me, since, in my

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opinion, he had no jurisdiction in the premises to entertain the motion at all.

The recent decision of the House of Lords in *Secretary of State for Home Affairs* v. *O'Brien* (1923), A.C. 603, has, in my opinion, no bearing on this appeal. It merely reaffirmed *Cox* v. *Hakes, supra,* adding the declaration that an order of a competent Court to the effect that the applicant for *habeas corpus* is entitled to his liberty, is no more appealable than one actually releasing him. There was some discussion of *Bernardo* v. *Ford* (1892), A.C. 326, but I do not understand it to have been doubted that the right of appeal was not confined to a case of that character, *viz.,* where the custody of an infant was involved. *O'Brien's* case itself shews that. No doubt was expressed as to O'Brien's right to appeal to the Court of Appeal from the order of the King's Bench Division, refusing to release him. Indeed, it was upon the order of the Court of Appeal that the House of Lords founded their judgment.

MACDONALD, C.J.A.

The law of England, as interpreted by those cases, is that the only appeal given is from the refusal of the writ or its equivalent, and this was applied by this Court in *In re Tidering-ton* (1912), 17 B.C. 81, before the law in this Province was amended by 1920, Cap. 21, extending the right of appeal to an order of discharge.

The writ and the proceedings leading up to it should be set aside.

MARTIN, J.A.: I am so much in accord with the reasons for judgment delivered by the Chief Justice that I only think it desirable, upon the point of fresh material arising since the matter came before us in the first appeal, to add that in fact there is no fresh material, because apart from what appears upon the record the counsel for the Crown did, upon the first argument before us on 29th October, make the admission upon the opening of the case, at the request of the appellant's counsel, Mr. *Mellish,* that Loo Len had a Canadian domicil, but strangely enough, after having obtained that admission the learned counsel for Loo Len based no argument upon it to us, though he subsequently used it in obtaining from a judge below the order for *habeas corpus* now appealed from.

MARTIN, J.A.

GALLIHER, J.A.: I agree in the reasons for judgment of the Chief Justice.

MCPHILLIPS, J.A.: This is an appeal in a *habeas corpus* matter, the learned Chief Justice of British Columbia having granted a writ. The short point in the appeal, as I view it, is, whether there can be a valid deportation when the person proposed to be deported is a person having Canadian domicil, which admittedly Loo Len has. The deportation is proposed to be made under The Opium and Narcotic Drug Act, Cap. 17, Can. Stats. 1911, as amended in 1922, Cap. 36, Sec. 5, being section 10B of the Act, which reads as follows:

"Notwithstanding anything to the contrary in The Immigration Act, an alien who, at any time after his entry, is convicted under subsection two 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 should otherwise order."

Now, section 43 of The Immigration Act reads as follows:

"43. Whenever any person other than a Canadian citizen or a person having Canadian domicile, has become an inmate of a penitentiary, jail, reformatory or prison, the Minister of Justice may, upon the request of the Minister of the Interior, issue an order to the warden or governor of such penitentiary, jail, reformatory or prison, which order may be in the form E in the schedule to this Act, commanding him after the sentence or term of imprisonment of such person has expired to detain such person for, and deliver him to, the officer named in the warrant issued by the Deputy Minister which warrant may be in the form EE in the schedule to this Act, with the view to the deportation of such person.

"(2) Such order of the Minister of Justice shall be sufficient authority to the warden or governor of the penitentiary, jail, reformatory or prison, as the case may be, to detain and deliver such person to the officer named in the warrant of the Deputy Minister as aforesaid, and such warden or governor shall obey such order and such warrant of the Deputy Minister shall be sufficient authority to the officer named therein to detain such person in his custody or in custody at any immigrant station until such person is delivered to the authorized agent of the transportation company which brought such person into Canada with a view to deportation as herein provided."

It becomes a question of construction of statute law to determine whether the person here ordered to be deported (one having Canadian domicil, although still an alien) may be deported.

It is not the province of the Court to legislate; the Court is entitled to look for apt words indicating the intention of Parlia-

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ment, especially where the liberty of the subject is in question, and that is the present case. The rules which govern in the construction of statute law are similar to those that obtain in the construction of contracts, and shortly it may be said the statute law shall have a reasonable construction according to the intention of Parliament, the words to be understood in their plain, ordinary and popular sense, and the construction shall be put upon all the language used so that one part may assist another.

Here we have the two sections as contained in the two Acts above quoted, and the meaning has to be deduced therefrom. One further rule in the construction of statute law is that the endeavour should be made to give effect to the legislation, that is, to so construe it where possible to the end of the workability of the enactment, not leave it wholly ineffective. However, there is no duty upon the Court to supply language or otherwise eke out the frailty or ineffectiveness of the words used and give them a meaning which in their plain, ordinary and popular sense, they do not bear. It is true that there is some latitude allowed where the context shews that words must be understood in some other meaning to give effect to the intention and where the words have by any usage of trade or custom, obtained some particular signification. The present case though, in my opinion, has no features of this character. The language is precise and there is little, if any, room for it to be said that there is ambiguity.

MCPHILLIPS, J.A.

The learned counsel for the Crown pressed for the construction that if the person proposed to be deported was an alien that the fact that he was a Canadian citizen or a person having Canadian domicil mattered not; that the deportation could be insisted upon even as against one who was a Canadian citizen or one having Canadian domicil. It may be effectively said at the outset, to construe the language used (as contained in the two sections) as not meaning that a Canadian citizen or one having Canadian domicil is to be subject to deportation, will not have the effect of making the enactment wholly ineffective or meaningless, as there are thousands of aliens in Canada who are not Canadian citizens and thousands likewise who have not

attained Canadian domicil so that the enactment is capable of operation and being enforced as against aliens not being Canadian citizens, or those having Canadian domicil. To arrive at a conclusion in the matter it is well to study the words in 10B: "And deported in accordance with section 43 of The Immigration Act."

What other meaning can be attributed to these words than complete compliance with section 43, and that plainly inhibits the deportation of Canadian citizens and those having Canadian domicil? And it may be said that the inhibition is reasonable and such an inhibition as one would look for. What right is there to banish citizens of Canada from their country? Further, under international law, would it be fitting to deport citizens of Canada to another country? There can only be one answer to these questions. Parliament has in no unmistakable language indicated that certain persons shall not be deported. And it is impossible, in my view, to construe the legislation otherwise.

In pursuing the inquiry, it is pertinent to note what meaning is attachable to the word "accordance." The Century Dictionary gives the meaning as "The state of being in accord; agreement with a person; conformity to a thing; harmony."

Now, viewing the matter in the light of these meanings, is it not well indicated that there cannot be deportation "in accordance with section 43" if the proposed deportation is not in accord or in harmony with the language of the section? *i.e.*, here we have the attempt made to deport a person who, under the section, is exempt from deportation. It was a simple matter for Parliament to have used apt words to effectuate the intention, if it was the intention to deport Canadian citizens and those having Canadian domicil. It has been repeatedly held by eminent judges that they should lean towards that construction that makes for the liberty of the subject, leaving it to Parliament to in precise terms prescribe any curtailment of liberty or deprivation of *status*. I had occasion to deal with this subject in *In re Immigration Act and Mah Shin Shong* (1923), 32 B.C. 176 at p. 182, and since then we have had the illuminative judgment of the House of Lords, in the case of *Secretary of State for Home Affairs* v. *O'Brien* (1923), A.C. 603 at pp. 609-11; 631, 633-5; 637-46; and at p. 638, Lord Shaw in his speech said:

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"If release was refused, a person detained might—see *Ex parte Partington* (1845), 13 M. & W. 679, 684—make a fresh application to every judge or every Court in turn, and each Court or judge was bound to consider the question independently and not to be influenced by the previous decisions refusing discharge. If discharge followed, the legality of that discharge could never be brought in question."

That the learned Chief Justice of British Columbia had jurisdiction to make the order appealed from, I have no doubt. Again, if the Legislature intended, in giving the right of appeal in *habeas corpus* to limit the right of application for the writ to a single judge, *i.e.*, intended to do away with the well-understood practice that application could be made from judge to judge, even of the same Court, then we should expect to have the apt words used in the legislation, and they are not to be found. Therefore, I unhesitatingly am of the opinion that there has been no disturbance of the practice which has long obtained in this as well as other Provinces of Canada.

MCPHILLIPS, J.A.

With regard to the contention made that it was not open to make another application for a writ of *habeas corpus* following an appeal to this Court, which was unsuccessful, I cannot see that there is any point in this. The application made was upon new material, and the considerations which weigh in other cases have no relevancy in *habeas corpus* proceedings.

I would dismiss the appeal.

EBERTS, J.A.

EBERTS, J.A. would allow the appeal.

Appeal allowed, McPhillips, J.A. dissenting.

Solicitors for appellant: *Congdon, Campbell & Meredith.*
Solicitor for respondent: *A. J. B. Mellish.*

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Criminal law—Speedy trial—Preferring new charge—Election—Criminal Code, Secs. 273, 825 and 834.

The defendant was committed for trial on a charge under section 273 of the Criminal Code for that he "unlawfully with intent to resist his lawful apprehension shot a rifle at Provincial Constable Carr, and Inspector A. E. Ackland, R.C.M. Police." Upon the accused being brought up to elect counsel for the Crown handed the judge a new count that he "unlawfully with intent to do grievous bodily harm to Provincial Constable Carr and Inspector A. E. Ackland, R.C.M. Police, shot at said Carr and Ackland contrary to section 273 of the Criminal Code of Canada." The judge then apprised the accused of the nature of the charge on which he was committed and also of the new charge that he had just received. Then, the accused being asked to elect, elected to be tried before the learned judge without a jury. On the objection that the learned judge had no jurisdiction to add the second count until the accused had elected upon the charge upon which he had been committed:—

Held, McPHILLIPS, J.A. dissenting, that in effect that was what took place. On accused coming before him for election he apprised him of the original charge and the count proposed to be added, and accused being asked to elect he did so on both, and the judge's assent to the proposed new count was then added as evidenced by his conviction on that count.

Per McPHILLIPS, J.A.: The action of the Police Provincial and the Royal North West Mounted Police in entering the prisoner's house at night without a warrant when he was not charged with any crime or liable to arrest under the Criminal Code was an illegal and improper invasion of the prisoner's house. The prisoner's action in shooting off his rifle was in the circumstances justified and further the onus that was on the Crown to establish "intent to do grievous bodily harm" was not discharged.

APPEAL by accused from the conviction by YOUNG, Co. J., on the 7th of September, 1923, on a charge of having unlawfully with intent to do grievous bodily harm to Provincial Constable Carr, and Inspector A. E. Ackland of the R.C.M. Police shot at the said Carr and Ackland contrary to section 273 of the Criminal Code. The facts are that on the 22nd of August, 1923, one Jeffrey reported to Constable Carr that Stanyer had pointed a loaded revolver at him and on that evening Carr, with Inspector Ackland and other constables, went to Stanyer's

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house to arrest him. On arriving there Carr and Ackland went to the front door and after knocking they entered when Stanyer fired two shots from a rifle from his bedroom through a partition in the direction of the policemen. The policemen then went out but stayed on guard until morning when Stanyer called them in and submitted to arrest. The charge upon which he was committed for trial was having unlawfully with intent to resist his lawful apprehension shot a rifle at Constable Carr and Inspector Ackland contrary to section 273 of the Criminal Code. Upon being brought before the learned judge to elect a further count was added (first above recited). The learned judge then advised the accused of the charge upon which he was committed also of the new count that was added and then asked him to elect when he decided to be tried before the learned judge without a jury. He was found guilty on the added count and sentenced to twelve months' imprisonment with hard labour.

Statement

The appeal was argued at Vancouver on the 7th of November, 1923, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Stuart Henderson, for accused: The accused must make his election on the charge upon which he was committed before the new count is added: see sections 825 and 834 of the Criminal Code. The judge never gave his consent to preferring the second charge as required by said section 834: see *Rex* v. *Carriere* (1902), 6 Can. Cr. Cas. 5; *Rex* v. *Cohon* (1903), *ib.* 386; *Abrahams* v. *Reginam* (1881), 6 S.C.R. 10; *Rex* v. *Wilson* (1913), 22 Can. Cr. Cas. 161. There is no jurisdiction when there is lack of consent of the judge: see *Rex* v. *Tetreault* (1909), 17 Can. Cr. Cas. 259; *Rex* v. *Jim Goon* (1916), 22 B.C. 381; *Rex* v. *Iman Din* (1910), 15 B.C. 476; *Goodman et al.* v. *Reginam* (1883), 3 Ont. 18; *Reg.* v. *Lonar* (1923), 25 N.S.R. 124. The cases under the old law before the amendment are in Tremeear's Criminal Code, 1919, at p. 1149; *Rex* v. *Blanchet* (1919), 36 Can. Cr. Cas. 10; *Rex* v. *Trefiak* (1919), 2 W.W.R. 794; 31 Can. Cr. Cas. 151; *Rex* v. *Bobyck* (1919), 32 Can. Cr. Cas. 26.

Argument

Craig, K.C., for respondent: The judge can explain the charge on which the prisoner is sent up for trial and then state the substance of the added charge without waiting for the prisoner to answer the first and he can then ask him how he will be tried and the prisoner can then elect on both charges together: see *Rex* v. *Jim Goon* (1916), 22 B.C. 381 at p. 390. It is presumed everything required was done until the contrary be shewn: see Tremeear's Criminal Code, 1919, p. 1143.

Argument

Henderson, in reply.

Cur. adv. vult.

13th December, 1923.

MACDONALD, C.J.A.

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

MARTIN, J.A.

MARTIN, J.A. would dismiss the appeal for the reasons given by GALLIHER, J.A.

GALLIHER, J.A.: At the close of the argument, there was only one point raised by Mr. *Henderson* counsel for the appellant, upon which I required further time for consideration.

The charge as originally laid and upon which the accused was committed for trial, was under section 273 of the Criminal Code, for that he "unlawfully with intent to resist his lawful apprehension, shot a rifle at Provincial Constable Carr and Inspector A. E. Ackland, R.C.M. Police." Upon being brought before YOUNG, Co. J. to elect, a further count was added to this effect: "that at the time and place aforesaid, he did unlawfully with intent to do grievous bodily harm to the said Provincial Constable and Inspector, shoot at them contrary to section 273 of the Code."

GALLIHER, J.A.

I gather from the appeal book that what took place was this: When the accused was brought up to elect, the Crown had handed in to the judge, the new count, and that the judge apprized the accused of the nature of the charge on which he had been committed, and also the proposed new count to be added, whereupon the prisoner being asked to elect, elected to be tried before the learned judge without the intervention of a jury.

Mr. *Henderson's* argument is shortly this: That the learned judge had no jurisdiction to add the second count until the

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accused had elected upon the charge upon which he had been committed. In other words, that the accused should have been asked to elect on the original charge and having elected for speedy trial, the new count should then have been read to him and on that also he should have been asked to elect, when having elected for speedy trial on that count, the count should then, and not till then, have been added. Had matters proceeded in the sequence, there could have been no doubt, but in effect, is not that what actually took place? I agree that the learned judge would not be seized of jurisdiction to add the count until the accused had elected.

GALLIHER, J.A.

I see no reason why the learned judge, on the accused coming before him for election, could not apprize him, as he appears to have done, of the nature of the original charge and the count proposed to be added, and ask the prisoner to elect as to both, and the accused having elected on both, the learned judge's assent to the proposed new count then being added, is evidenced by his proceeding with the trial, and convicting on that count.

MCPHILLIPS, J.A.: This appeal brings up for consideration the question of the liberty of the subject in a most graphic way, and demonstrates conduct upon the part of the Provincial constable and officer of the Royal Canadian Mounted Police, that cannot meet with the approval of this or any other Canadian Court. It astounds one that police officers should be so ignorant of their duty to proceed as they did (if not ignorant, then all the more reprehensible was their conduct), in the dead of night, in pitch-black darkness, at about 1 a.m., they, in number some six in all, all armed, surround the house of the prisoner, knowing him and his wife and family, a large one, to be in bed, some of the children being very young and the attempt is made to make entry into the house, the locality being one remote from any settlement in the wild north land. Can it be wondered at that trouble ensued? The officers of the law admittedly had no warrant for the arrest of the prisoner, and even after all the occurrences took place, no attempt was made to arrest the prisoner. Under the Criminal Code (section 273) intent to do grievous bodily harm has to be

established by the Crown, and there is no evidence whatever of this; in truth there is the most positive evidence to the contrary upon the part of the prisoner and his wife—in any case that onus was and always is upon the Crown. The inspector of the Royal Canadian Mounted Police had the effrontery to call out to the prisoner to open the door of his house in the dead of night, using these words, "I want you to open this door in the name of the law," without having one vestige of legal right to make the demand. The prisoner was not then charged with the commission of any crime, nor was there a warrant out for his arrest, and it is not contended that any crime had been committed by the prisoner up to this time. It must be conceded that the police were proceeding without legal authority in their attempt to make entry into the house of the prisoner. Therefore, the fact that the attempt was made by the police differs not from the attempt of any other person or persons to make entry into another's house without colour of right. Commencing at this point then, what were the rights of the prisoner—was he not entitled to resist the attempt to forcibly enter his house especially considering the time of night and all the surrounding circumstances? In truth his house was under seige by no less than six armed police, the prisoner then being in bed and the natural guardian of his wife and children. To attempt to say what should or should not have been done in this situation is a matter of difficulty. In passing, this may be said, that all of the police may well thank Providence that they are alive today. Had any one of them lost his life it could have been well said that it was owing to crass blundering and illegal conduct and against the well understood and well followed constitutional rights of all British subjects that they are to be left undisturbed in their homes and their liberty unaffected, save due process of law otherwise ordains, and here there was the entire absence of this. More could not have been done where martial law had been proclaimed, and it was soldiery who were acting in the matter. It passes comprehension that in Canada we should have such flagrant and illegal conduct at the hands of the police, subversive of all the traditional and constitutional rights of His Majesty's subjects. It is not a

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matter that can be glossed over or looked upon with equanimity, it must be condemned in the most positive way, if not, the country and the people will be at the mercy of bandits masquerading in the guise of police officers. Could it be thought that men, really officers of the law would proceed in this way? Rather should we say "they could not have been police, they must have been robbers, burglars or bandits, attempting to make entry into the house, under the spurious claim that they were officers of the law." Was the prisoner bound, even with the statement "An officer of the Mounted Police" to admit the man? I unhesitatingly say no, he was not, and he was right in saying "Then get back on to the road." The attempt to make entry was without justification, he was without a warrant, and the circumstances were not such as entitled an arrest to be made without a warrant.

It is attempted to be said that later the prisoner said, "Come on in." This is denied by the prisoner and his wife. They agree that what was said was, "Don't come in," and it is plain in view of the circumstances that no permission was given to the inspector to enter the house, nevertheless, he did enter and a little later two shots were fired, but no one was wounded, and the evidence establishes that the shots were not fired at any one, but merely into the staircase or partitions in the house. There was no intent to do grievous bodily harm, and the shots may be said to have been reasonably fired to preserve the privacy of the home and in protection of the family. It is difficult, indeed, to lay down the extent or latitude the prisoner should be admitted to have in view of all the circumstances, and whether the shots fired were in excess of the force necessary to preserve the privacy and sanctity of the home and in prevention of an illegal trespass upon the land, and a threatened illegal trespass to the person of the prisoner—it is a nice question. I must confess that I hesitate to say that the prisoner exceeded his legal right in view of all the circumstances. I venture to think that many of the most law-abiding citizens in this very city would treat people who proceeded as these police officers did, in like manner. The shots were fired to intimidate and drive away the

MCPHILLIPS, J.A.

violators of the law, and who can say that there was any excess of force? It was not the case of the intention to do grievous bodily harm, as no one was aimed at, or any reasonable belief that any one would be hit by the shots. It might well be, though, that upon the facts of the present case, that even might have been justifiable.

The prisoner had been guilty of no crime whatever when this illegal invasion of his home was made; further, the police officers knew that he was greatly aroused, and justifiably, by the fact that a man had contrary to law, run off with his daughter of tender years, an infant in the eye of the law, and married her without the consent of the parents, the father of the young girl smarting under this affliction and carried out of himself had the added insult to his feelings of an illegal raid made upon his home by police officers in the dead of night, unsupported by a warrant or other legal authority, thus violating the privacy and sanctity of his home, being an illegal attempt to place him under arrest and deprive him of his liberty. The illegality of this conduct, and the callousness of it all really beggars description; it makes one question whether we really have in Canada a free country. Incidents of this kind cannot and must not be passed over. The Courts are the last bulwark of the people, the traditional and constitutional rights of the people must be maintained.

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Then as to the extent to which a person may protect himself and his family in his dwelling-house. It is well to remember that the law admits of very drastic protection, *i.e.*, it is permissible in the dwelling-house to have a spring gun, man trap, or other engine calculated to destroy life, and with the intent of destroying or doing grievous bodily harm to trespassers, set for the protection of the dwelling-house in the night time, therefore the firing of shots cannot be said to be in effect, the doing of more than one is entitled to if the analogy of the statute law is given effect to (see Indermaur's Principles of Common Law, 12th Ed., 378; 24 & 25 Vict., c. 100, s. 31; re-enacting 7 & 8 Geo. IV., c. 18, and this Province took the Laws of England as same existed on the 19th day of November, 1858—Cap. 75, R.S.B.C. 1911). It is to be remembered

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here that these police officers were armed and in this connection it is useful to note that there is authority for assault and battery in defence of one's property, whether real or personal, and it is perfectly justifiable (see Blackstone's Commentaries, Lewis's Ed., Vol. 3, p. 120; Addison on Torts, 8th Ed., 162-164, Indermaur, at pp. 377-8).

It is true that the force used ought not to be more than is necessary, but in this "the original act to prevent which it was necessary to resort to defence must be looked to" (see Indermaur at p. 377). Here we have armed men attempting to forcibly enter the prisoner's dwelling-house in the dead of night.

In passing it may be further said, that "a person is also justified in forcibly defending the possession of his land against any one who attempts to take it": see Indermaur, at p. 342; *per* Fry, J., in *Edwick* v. *Hawkes* (1881), 18 Ch. D. 199; 50 L.J., Ch. 577; *Tullay* v. *Reed* (1823), 1 Car. & P. 6).

The fundamental principle of law that always governs is was necessary to resort to defence must be looked to" (see *Semayne's Case* (1604), 1 Sm. L.C., 12th Ed., 115; 5 Co. Rep. 91).

In *Meade's and Belt's Case* (1823), 1 Lewin, C.C. 184, Holroyd, J., said:

MCPHILLIPS, J.A.

"But the making of an attack upon a dwelling, and especially at night, the law regards as equivalent to an assault on a man's person; for a man's house is his castle, and therefore, in the eye of the law, it is equivalent to an assault; but no words or singing are equivalent to an assault, nor will they authorize an assault in return."

Therefore, in my opinion, as a matter of law, the judgment cannot be supported, in that firstly, there is no evidence upon which the charge laid can be supported; secondly, no intent to do grievous bodily harm was established, and that onus was upon the prosecution. Then, quite apart from all the foregoing, there was error in law in that the charge upon which the prisoner was convicted was an added charge and was made after the prisoner had elected to be tried in the County Court Judges Criminal Court upon the first charge—which was of having unlawfully with intent to resist his lawful apprehension, shot a rifle—admittedly the prisoner could not be effectually

charged for the perpetration of any such crime—and it was to that charge only he made his election. No election was made to the added charge, therefore there was no jurisdiction whatever in the learned judge to proceed with the trial of the prisoner upon this added charge, and the conviction thereon cannot stand upon this point alone.

Further, there was want of jurisdiction in that the conviction was on the added charge which was never formally before the Court, the consent of the judge not having been previously given therefor. The want of jurisdiction alone is sufficient to displace the conviction, as it is evident that the conditions precedent were not complied with, and there was no election to be tried upon the added charge upon which the conviction was made, but if I were in error in this, the judgment in my opinion, cannot stand, for the already stated reason, *i.e.*, that no offence under section 273 of the Criminal Code was made out, there being an absence of any intent to do grievous bodily harm. Finally, in view of all the circumstances, there is no evidence to support the conviction, and this is a point of law. The judgment is unreasonable, and cannot be supported and should be set aside and a judgment of acquittal entered.

MCPHILLIPS, J.A.

In arriving at my conclusions, the following authorities, amongst others, were considered: *Rex* v. *Carriere* (1902), 6 Can. Cr. Cas. 5; *Abrahams* v. *Reginam* (1889), 6 S.C.R. 10; *Rex* v. *Tetreault* (1909), 17 Can. Cr. Cas. 259; *Goodman et al.* v. *Reginam* (1883), 3 Ont. 18; *Rex* v. *Trefiak* (1919), 2 W.W.R. 794; *Rex* v. *Bobyck* (1919), 32 Can. Cr. Cas. 26.

I would therefore quash the conviction, and direct a judgment of acquittal to be entered. Even if it could be said that there was some evidence upon which the conviction could be based, the errors in law would entitle the prisoner to a new trial, particularly upon the ground that the conviction was upon the added charge, not consented to by the judge and to which the prisoner never elected to be tried before the County Court judge.

EBERTS, J.A. would dismiss the appeal.

EBERTS, J.A.

Appeal dismissed, McPhillips, J.A. dissenting.

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Nov. 9.

MINISTER OF FINANCE v. CALEDONIAN INSURANCE CO.

MINISTER OF FINANCE v. CALEDONIAN INSURANCE COMPANY. *IN RE* LAND REGISTRY ACT AND HIGGINSON.

Practice—Application for leave to appeal to the Supreme Court of Canada —Action involving interpretation of Succession Duty Act and Land Registry Act—R.S.B.C. 1911, Cap. 217—B.C. Stats. 1921, Cap. 26—Can. Stats. 1920, Cap. 32.

On a petition for an order directing the registrar of titles to register a title clear of a lien claimed on behalf of the Crown for succession duty, it appeared the lot in question had been sold under agreement for sale by a former owner who died before the final payment was made. A bond by a guarantee company was accepted to cover the succession duty on the estate and the executor on receiving the final payment conveyed the lot to the purchaser. A subsequent owner obtained an indefeasible title and then mortgaged to the petitioner who subsequently obtained judgment in a foreclosure action. A caution was then filed against the property by the minister of finance under section 50 of the Succession Duty Act. It was held by the Court of Appeal that the lot was not subject to the succession duty claimed. On an application for leave to appeal to the Supreme Court of Canada:—

Held, that as it is a matter of some importance and of grave concern as to land titles, the Act being somewhat ambiguous, it is a proper case for granting leave to appeal.

MOTION on behalf of the Minister of Finance to the Court of Appeal for special leave to appeal to the Supreme Court of Canada from the decision of the Court of Appeal of the 2nd of October, 1923, reported *ante* p. 29, on appeal from the decision of MCDONALD, J. of the 12th of January, 1923, on a petition of the Caledonian Insurance Company for an order directing the registrar of titles to register the title of lot 16, block 390, subdivision of district lot 526, group 1, New Westminster district clear of encumbrances particularly of a lien claimed by the Crown. One, T. S. Higginson purchased the lot in question on the 18th of April, 1911. On the 24th of April, he applied to register the conveyance but registration was not completed until the 8th of March, 1922. Prior to his death Higginson sold the lot under agreement for sale to Messrs. Stonehouse & Carlow for $6,000. On the 15th of September, 1911, Higgin-

Statement

son died and at that time there was still owing to him on the purchase price of the lot the sum of $1,207.84. The succession duty on the Higginson estate was fixed at $1,864.55 by the treasury department and the surviving executor of the estate and the U.S. Fidelity & Guaranty Co. entered into a bond in the penal sum of $10,000 conditional upon payment of the succession duty. On the 29th of November, 1911, the balance being paid on the above lot the executor conveyed to Stonehouse & Carlow. After *mesne* conveyance a certificate of indefeasible title of said property was issued to G. A. Arbuthnot on the 10th of December, 1912, who mortgaged the property to the petitioner the Caledonian Insurance Company to secure an advance of $8,000. Later the petitioner brought an action for foreclosure, filed a *lis pendens* against the property, and obtained judgment on the 29th of May, 1922. On the 5th of June, 1922, the Minister of Finance registered a caution pursuant to section 50 of the Succession Duty Act claiming succession duty for the whole property in respect to the estate of T. S. Higginson. The registrar refused to register the petitioner's title except subject to the lien for succession duty in respect of the estate of the said T. S. Higginson. It was held by the trial judge that T. S. Higginson was at the time of his death possessed of an interest in the said property being the sum of $1,207.84 the sum still due him on the sale of the property and the property is subject to a lien in favour of the Crown for the succession duties payable in respect of the interest of the estate as above stated. The Crown appealed claiming that the interest of Higginson was subject to a lien in favour of the Crown for all succession duties properly payable in respect of the whole estate and the petitioner cross-appealed claiming the property had been transferred prior to Higginson's death and the said lands were not subject to any succession duty and further the issuing of an indefeasible title to G. A. Arbuthnot a predecessor in title was a bar to any claim for succession duty against the property. The appeal was dismissed and the cross-appeal allowed.

Statement

The motion was heard by MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A. at Vancouver on the 9th of November, 1923.

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D. Donaghy, for the motion.
Alfred Bull, contra.

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MINISTER OF FINANCE v. CALEDONIAN INSURANCE CO.

MACDONALD, C.J.A.: This is a case of some importance. It is a matter of grave concern to a great many people as to what titles they may take and what they may not, and the Act is somewhat ambiguous. While the Legislature could have amended it, it has not done so.

I think it is a proper case for granting leave to appeal, and I do not think under the circumstances terms ought to be imposed.

MACDONALD, C.J.A.

MARTIN, J.A.: I agree. The case comes within the principle this Court has laid down of granting leave in vexed questions of general public importance. Under the statute we have jurisdiction to grant such leave without the imposition of terms.

MARTIN, J.A.

GALLIHER, J.A.: I would grant the application. I do not think we should make any exception in this case.

GALLIHER, J.A.

MCPHILLIPS, J.A.: I would grant leave. What this Court must do in these applications is, first to decide whether the matter is one of great public importance; here a statute is under review. That, in itself, when a public general statute is under review upon an important point for the first time constitutes a sufficient ground. We have no authority and no warrant to impose terms.

MCPHILLIPS, J.A.

Motion granted.

ROLSTON v. SMITH.

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Nov. 14.

ROLSTON v. SMITH

Practice—Appeal—Expiration of time for giving notice—Illness of appellant and her solicitor cause of delay—Application to extend time—Preciseness of evidence in support.

An application to extend the time for giving notice of appeal after the expiration of the statutory period will not be granted if there is reasonable doubt of the soundness of the ground upon which the application is made.

Where, on such an application, the excuse for delay was the illness of the applicant and of her solicitor the evidence in support must shew precisely that the severity of the illness and the period it covered reasonably precluded the possibility of giving notice of appeal within the statutory period.

MOTION to the Court of Appeal for an order extending the time for appealing from the decision of SWANSON, Co. J. Judgment was delivered in the Court below at Vernon on the 21st of June, 1923. The defendant (appellant) was in Toronto at this time taking medical treatment and her evidence used on the trial was taken by commission in Toronto, her husband in Vernon looking after her affairs. She was advised by her solicitor, Mr. *W. H. D. Ladner* of the decision in the Court below and she requested her husband by letter to discuss with Mr. *Ladner* the advisability of an appeal. They decided upon obtaining the advice of Mr. *Mayers* who on the 8th of August advised an appeal. Mr. *Ladner* sent a copy of the opinion to the defendant's solicitor in Toronto, but owing to defendant's illness at the time from ulcers of the stomach and general nervous breakdown she did not give instructions to her husband until the middle of September and the husband was further detained by Mr. *Ladner's* illness which kept him from his office from the time Mr. Smith received instructions to appeal until after the 21st of September, when the time for appeal had expired.

Statement

The motion was heard by MACDONALD, C.J.A., MARTIN and GALLIHER, JJ.A. at Vancouver on the 14th of November, 1923.

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Nov. 14.

ROLSTON v. SMITH

Mayers, for the motion.
McPhillips, contra.

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

I do not think a case has been made out for the extension of time. Special circumstances must be shewn when the time has expired and a vested right has accrued to the plaintiff. In such case the authorities shew, both here and in England, that the Court will not interfere if there be reasonable doubt of the soundness of the ground upon which the application is made. In this case I am not at all satisfied with defendant's affidavit or the affidavit of Mr. *Ladner*. The defendant makes more or less indefinite statements about her illness and draws certain conclusions from that and makes certain statements based upon it. But she has not done what was the obvious thing to do and which her solicitor must have known was the obvious thing to do. For instance, when she received the letter of advice from Mr. *Mayers* she should have shewn what was her condition at that time and if ill how long her illness continued. That she has entirely failed to do and therefore I think she has not made out a case for extension.

MACDONALD, C.J.A.

MARTIN, J.A.: I am not without some doubt in arriving at the conclusion that this motion should be allowed. I quite appreciate what my brother has said about the matter not being as precise in some respects as it might be; particularly in regard to the affidavit of the defendant's solicitor. Nevertheless, I do think that on the consideration of the whole affidavit it makes out a *prima facie* case—not a strong one—but one sufficient to support her application and therefore I think it should be allowed. It is only a matter of what inference should be drawn from this affidavit as to her real condition.

MARTIN, J.A.

GALLIHER, J.A.: In my opinion a proper case has not been made out and I think the application should therefore be dismissed.

GALLIHER, J.A.

Application dismissed, Martin, J.A. dissenting.

HADDOCK v. NORGAN.

MCDONALD, J.

1923

Dec. 10.

HADDOCK v. NORGAN

Vendor and purchaser—Oral contract for sale of land—Specific performance—Statute of Frauds—Part performance—Failure of vendor to register title—B.C. Stats. 1921, Cap. 26, Sec. 31.

The plaintiff entered into a written agreement with the owner of a property to construct a house thereon and at the same time obtained an option for a certain period to purchase lands and building for $4,200. On the house nearing completion, and before the expiration of the option, the defendant, who had employed W. a broker, to procure him a suitable house for his parents, was shewn the plaintiff's house, and on negotiating with one of the brokers with whom the house was listed, agreed to purchase for $5,150 and paid $100 on account as a deposit, agreeing to close the sale at his solicitor's office that afternoon. The defendant did not turn up to complete the sale but W. in the meantime, acting under the defendant's instructions, obtained the key to the house and installed defendant's parents with their furniture three days later. Defendant then decided not to complete the purchase and buying another house moved his parents into it two days later. In an action for specific performance of the contract or in the alternative damages:—

Held, that as there was a parol agreement complete in all its terms followed by the taking of possession by the defendant with the consent and knowledge of the plaintiff which possession was referable to the agreement and to that only, the plaintiff is entitled to specific performance.

Held, further, that the prohibition in the last clause of section 31 of the Land Registry Act, B.C. Stats. 1921, does not apply to a cash sale, and the plaintiff is entitled to a decree for specific performance notwithstanding the fact that the title remained registered in the name of his vendor.

ACTION for specific performance of an agreement for the sale of land or in the alternative for damages suffered by him by reason of the defendant's occupation of the premises in question. The facts are sufficiently set out in the head-note and reasons for judgment. Tried by MCDONALD, J. at Vancouver on the 30th of November, 1923. Statement

E. A. Burnett, for plaintiff.

Dorrell, and *Donald Smith*, for defendant.

10th December, 1923.

MCDONALD, J.: On 1st March, 1923, the plaintiff entered into a written agreement with one Noran, the registered owner of the lands in question in this action, whereby the plaintiff agreed to construct a house upon the said lands, and was given an option, exercisable at any time until the 31st of October, Judgment

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1923, to purchase the lands and building for the price of $4,200. A further agreement, dated 31st October, 1923, extending the period of the option for a reasonable time after the trial of this action was tendered in evidence. I reserved the question as to its admissibility in evidence, and now hold that inasmuch as it came into existence after the delivery of the statement of defence in this action, it is not admissible.

Some time prior to 7th September, 1923, when the house above mentioned was practically completed, the defendant employed one West, a real-estate broker, to procure for him a house in the City of Vancouver, suitable as a residence for the defendant's father and mother, who were coming to Vancouver to reside. West shewed the defendant several houses, and finally shewed him the house in question, stating that the owner was asking for it a price of $6,500. Defendant stated that the price was too high. West then saw Messrs. Knowles & Co., with whom, among other real-estate agents, the house had been listed by the plaintiff for sale. After some negotiations it was arranged between West and Knowles & Co., that the agents should make a reduction in their commission and an endeavour should be made to effect a sale to the defendant Norgan at $5,150. West went to Norgan on Friday, the 7th of September, 1923, and the latter agreed to purchase for cash at the latter price, and gave West his cheque for $100 to pay as a deposit.

Judgment

West reported this to Knowles & Co., and endorsed to them the cheque. Knowles's representative and West then went to the plaintiff who agreed to accept $5,150 cash, and agreed further, at West's request, to put certain moulding on the stairway and oil the upstairs floors, which work was done. Of the $100 deposit, $50 was paid to Haddock and the remaining $50 was retained by Knowles & Co., on account of their commission. It was at the same time arranged that the plaintiff should attend that afternoon at three o'clock at the office of his solicitor, Mr. Daykin, and close the transaction. The plaintiff did so attend with Noran, the registered owner, and a conveyance of the property was executed by Noran direct to the defendant. This conveyance, together with Noran's certificate of indefeasible title and a certificate of encumbrance, were left with Mr. Daykin with instructions to deliver the same on receipt of $5,050.

Neither at three o'clock on that day nor on any other day did the defendant or his agent West attend for the purpose of completing the transaction, though Mr. Daykin has at all times been ready and willing to deliver the said documents upon receipt of payment.

Meanwhile the defendant's father and mother had arrived with their furniture, and were living in a suite under an arrangement whereby, if they did not vacate by Monday, the 10th of September, they would be liable for another month's rent. West acting, as I hold, within the scope of the authority given him by the defendant, if not in exact words, at least by implication, knowing the situation in which the defendant's parents were placed, and being deputed by the defendant (a very busy man) to procure a home for them, obtained, with the plaintiff's consent, the keys of the premises on Saturday, the 8th of September, with the result that by Monday, the 10th of September, the defendant's parents had moved their furniture into the house. About this time the defendant decided not to complete his purchase and so advised Knowles & Co. and bought another house. On Wednesday, the 12th of September, the defendant removed the furniture from the house.

The premises were damaged to an amount which I fix at $250, by reason of the rough and careless manner in which the furniture was moved about, and by the carelessness of the occupants.

Judgment

In reaching the above conclusion upon the facts, I have, where the defendant's evidence was at variance with that of the plaintiff, accepted the evidence of the plaintiff, partly by reason of the fact that the defendant was an unsatisfactory and a hesitating witness, who neither in his conduct prior to the trial, nor in giving his evidence, acted with entire candor.

The plaintiff sues for specific performance of the contract, and in the alternative for damages suffered by him by reason of the defendant's occupation of the premises. It is admitted there is no contract in writing to satisfy the Statute of Frauds, the only document in existence being a receipt to Knowles & Co. signed by the plaintiff on the 7th of September, 1923, for $50, but the plaintiff relies upon the fact that there has been such partial performance of the contract as to exclude the operation of the statute. Inasmuch as there was here a parol agree-

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ment complete in all its terms, followed by the taking of possession by the defendant (by his duly authorized agents) with the consent and knowledge of the plaintiff, which possession was referable to the agreement and to that only, the law seems to be clear that the plaintiff is entitled to specific performance of the agreement. See Fry on Specific Performance, 6th Ed., pars. 602, 603 and 604; *Morphett* v. *Jones* (1818), 1 Swanst. 172 at p. 174; *Ungley* v. *Ungley* (1877), 5 Ch. D. 887; *McLaughlin* v. *Mayhew* (1903), 6 O.L.R. 174; *Carr* v. *Canadian Northern Ry. Co.* (1907), 17 Man. L.R. 178.

It is contended, however, that the plaintiff cannot succeed by reason of the provisions of section 31 of the Land Registry Act, B.C. Stats. 1921, Cap. 26. Prior to the amendment to that section, adding the last clause thereof, it had been held by MACDONALD, J., in *McDonnell* v. *McClymont* (1915), 22 B.C. 1; 8 W.W.R. 990, that the failure of a vendor to register his title did not preclude him from bringing an action to recover money due under a covenant contained in an agreement for sale, reference being made by the learned judge to the decision of MURPHY, J., in *Thomson* v. *McDonald and Wilson* (1914), 20 B.C. 223, affirmed by the Court of Appeal.

It seems obvious that the additional clause now contained in paragraph 31 was passed for the purpose of making it clear that no such action upon any covenant in such agreement or sub-agreement shall be brought unless and until the vendor has registered his title. There being, however, no such prohibition with regard to a cash sale or to a conveyance, it seems to me that the plaintiff is entitled to a decree for specific performance notwithstanding that the title still remains registered in the name of Noran.

Judgment

It may be noted also, that the person actually conveying the land to the defendant in the present instance, is Noran, whose title is registered, and the delivery of a conveyance direct from Noran to the defendant would appear to be a sufficient compliance with the plaintiff's obligation to convey on receipt of his purchase-money. *Foote et al.* v. *Mason et al.* (1894), 3 B.C. 377 at p. 381.

There will be judgment accordingly for the plaintiff for specific performance.

Judgment for plaintiff.

IN RE HALL, DECEASED.

MCDONALD, J. (At Chambers)

1923

Dec. 11.

IN RE HALL, DECEASED

Husband and wife—Will of deceased husband—No provision for wife—Testator's Family Maintenance Act—Wife's petition for relief—Discretion of judge—B.C. Stats. 1920, Cap. 94.

The Testator's Family Maintenance Act provides that where any person dies leaving a will without making adequate provision for the proper maintenance and support of the testator's wife, husband or children, the Court may, at its discretion order that such provision as it thinks adequate, just and equitable be made out of the estate of the testator for such wife, husband or children.

Husband and wife were married in 1898, and lived together until 1915, when they separated. At the time of the husband's death in May, 1923, the wife owned a property in Victoria upon which were two cottages assessed at $4,400 and from the operation of a boarding-house she realized a gross income of about $50 a month. The husband by will bequeathed all his property to another woman which consisted of liquid assets of the net value of $13,699.37. On the wife's petition for relief under the above Act, it was ordered that sufficient money should be invested by the executor and trustee under the testator's will in securities authorized by law for trust funds, to create a net income of $550 per annum payable to the wife quarterly.

PETITION by Nellie Hall, widow of Albert Henry Valentine Hall, deceased, that adequate provision be made for her out of her husband's estate under the provisions of the Testator's Family Maintenance Act, B.C. Stats. 1920. The facts are set out in the reasons for judgment. Heard by MCDONALD, J. at Chambers in Victoria on the 7th of December, 1923. Statement

Harold B. Robertson, K.C., for the petitioner.
Maclean, K.C., for beneficiary under the will.

11th December, 1923.

MCDONALD, J.: Petition by Nellie Hall, widow of Albert Henry Valentine Hall, who died 21st May, 1923, for an order pursuant to the Testator's Family Maintenance Act (B.C. Stats. 1920, Cap. 94), that such provision be made for her as the Court thinks adequate, just and equitable, out of her husband's estate. Judgment

The petitioner was married to her said husband on the 24th

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of October, 1898. The husband was a carpenter with steady employment, earning $5 to $6 per day, and resided with his wife until the year 1915, when he left her home. In 1910, they had gone to Vancouver where they purchased the lease and furniture of a rooming-house for $1,600, which was advanced by the husband. This rooming-house was sold shortly after for $3,000, the husband receiving thereout $1,600, and the petitioner $1,400. The latter amount was invested by the wife in a rooming-house in Victoria, which she operated for some time and afterwards sold for some $5,000. With the money so received, the petitioner purchased lot 1242, block 29, Victoria City, upon which are situate two cottages. In one of these she lives and keeps two boarders, and the other she rents for an average rental of $20 a month. The property is assessed for $4,400, and taxes are in arrear since 1921. From the operation of the boarding-house she realizes a gross income of some $50 a month.

From all that appears, there was no trouble between the husband and wife until 1914, when the husband commenced an action to have it declared that the above property belonged to him; no pleadings were delivered in this action, nor was it ever proceeded with, nor was any settlement made. In 1915, the husband, as stated above, left the petitioner's home, for the reason, as stated by her, that she objected to his relations with other women.

Judgment

During the years 1916 to 1918, he sent her some small presents, but provided nothing by way of maintenance, as she was able to provide for herself and refused the aid offered by her husband. She has no other means whatever save her income as above set forth. There are no children of the marriage.

At the time of the husband's death he was 52, and the petitioner 48 years of age.

On the 19th of March, 1923, the husband made his will, whereby he bequeathed his property, consisting largely of liquid assets of a net value of $13,699.37, to one Grace Penny Bowden, a stranger, who opposes this application.

On the 27th of September, 1923, the petitioner was cross-examined on her affidavit filed in support of her petition, and

during this cross-examination it was suggested to her that she had been guilty of some improper conduct with one McAlpine, and that her husband in 1914 or 1915 had complained of McAlpine's frequent visits to the house. This charge was emphatically denied, it appearing that McAlpine had been one of the petitioner's lodgers since the year 1916. On 23rd October, 1923, one Coles, the executor and trustee named in the will, made an affidavit to the effect that the testator Hall had, in 1914 and 1915, made complaint to him of his wife's relations with McAlpine, and had stated that either McAlpine must keep away from their house or he (Hall) would leave.

On the 5th of November, 1923, McAlpine made an affidavit that during the whole period, from July, 1912, until 29th January, 1916, he was never at any time in the City of Victoria. Upon this affidavit McAlpine was not cross-examined.

I have not had the advantage of seeing any of the witnesses, but am satisfied from the evidence adduced that if the said charges were made by Hall, they were made without foundation in fact. Certainly, on such evidence, no one would think of convicting the petitioner of any wrong-doing.

Judgment

Upon the above facts I am asked to make such order as ought to be made for an adequate, just and equitable provision for the petitioner out of the testator's estate. Applying as best I can the principles laid down in *Allardice* v. *Allardice* (1911), A.C. 730, and in *In re Livingston, Deceased* (1922), 31 B.C. 468; (1923), 1 W.W.R. 628, I think that under all the circumstances of this case a proper order to make in order to effectuate the purpose of the statute, would be that sufficient moneys should be invested by the executor and trustee under the testator's will, in securities authorized by law for trust funds, to create a net income of $550 per annum, payable to the petitioner quarterly, as from the time of the testator's death. Costs of all parties out of the estate.

Order accordingly.

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1923

Dec. 13.

REX v. MORRISON.

Criminal law — Theft — "Verdict" — "Animus furandi"—Evidence allowed in of criminal acts other than that charged—Admissibility—Criminal Code, Sec. 1014.

REX v. MORRISON

On a charge of theft, evidence tending to shew that an accused has been guilty of criminal acts other than that upon which he has been charged is inadmissible, and when allowed in entitles the accused to a new trial (MCPHILLIPS, J.A. dissenting).

Per MCPHILLIPS, J.A.: That on the evidence no conviction should have been made and the accused should be discharged.

APPEAL from the conviction of accused by HOWAY, Co. J., of the 9th of November, 1923, on a charge of stealing a heifer, the property of Fred and Richard Yeomans, contrary to section 369 of the Criminal Code. The accused lived at Nicomen Island in the County of Westminster about three-quarters of a mile from the farm of one Tipping, an agister, with whom the Yeomans claimed they left the heifer in question and the accused took the heifer away from Tipping's on the 27th of September, 1923. The farmers in that vicinity were in the habit of allowing their cattle to stray on the roads and the accused's story was that he had about 24 head of cattle, 10 being heifers. He allowed his cattle on the road and when rounding them up three heifers were missing. On making a search he found two of the heifers on other people's property and later saw the third one (over which the trouble arose) on Tipping's farm. He went on Tipping's property and took the heifer back to his own farm. Evidence was allowed in that accused had previously committed acts of the same nature as that upon which this charge was made. The accused appealed on the ground that the learned judge erred in allowing in evidence of previous misdeeds and that he misdirected himself.

Statement

The appeal was argued at Vancouver on the 28th of November, 1923, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Argument

Cassidy, K.C. (*Fleishman,* with him), for appellant: Accused

took the heifer from another man's farm thinking it was his own. Evidence of similar acts being allowed in is wrong and naturally affects the accused's case: see *Rex* v. *Iman Din* (1910), 15 B.C. 476 at p. 491. The learned judge misdirected himself as appears on the face of the proceedings. As to "verdict" applying to a decision of the County Court judge see *Rex* v. *Murray and Fairbairn* (1912), 27 O.L.R. 382 at p. 385; *Rex* v. *Tonks* (1916), 1 K.B. 443, and section 1014 of the Criminal Code as re-enacted by section 9, Can. Stats. 1923, Cap. 41. The judge is the same as a jury and subject to the same objections. The accused *bona fide* thought the animal was his and there is no *animus furandi*. On the admissibility of evidence of other criminal acts see *Rex* v. *Redd* (1922), 92 L.J., K.B. 208; *Harry Ratcliffe* (1919), 14 Cr. App. R. 95; *Oddy's Case* (1851), 2 Den. C.C. 264 at p. 269; *Rex* v. *Bond* (1906), 2 K.B. 389; *Herbert Rowse Armstrong* (1922), 16 Cr. App. R. 149. As to the judge misdirecting himself see *Rex* v. *Hayes* (1923), 1 W.W.R. 209; *Allen* v. *Regem* (1911), 44 S.C.R. 331. The onus is on the prosecution: see *Zavil Badash* (1917), 13 Cr. App. R. 17; *Isaac Schama and Jacob Abramovitch* (1914), 11 Cr. App. R. 45; *Rex* v. *Iman Din, supra,* at p. 483. On a criminal appeal all points are open to us whether raised in the notice of appeal or not.

Argument

Petapiece, for respondent: Of the cases referred to the only one applying is *Harry Ratcliffe* (1919), 14 Cr. App. R. 95. As to eliciting evidence of other criminal acts see *Rex* v. *D'Aoust* (1902), 5 Can. Cr. Cas. 407; *Reg.* v. *Connors et al.* (1893), *ib.* 70; *Reg.* v. *Gibbons* (1898), 1 Can. Cr. Cas. 340. On the question of *animus furandi* see Archbold's Criminal Pleading, 26th Ed., 511. As to examining accused on other illegal acts see Phipson on Evidence, 6th Ed., 478.

Cassidy, in reply: In a case such as this where the decree is an unreasonable one the accused should be acquitted; it is not a case for a new trial.

Cur. adv. vult.

13th December, 1923.

MACDONALD, C.J.A. (oral): I think there should be a new trial. The appeal was upon a point of law only. The point

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of law was that there had been wrongful admission of evidence. This, I think, has been established. At the same time I wish to express the opinion, which, I understand, is the opinion of my brothers as well, that the case was one for the civil Courts and not for the criminal Courts. We cannot pass upon the question of fact, but that is the comment I wish to make on the evidence.

MARTIN, J.A. (oral): Because of the judgment just delivered by my brother the Chief Justice it is unnecessary to add much more. I am of opinion that there was no appeal before us on the question of fact, for which no leave was asked, and I do not understand that the appeal was argued on that basis; my notes shew it was not. The case, however, is, as the Chief Justice said, one that should not (I think I ought to say so as to avoid future proceedings) be proceeded further with against the accused, because in the course of the argument it became apparent that he had acted beyond reasonable doubt under colour of right, and where that element is present it negatives the element of *animus furandi,* without which theft cannot be established.

MARTIN, J.A.

GALLIHER, J.A. (oral): I take the same view as the Chief Justice and my brother MARTIN in this case. If it had been really before us to deal with on the question of fact, I can only say that I consider that the element of the colour of right is present and is within the definition of what is necessary to establish when the colour of right is applied or put in as a defence.

GALLIHER, J.A.

MCPHILLIPS, J.A.: This appeal is one from a conviction for the theft of a heifer, the accused being a young man engaged in farming at Nicomen Island.

The learned counsel for the accused, Mr. *Cassidy,* in his very able argument, not only dealt with the evidence exhaustively to demonstrate that the conviction was not sustainable, but dealt with several very important points of law, shewing to my satisfaction that the conviction cannot stand. There was manifest error in law during the course of the trial and the learned judge admitted evidence that should have been properly excluded, tending to shew that there was other conduct upon the part of

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the accused of similar or other acts which would lend colour to the likelihood that he was guilty of the crime charged. All this evidence was inadmissible and irrelevant to the issue before the Court and contrary to the well-known decided cases upon the point (*Makin* v. *Attorney-General of New South Wales* (1893), 63 L.J., P.C. 41; (1894), A.C. 57 at p. 65; *Rex* v. *Fisher* (1910), 1 K.B. 149). Further, there was really no proof made of these other acts, but the gravaman of the matter is apparent in that this evidence, if it can be called such, would appear to have influenced the learned judge in arriving at the conclusion that there was guilt in this case. I do not propose to discuss the authorities in detail, I content myself with saying that there was palpable error (with great respect to the learned trial judge) in the reception of evidence and the undue latitude allowed to counsel in cross-examination upon irrelevant matters, sufficient to entitle the accused to a new trial. I am not of opinion, though, that in this case the ends of justice would be satisfied by a new trial. A careful study of the evidence convinces me that the conviction should be set aside, being unreasonable; not being capable of being supported, having regard to the evidence, and there was a clear miscarriage of justice, and it is a proper case in which to quash the conviction and direct a judgment of acquittal to be entered.

MCPHILLIPS, J.A.

The accused, upon the evidence, cannot be said to have been guilty of the crime charged. There is an absence of any element in the case which could be said to ear-mark theft, nor is it possible to even say, with the most vivid imagination, that any inference could be drawn from the evidence that there was dishonest intent. Everything points to the entire absence of *mens rea*. There is nothing in the evidence to indicate a blameworthy condition of mind of the accused. It is idle to contend that in the present case there was anything done which could be construed into the intention to do a criminal act. Here the evidence, in my opinion, conclusively establishes that the accused in taking the heifer was proceeding in the honest belief of a claim of right to the heifer; he had raised a heifer which had gone astray and in all that he did there was ever present to his mind the belief, and as I read the evidence, the honest

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belief that the heifer was his, and the claim of the accused was one made in good faith. The heifer was taken openly, in broad daylight, and during working hours, when everybody was about and in the clear view of onlookers and accompanied by others, not secretly or with any badges of crime or fraud. Further, the heifer was taken to a pasture in the immediate neighbourhood of Yeomans, who claims to be the owner of the heifer, and was there to be seen by all. Could this be said by any convolution of mind to evidence or import in even the smallest way the crime of larceny? Even if there be a claim of right which may be unfounded in law or in fact, that in no way constitutes a criminal offence where the claim of right is an honest one, as I believe it was in the present case. There is no evidence, in my opinion, whatever which would entitle it to be inferred that the accused took the heifer knowing that it was not his heifer; on the contrary, everything indicates an honest belief on his part that the heifer was his. Here it is not the case of a heifer with a brand, and the accused stoutly maintained throughout that the heifer was his, and well sustained cross-examination upon the point. That the accused was not as minute in his description of the heifer as Yeomans's sons, is not to be wondered at; boylike, they were very familiar with the heifer. The *bona fide* belief of the accused that the heifer was his, whether mistaken or not, negatived the charge of theft (*Rex* v. *Ford and Armstrong* (1907), 13 B.C. 109, MARTIN, J. at p. 110). There is the further fact not to be lost sight of, that the heifer was not taken from off Yeomans's farm, but from off another farm, and the evidence shews that cattle are wont to stray about in that particular section of the country, the fences being down to a great extent most of the time, being carried away by floods. The area is one of dyked lands, and it is notorious that cattle in the neighbourhood are allowed to wander about, and no exception is taken to this. The farmers know how impossible it is to prevent this and there is the general practice of turning cattle into the highways to feed, and it would appear to be a common thing for farmers in the neighbourhood, from time to time, to go in search of their cattle and take them wherever they find them, not deeming it at all necessary to make any demand for them or apprize the person on whose lands they find them

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that they are taking them away; the custom is not to ask, but to take wherever found.

In short, this present case has elements only of a civil action. If there be doubt, as unquestionably there is, as to the true ownership of the heifer, the question should have been in that way tried out, not the utilization of a criminal Court to determine what was properly a matter for decision in a civil Court. And upon this point it is significant to note that Yeomans said under cross-examination:

"Well, don't you think that if you had gone to Morrison and asked him for the heifer, if it was your heifer, he would have given it back to you? He might have done."

I may say that I am not at all impressed with the evidence of Yeomans. He evidently is a man with a violent temper, given to the use of foul and abusive language and inhuman conduct to his horses. That the accused did not first ask for the delivery up of the heifer does not appear to me to be a pertinent matter. In the first place, it is not the custom; secondly, the accused believed it was his heifer. Why would he ask Yeomans for it? It was not in Yeomans's field, but in Tipping's field.

Upon the whole case I am satisfied that no conviction should have been made. There is not one element in the evidence which would convey to my mind that there was any criminal or dishonest intention in all that the accused did. What he did do, he did openly and to the knowledge of those present in the neighbourhood. There was no concealment whatever, not secretly, but in the presence and company of others, and there is no suggestion that the others were parties to a crime, one of them being the accused's brother, who undoubtedly also was convinced that the heifer was the property of the accused. In this connection I would refer to the case of *Rex* v. *Hayes* (1923), 1 W.W.R. 209, and the judgment of Beck, J.A., where that learned judge, at p. 219, said, after laying stress upon the requirement that the prosecution satisfy the Court on the whole evidence that there is no reasonable doubt of the guilt of the accused:

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"Applying these principles to the evidence I am convinced not only that had I been trying the case I should not have convicted the accused, but that, in view of the several hypotheses consistent with his innocence, there is no evidence on which he could be properly convicted."

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I would adopt and apply the language just quoted to the present case, it being language peculiarly apposite and cogent when applied to the facts of this case.

The appeal, in my opinion, should be allowed, the conviction quashed and a judgment of acquittal entered.

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

New trial ordered, McPhillips, J.A. dissenting.

Solicitor for appellant: *A. H. Fleishman.*
Solicitor for respondent: *A. W. Petapiece.*

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THE STANDARD TRUSTS COMPANY v. PULICE *ET AL.*

Will—Lunacy—Administration—Two estates—One in Canada and one in the United States—Expenses of lunacy and of administration—Where to be charged.

A testator who lived in Victoria, B.C., and had assets both in British Columbia and the United States made two bequests under his will, one to his sister who lived in the United States of "all that portion of my estate both real and personal, that shall be situate, and wherever situate in the United States of America," and the other to Frank Pulice of "all the residue of my estate both real and personal of every kind whatsoever not otherwise disposed of by this my will." The will further recited "I direct that the costs of executing this my trust shall be shared proportionately by the beneficiaries herein named." Shortly after making his will he was found to be of unsound mind. A committee was appointed and by orders of the Court in Lunacy sums were authorized to be raised for maintenance of the lunatic and the committee made up the payments out of the British Columbia estate. On an application that the expenses of maintenance during lunacy and the testamentary expenses be borne proportionately by the beneficiaries it was held that both should be paid from the British Columbia assets.

Held, on appeal, affirming the decision of GREGORY, J., that the committee in lunacy was entitled under the orders of the Court in Lunacy to draw the cost of maintenance during lunacy from the British Columbia fund.

Held, further, reversing the decision of GREGORY, J., that as it is clearly expressed in the testator's will that the costs of executing the trusts be shared proportionately by the beneficiaries it is the duty of the Court to carry out that intention.

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APPEAL by defendant Pulice from the decision of GREGORY, J., on an application heard by him at Chambers in Victoria on the 4th of September, 1923, for an order that (a) the moneys expended for the maintenance of Franklin R. Roundy, deceased, during the period he was of unsound mind be charged rateably against his estate situate in the United States of America as well as against his estate situate in Canada; and (b) that the testamentary and other expenses be borne rateably by the two said portions of his estate. Roundy died at Victoria on the 15th of April, 1921, and by his will left his American estate valued at about $35,000 to his sister who resided in Minneapolis, U.S.A., and his Canadian estate, valued at about $15,000, to the defendant Frank Pulice. The facts are sufficiently set out in the judgment of GREGORY, J.

Statement

Hankey, for the application.
Maclean, K.C., contra.

21st September, 1923.

GREGORY, J.: This application must, I think, be dismissed. It divides itself into two branches, (a) an application to vary or add to the orders already made by the Court with reference to the moneys expended for the maintenance of the lunatic during his lifetime, and made the same chargeable rateably against the bequest to the sister and to the residuary legatee Pulice; (b) an application for a declaration or direction that the testamentary and other expenses of the executor shall be charged rateably against the estate left to the deceased's sister and the residuary bequest to Frank Pulice.

GREGORY, J.

With reference to the second point, I do not propose to deal with it, as the applicant has already obtained from the Court of Appeal an order based upon the assumption that the bequest to Pulice was a residuary bequest. The rule with reference to testamentary expenses, and the fund from which they shall be paid, is set out in Williams on Executors, 11th Ed., Vol. 2, p. 1087. It is shortly stated that the whole general estate must

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be exhausted before specific legatees can be called upon to contribute to payment of the debts, etc. The bequest to the sister is a specific bequest of all moneys, etc., in the United States. If it had been a bequest of a piano, or a gold watch, could it for a moment be contended that the watch would have to be sold and a proportion of the testamentay expenses deducted from it? I think not.

With reference to the first contention counsel has cited a great many cases, but they are practically all reviewed in the case of *Attorney-General* v. *Marquis of Ailesbury* (1887), 12 App. Cas. 672 at p. 688, and Lord Macnaghten says "the paramount consideration is the interest of the lunatic."

When the orders in question were made by the Court the only fund available for the payment of the moneys was the moneys in the Province of British Columbia, and the committee could not, without considerable expense, have reached the funds in the United States. Therefore it is quite clear that it was in the interest of the lunatic that no moneys should be expended in trying to obtain from the United States funds to pay accounts, when the funds in British Columbia were already available without expense. The orders made no direction whatever as to what fund they should be paid out of, but, as already stated, the only funds subject to the jurisdiction of this Court were those in British Columbia, and they were properly paid out of those funds.

GREGORY, J.

It was contended on the argument that the Court has no jurisdiction to add to or vary those orders now. It is unnecessary, I think, to decide that question. All the cases referred to by Mr. *Hankey* were cases arising out of a contention between the heirs and the next of kin, or legatees, that is, between properties of different nature, real estate or personal. No such consideration arises here, and I do not know of any rule whereby personal estate is divided into classes.

The application will therefore be dismissed and the costs will have to be paid by the applicant.

From this decision the defendant appealed. The appeal was argued at Vancouver on the 12th and 15th of October, 1923,

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

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Hankey, for appellant: As to the portion of the estate to which lunacy expenses are chargeable see *In re Larking. Larking* v. *Larking* (1887), 37 Ch. D. 310; *In re Gist (a Person of Unsound Mind)* (1904), 1 Ch. 398 at p. 407; *Marquess of Anandale* v. *Marchioness of Anandale* (1751), 2 Ves. Sen. 381. Even if the Canadian portion of the estate was the residue the expense should be divided proportionately but we contend the Canadian estate was a specific bequest to Pulice: see *Woodhead* v. *Marriott* (1837), C.P. Cooper 62; 47 E.R. 402 at p. 406; Pope on Lunacy, 2nd Ed., 158; *Heir and Administrator* (1690), Freeman C.C. 114; Elmer's Practice in Lunacy, 7th Ed., 82; *In re Moore* (1849), 1 Mac. & G. 103; *Ex parte Grimstone* (1772), 2 Amb. 706; *In re Leeming* (1861), 3 De G.F. & J. 43; *In re Melly* (1883), 53 L.J., Ch. 248; *Attorney-General* v. *Marquis of Ailesbury* (1887), 12 App. Cas. 672 at p. 682; *In re Pares. Lillingston* v. *Pares* (1879), 12 Ch. D. 333; *In re E.D.S. (A Person of Unsound Mind so found by Inquisition)* (1914), 1 Ch. 618 at p. 624. As to an intention being inferred from the will see Heywood & Massey's Lunacy Practice, 5th Ed., 227; *Wheeler* v. *Thomas* (1860), 4 L.T. 173. On testamentary expenses see Williams on Executors, 11th Ed., 763. That they are paid out of the general estate see *Perry* v. *Meddowcroft* (1841), 4 Beav. 197 at p. 204; *Sharp* v. *Lush* (1879), 10 Ch. D. 468 at p. 470. "Residue" is defined in Stroud's Judicial Dictionary, 2nd Ed., Vol. 3, p. 1738; see also *Page* v. *Leapingwell* (1812), 18 Ves. 463; and Jarman on Wills, 6th Ed., Vol. 2, p. 1053; *Wright* v. *Weston* (1859), 26 Beav. 429; Halsbury's Laws of England, Vol. 28, p. 656, par. 1264; *Nimmo* v. *Adams* (1921), 29 B.C. 277; (1922), 30 B.C. 527. He had two estates and the circumstances shew he intended they should bear the expenses proportionately.

Argument

Maclean, K.C., for respondents Glynn *et al.*: The bequest to Pulice is expressly residuary. For the requirements to make a gift of the residue specific see Theobald on Wills, 7th Ed., 156. It was in the interest of the estate to pay the lunacy

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expenses out of the estate here. As to a lunatic's property, (a) the Court will not change it from one kind of security to another; (b) but if necessary it will be dealt with in the manner that he would himself, if sane; (c) if a change is necessary the property will be regarded as it was at first. The *Gist* case (1904), 1 Ch. 398 must be considered with the original *Gist* case (1877), 5 Ch. D. 881, as the result in the second case was largely influenced by the decision in the first case. The Court is careful not to change the lunatic's property so that if he recovers he will find it as near as possible intact: see *Ex parte Whitbread In re Hinde* (1816), 2 Mer. 99 at p. 102; *Lord Leitrim* v. *Enery* (1844), 6 Ir. Eq. R. 357 at p. 363; *Attorney-General* v. *Marquis of Ailesbury* (1887), 12 App. Cas. 672 at p. 688. Lewin on Trusts, 12th Ed., 1242 indicates that *Marquess of Anandale* v. *Marchioness of Anandale* (1751), 2 Ves. Sen. 381 was overruled. The money was properly paid out by the Court in lunacy.

Hankey, in reply.

Cur. adv. vult.

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MACDONALD, C.J.A.: I agree with the result arrived at by my brother GALLIHER for the reasons given by him.

MARTIN, J.A.

MARTIN, J.A. agreed.

GALLIHER, J.A.

GALLIHER, J.A.: One of the first questions to determine is whether the bequest in the will to the appellant, Pulice, is general or specific. The words "all the residue of my estate both real and personal" do not necessarily of themselves make the bequest a residuary one, and if we can gather from the will itself that such is not the case, then we can so determine.

There are two bequests only, one to his sister, Rose Glynn, of "all that portion of my estate both real and personal that shall be situate and wherever situate in the United States of America at the time of my decease," etc.; the second is to Frank Pulice of "all the residue of my estate both real and personal of every kind whatsoever not otherwise disposed of by this my will."

The effect of these two bequests would be to give to Mrs.

Glynn all the property in the United States of America, and to Frank Pulice the residue not already disposed of, which, as it afterwards turned out, was all in the Province of British Columbia. Had the bequest to Pulice been of all the residue of my estate and which is situate in the Province of British Columbia, then, I should have held that a specific legacy.

In Williams on Executors, 11th Ed., Vol. 2, at p. 928, the author states:

"So where the testator bequeaths the residue of all his personal estate in the Island of Jamaica, this is a specific legacy"

citing *Nisbett* v. *Murray* (1799), 5 Ves. 150, and *Robinson* v. *Webb* (1853), 17 Beav. 260.

Now, the bequest to Pulice is of "all the residue not disposed of" and would include property in any part of the globe outside the United States of America; in other words, it is a general bequest of all property not disposed of by the first specific bequest.

As to the first bequest being specific see Williams on Executors, *supra,* 928, and the case of *Sayer* v. *Sayer* (1714), 2 Vern. 688, referred to.

If there was a deficiency of assets to pay other legacies, the specific legacy would not abate with the other legacies, neither could it be called upon to contribute towards the maintenance of the lunatic.

The committee in lunacy being entitled to draw from the British Columbia fund, the orders granted for that purpose were proper.

The case of *Marquess of Anandale* v. *Marchioness of Anandale* (1751), 2 Ves. Sen. and other cases cited by Mr. *Hankey,* in the circumstances of this case, are not in point.

With regard to the testamentary expenses, or as it is put in the will, "the costs of executing this my trust," that is clearly expressed by the testator in his will in these words:

"I direct that the costs of executing this my trust shall be shared proportionately by the beneficiaries herein named."

Had this clear intention not been expressed in the will, I should have agreed with the learned judge below in his disposition of this matter, but when we find a clear intention expressed by the testator it is the duty of the Court to carry out that

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intention. This holding would result in the learned judge below being in error in awarding the costs of the application to be paid out of the portion of the estate bequeathed to Pulice.

In the result, the appeal will be allowed in part.

The testamentary expenses, including the costs of the application and this appeal, should be borne proportionately by the respective estates.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I formed the opinion during the hearing of the appeal that it should be dismissed as to the contention made that the costs of maintenance of the testator should be imposed proportionately against the whole estate in the United States and Canada, and not be, as it worked out, a charge upon the residue, and referred to the controlling cases collected in Lewin on Trusts, 12th Ed., 1241 *et seq.*, which demonstrated that the maintenance costs could be taken from any portion of the estate and the Court would disregard the ultimate result, *i.e.*, as to the possible effect upon beneficiaries under a will, which, of course, at that time had no legal effect. The committee in lunacy would necessarily have a very wide discretion as to what securities could be turned to. I am in complete agreement with the proposed disposition of the appeal.

EBERTS, J.A.

EBERTS, J.A. agreed.

Appeal allowed in part.

Solicitor for appellant: *S. T. Hankey.*

Solicitors for respondent Company: *McGeer, McGeer & Wilson.*

Solicitors for respondents Glynn *et al.*: *Elliott, Maclean & Shandley.*

ROYAL BANK OF CANADA v. DOERING.

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Mortgage—Priority—First mortgage to secure certain debt and future advances—Second mortgage—Further advance after second mortgage and notice thereof but in respect of obligation existing prior to date of second mortgage.

The plaintiff Bank, as mortgagee, under a second mortgage foreclosed and acquired an undivided one-half interest in the property subject to a first mortgage. Desiring to pay off the first mortgage a dispute arose as to the sums due. The first mortgage was taken to secure a certain debt and also to secure the mortgagee in respect to any future sums which might become owing to him from the mortgagor. Shortly after the taking over of the first mortgage the mortgagee thereunder entered into a joint obligation along with the mortgagor and two other persons as endorsers of a promissory note to the plaintiff Bank. This obligation arose before the second mortgage was executed but no payment was made in respect thereof until after the date of the second mortgage when the first mortgagee was compelled to pay the entire indebtedness under the joint obligation of endorsement. The first mortgagee (defendant) claims that the proportion of the entire indebtedness so far as payable by the mortgagor as one of the joint endorsers was a sum owing to him from the mortgagor under the terms of the first mortgage.

Held, that where there are first and second mortgages both taken to cover present and future advances and the first mortgagee has notice of the execution of a second mortgage, the first mortgagee cannot claim priority for advances made by him to the mortgagor after the date of the second mortgage as against antecedent advances made by the second mortgagee under the second mortgage. But the first mortgagee is entitled to assert that his mortgage operated as security for an amount he was required to pay on the mortgagor's account by reason of a transaction that arose prior to the execution of the second mortgage.

Hopkinson v. *Rolt* (1861), 9 H.L. Cas. 514 distinguished.

PROCEEDINGS by way of originating summons to determine the amount due the defendant as mortgagee under a first mortgage on certain property in the City of Vancouver in which the plaintiff had acquired an undivided one-half interest. The facts are set out fully in the reasons for judgment. Tried by MACDONALD, J. at Vancouver on the 5th of December, 1923. Statement

R. H. Tupper, for plaintiff.
Coburn, for defendant.

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MACDONALD, J.: Plaintiff having, by foreclosure, acquired the ownership of an undivided half-interest in certain property in the City of Vancouver, subject to a mortgage, dated 15th of January, 1915, executed by one Williams to the defendant, desired to pay off such mortgage. A dispute thereupon arose between the parties, as to the amount required for that purpose, and the matter is sought to be determined by these proceedings, taken by originating summons.

The mortgage by said Williams to the defendant recited that it was, for the purpose of securing an indebtedness, then existing, of $9,500 and to secure the defendant as to the endorsement by him, for the accommodation of said Williams, of a note of $5,500 with interest at 8 per cent. The mortgage further recited that, it was to secure

"the said mortgagee from any loss against the endorsement of the said promissory note or any renewal or renewals thereof and any loss which may be sustained by reason of such endorsement and also to secure all further sum or sums which may hereafter be due and owing by the mortgagor to the mortgagee."

The proviso for payment in the mortgage stipulated that it should be void on payment of the said sum of $9,500 and interest and upon the mortgagor paying, or causing to be paid, the said promissory note for $5,500 and interest and on payment "by the mortgagor to the mortgagee of all sums of money, which the mortagagor now owes or may hereafter owe to the mortgagee for cash loan or for any other moneys which may hereafter be due and owing by the said mortgagor to the said mortgagee."

Judgment

Plaintiff, in order to satisfy such mortgage, tendered an amount sufficient to include the balance owing of said sum of $9,500 and interest and also the amount of the said promissory note for $5,500 and interest, which remained unpaid, but the defendant contended that he was entitled to a further sum of approximately $2,500, as being moneys "due and owing" to him from Williams and secured by the terms of the mortgage. This latter claim arose under circumstances which are not in dispute between the parties. They may be shortly outlined as follows: On the 12th of March, 1915, one Lillian Quann and the Pacific Bottling Works Limited made a demand note for

$10,291.50, payable to the order of the defendant Doering, Yarwood, Reifel and the said Williams. All the said payees endorsed such note and upon its delivery to the plaintiff for discount on the 12th of March, 1915, jointly received the proceeds thereof. The note not being paid by the makers, plaintiff enforced its collection from the endorsers. The result being that the defendant Doering was, in 1917, compelled to pay the full amount with interest. He thus became entitled to recover from the said Williams, by way of contribution, a proportionate part of the amount paid to the plaintiff. This amount was "due and owing" by Williams to defendant. His contention is, that the mortgage operated as a security to him, for the payment he was thus obliged to make on behalf of Williams and that, in the redemption of the mortgage by the plaintiff it should be called upon to pay this amount. Plaintiff contends, that, aside from any construction that might be placed upon the special terms of the mortgage, that it ceased to exist as a security which could be invoked by defendant in respect of such an indebtedness when a second mortgage was executed by said Williams in its favour on the 15th of November, 1915, upon the same property, and notice was duly given to the defendant. In other words, that such second mortgage given by the mortgagor in 1915, prevented defendant from setting up the mortgage in his favour as a security for money which only became due and owing to him from the mortgagor in 1917. Plaintiff, in making this contention, relies upon the principle enunciated in *Hopkinson* v. *Rolt* (1861), 9 H.L. Cas. 514. In that case, Lord Campbell said that, independently of any particular agreement between the parties, the question to be decided was accurately, as well as tersely, stated by Lord Chancellor Chelmsford in the judgment appealed from as follows:

Judgment

"'A prior mortgage for present and future advances; a subsequent mortgage of the same description; each mortgagee has notice of the other's deeds; advances are made by the prior mortgagee after the date of the subsequent mortgage, and with full knowledge of it; is the prior mortgagee entitled to priority for these advances over the antecedent advance made by the subsequent mortgagee?'"

Defendant submits that the doctrine established in *Hopkinson* v. *Rolt, supra,* is not applicable to the facts here outlined. Distinction is sought to be drawn between the position of a first

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mortgagee advancing, under the provisions of his mortgage, further amounts, after he has received notice of the existence of a second mortgage, where he is not obliged, upon request of the mortgagor, to make such further advances, and a case where the further amount sought to be secured by the first mortgage arises, as here, from a transaction between the mortgagor and first mortgagee prior to the execution and due notification of the second mortgage.

West v. *Williams* (1899), 1 Ch. 132, is relied upon by the plaintiff as an authority in support of its position. Except as supplying material for consideration of the principle of *Hopkinson* v. *Rolt, supra,* I do not think, in this case, it affords any assistance to the plaintiff. It might be said to extend the application of the principle and decide that a first mortgagee cannot, after notice of a subsequent encumbrance, as against the encumbrancer, tack to his debt further advances, then made by him to the mortgagor, in pursuance of an obligation or covenant on his part, entered into at the time of the execution of the first mortgage. The obligation which existed on the part of the first mortgagee has, by the act of the mortgagor in giving a second mortgage, ceased to exist.

"Even if the first mortgagee has agreed to make further advances on the property mortgaged to him, the mortgagor is under no obligation to take further advances from him and from no one else, and if the mortgagor chooses to borrow money from someone else, and to give him a second mortgage, the mortgagor thereby releases the first mortgagee from his obligation to make further advances. Whatever prevents the mortgagor from giving to the first mortgagee the agreed security for his further advances releases the first mortgagee from his obligation to make them": *per* Lindley, M.R. in *West* v. *Williams, supra,* at p. 143.

Judgment

The result is, if any such advances are made, they would be voluntary and as against the second mortgagee not enforceable. The application of *Hopkinson* v. *Rolt, supra,* has been considered in many other cases, and particularly by the House of Lords in *Bradford Banking Company* v. *Briggs* (1886), 12 App. Cas. 29. In that case, the decision of the Court of Appeal ((1889), 31 Ch. D. 19) was reversed and the judgment of Field, J. restored (29 Ch. D. 149). It was held that where the articles of association of a company provided that, it should have a first and permanent lien and charge available at law and

in equity upon its shares for all debts due from the shareholders, this did not enable the company to claim priority, as against a bank, in respect of moneys which had become due from a shareholder to the company, after notice from the bank of shares having been deposited for security. In the Court of Appeal a distinction was sought to be drawn between the facts presented and those appearing in the *Hopkinson* v. *Rolt* case. While it was referred to as a binding decision, still it was held such difference in the facts rendered even its general principles inapplicable. Brett, M.R. referred to the articles of association forming a contract, under which persons became shareholders and that as between such shareholders and the company at all events, "the company had a lien and charge upon their shares whether they (the shareholders) had any former debts to others or not." Further, that the bank having received notice of such contract between the shareholders and the company, it was bound in making any advances by its terms and the lien that might arise, upon the shares so received by it as security.

This conclusion did not prevail. If it had, the result would have been that the effect of the principle in *Hopkinson* v. *Rolt* would have been destroyed in many cases of a like nature, such as the one under consideration. It is to be observed that no debt had arisen by the shareholder to the company at the time when the bank took the shares as security.

Judgment

The sole question then remaining to be decided is, whether under the facts of this case, the principle of *Hopkinson* v. *Rolt* is applicable. Are they so different as to affect the decision? Counsel frankly admitted that they were unable to find any case in which the facts were similar. The note for $10,291 which defendant jointly endorsed with Williams, was payable on demand. There was no evidence as to when plaintiff first sought to enforce payment of the note from the endorsers, but this event was liable to occur at any time, after it was discounted. Then, was the transaction between the defendant and Williams, when they became joint endorsers of the note, such as to enable the defendant to subsequently assert that the mortgage, previously given in his favour, afforded him security in the event of his being required, as he was, to pay not only

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his own proportion, as an endorser of such note, but also the amount which should properly have been paid by Williams? At the time, when such endorsement took place, there was a contingent liability between the defendant and Williams. It would become a direct liability only, in the event of the makers of the note failing to pay the same and Williams, on his part, making default in paying his proportion of the notes so endorsed by the payees and defendant then being required to pay whatever amount was due under the note. Still, as between the defendant and Williams, a situation then arose, in which Williams, in effect, agreed with the defendant that he would pay his proportion of the liability created by the endorsement and to that extent indemnify the defendant. If the rights of the parties were determined, as they stood at the time when the second mortgage was executed in favour of the plaintiff, what would be the position? It could not acquire, to the detriment of the defendant, any stronger position than Williams possessed with respect to the property then mortgaged as security. What then would have been the situation, had the plaintiff applied, as is usual, to the defendant as first mortgagee, for a statement of the amount due or accruing due under his mortgage? In the event of such a statement being rendered, could the defendant have properly claimed, as he does, that the mortgage was security not only for amounts mentioned and admittedly covered but specifically for whatever sums he might be called upon to pay for Williams, arising out of his joint endorsement with him of the note referred to? If he could properly set up such a claim then, it should certainly prevail subsequently, when he had, in the meantime, been required by the plaintiff itself to make the payment mentioned under his endorsement.

In my opinion, defendant is entitled to assert that his mortgage operated as a security, as against Williams, for any amount which he might be required to pay, on his account, by virtue of having jointly endorsed the note with him, before the second mortgage was executed. I think, further, that the terms of the mortgage to defendant are broad enough to allow of this construction, and that the principle of *Hopkinson* v. *Rolt* is, under the circumstances, inapplicable. The result is that the defend-

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ant is entitled, in order to redeem his mortgage, to have the additional amount which is in dispute, paid by the plaintiff.

There were other matters dealt with by the originating summons, but they are not the subject of controversy between the parties. Defendant has succeeded in the issue and is entitled to his costs.

Judgment for defendant.

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Promissory note—Payable on demand—Presented for payment after seven years—Reasonable time—Continuing security—Consent of endorser—Evidence of—R.S.C. 1906, Cap. 119, Secs. 180, 181 and 182.

Section 180 of the Bills of Exchange Act provides that "where a note payable on demand has been endorsed, it must be presented for payment within a reasonable time of the endorsement," and section 181 provides that if such a note "is not presented for payment within a reasonable time, the endorser is discharged: Provided that if it has, with the assent of the endorser, been delivered as a collateral or continuing security it need not be presented for payment so long as it is held as such security."

Where a promissory note dated the 22nd of June, 1914, made payable on demand and endorsed by the defendant was not presented for payment until the 23rd of September, 1921, it was held that the presentation was not made within a reasonable time, and further, that as there was no proof that the note was delivered as a collateral or continuing security with the assent of the endorser the action did not come within the proviso in section 181 of the Bills of Exchange Act.

Held, on appeal, affirming the decision of GREGORY, J. (McPHILLIPS, J.A. dissenting), that there was no evidence of the endorser's assent to the demand note being regarded as a collateral or continuing security.

APPEAL by plaintiff from the decision of GREGORY, J. in an action tried by him at Vancouver on the 6th of June, 1923, against the defendant William McNeill, as maker, and Minnie J. McNeill, his wife, as endorser of a promissory note for $22,403.75, dated the 22nd of June, 1914, payable with inter- Statement

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est at the rate of 7 per cent. per annum as well after as before maturity to the defendant Minnie J. McNeill or order on demand at the Bank of Montreal, Vancouver, which note was endorsed by the defendant Minnie J. McNeill, to the plaintiff and was duly presented for payment at the Bank of Montreal, Vancouver, and was dishonoured, notice of which was given the defendant, Minnie J. McNeill by letter dated the 23rd of September, 1921.

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

Craig, K.C., and *Tysoe*, for defendant Minnie J. McNeill.

7th June, 1923.

GREGORY, J.: There must be judgment for the defendant. The sole question involved is, was the note sued on presented for payment within a reasonable time as required by section 180 of the Bills of Exchange Act?

It is true that the plaintiff sets up, in its reply, section 181 of the same Act that the note was, with the assent of the defendant (who was the endorser) delivered as a collateral or continuing security and was held by the plaintiff as such until the 22nd of September, 1921. No attempt was made by the plaintiff to prove that the note was so delivered with the assent of the defendant or that the plaintiff held it as such. In fact no evidence upon either of two points was given or offered by the plaintiff; and in the absence of such evidence I think, as stated by Bain, J. in delivering the judgment of the Court in *Commercial Bank* v. *Allan* (1894), 10 Man. L.R. 330 at p. 334, the provisions of that section (which is identical with section 85 of the old Act) do not apply, and it is not sufficient merely to shew that the note in question was a continuing security, even if that expression in section 181 of that Act should be held to be equivalent to a similar expression as used by the Court in *The Chartered Mercantile Bank of India, London, and China* v. *Dickson* (1871), L.R. 3 P.C. 574, and in *Brooks* v. *Mitchell* (1841), 9 M. & W. 15.

GREGORY, J.

Section 180, subsection 2, of the Act is not new law. It always has been the law that in determining what is a reasonable time within which a demand note must be presented means

a period reasonable with reference to the circumstances connected with the particular note in question.

In the present case we have practically no evidence of the circumstances under which this note was given and endorsed, but it was clearly not presented for payment until after six years from its making. The Statute of Limitations has apparently run against it so far as the maker is concerned, for it is clearly stated by Chitty, J. in *In re George. Francis* v. *Bruce* (1890), 44 Ch. D. 627, that such a note as this bearing interest is a present debt and at maturity as soon as given. This fact alone, in the absence of other information, is enough to indicate that its presentation was not made within a reasonable time. The indorsements on the note shew that the interest on the same was charged (presumably against the maker) up to the month of February, 1917, but not afterwards. The Bank thereafter apparently assumed that the maker was not worth pursuing and if it intended to hold the indorser it should have presented the note for payment and given the endorser, who is in the nature of a guarantor, notice of non-payment. Such a course would have been an intimation that the Bank intended to hold her and given her an opportunity of taking some steps to protect herself.

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The costs must follow the event.

From this decision the plaintiff appealed. The appeal was argued at Vancouver on the 17th of October, 1923, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Wilson, K.C. (*Symes,* with him), for appellant: The note was held by the Bank as collateral, the consideration being an antecedent note of September, 1913. At the time the note was given both husband and wife were indebted to the Bank. As to the notice see *Royal Bank* v. *Kirk and Rumball* (1907), 13 B.C. 4. Her liability on the note did not arise until 1921: see *Brooks* v. *Mitchell* (1841), 9 M. & W. 15. The liability of the maker may run from the date of the note but that does not apply to the endorser: see *Commercial Bank* v. *Allan* (1894), 10 Man. L.R. 330; *Brooks* v. *Mitchell, supra,* foot-note at pp.

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17 and 18; Russell on Bills of Exchange, 3rd Ed., 271. As to when a note is payable on demand see *Bradford Old Bank* v. *Sutcliffe* (1918), 2 K.B. 833. On the Statute of Limitations see Chalmers's Bills of Exchange, 8th Ed., 340. Assent to a continuing security may be given in a variety of ways and by a course of conduct. She assented to interest before and after maturity and to a continuing security. Her assent is sufficiently proved by her course of conduct throughout.

Craig, K.C., for respondents: There are the two points: first, as to the presentation within a reasonable time, and secondly as to the consent of the endorser. As to the first point it was not presented for over seven years and when beyond the time allowed by the Statute of Limitations it is an unreasonably long time. Under section 70(3) of the Bills of Exchange Act the question of reasonableness is one of fact and the trial judge's decision as to this should not be disturbed. When a bill is payable on demand it is deemed to be overdue: see Maclaren on Bills, Notes and Cheques, 5th Ed., 232. The principal debtor is barred at the end of six years; it must therefore be a bar as against the endorser. On the second point it is said this is a continuing security with the assent of the endorser. The evidence of the first note was improperly admitted: see *Rush* v. *Smith* (1834), 3 L.J., Ex. 355. The cases of *Brooks* v. *Mitchell* (1841), 9 M. & W. 15 and *Commercial Bank* v. *Allan* (1894), 10 Man. L.R. 330, can be distinguished and do not apply. There is no evidence except the note itself so there is no evidence either of a continuing security or of the assent of the endorser. Both are questions of fact decided by the Court below.

Argument

Wilson, in reply: The note itself is evidence of a continuing security: see Maclaren on Bills, Notes and Cheques, 5th Ed., 466.

Cur. adv. vult.

8th January, 1924.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I agree with the judgment of the learned trial judge. There is no evidence of defendant's assent to the demand note being regarded as a collateral or continuing security.

MARTIN, J.A. would dismiss the appeal.

GALLIHER, J.A.: On a perusal of the evidence and a consideration of the cases cited, I have come to the conclusion that the learned judge below was right and would dismiss the appeal.

MCPHILLIPS, J.A.: This appeal brings up for consideration sections 180, 181 and 182 of the Bills of Exchange Act, Cap. 119, R.S.C. 1906, dealing with demand notes and notes held as collateral or continuing securities.

The proviso to section 181 is not in the English Act (45 & 46 Vict., Cap. 61); this proviso, referring to the note, reads as follows:

"Provided that if it has, with the assent of the endorser, been delivered as a collateral or continuing security it need not be presented for payment so long as it is held as such security."

In Maclaren on Bills, Notes and Cheques, 5th Ed., p. 466, we find this stated:

"The proviso of this section is not in the Imperial Act or the Negotiable Instruments Law; but the principle is in accordance with the law of both countries."

"A promissory note payable on demand is often intended to be a continuing security, it is quite unlike a cheque which is intended to be presented speedily":

Per Parke, B. in *Brooks* v. *Mitchell* (1841), 9 M. & W. at p. 15.

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Now the note sued upon in the present case was for $22,403.75, and provides for the payment of interest at 7 per cent. per annum, as well after as before maturity. It bears date the 22nd of June, 1914, made by William McNeill and endorsed by the defendant Minnie Jean McNeill. The note would appear to have been a renewal of a note given in September, 1913. The note was presented for payment at the place named for payment, the Bank of Montreal, Vancouver, and duly protested for non-payment, of which the defendant had notice on the 23rd of September, 1921. The fact that the note provides for the payment of interest after as well as before maturity entitles, in my opinion, the inference being drawn, in the absence of any evidence to rebut it, that the note had, with the assent of the defendant, been delivered as a collateral or continuing security.

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We find it stated in Maclaren, at p. 466, that:

"Where a demand note is payable with interest, this has been considered as an indication that an early presentment was not contemplated: *Beaudry* v. *Renaud* (1902), 8 R.J. 490; *Thorne* v. *Scovil* (1844), 4 N.B. (2 Kerr) 557; *Commercial Bank* v. *Allan* (1894), 10 Man. L.R. 330; *Vreeland* v. *Hyde* (1829), 2 Hall. (N.Y.) 463; *Seaver* v. *Lincoln* (1838), 21 Pick. (Mass.) 267; *Merritt* v. *Todd* (1861), 23 N.Y. 28; *Parker* v. *Stroud* (1884), 31 Hun. (N.Y.) 578."

See also Russell on Bills, 2nd Ed.

The presumption is and should be that the note was a continuing security. The respondent "ought to have gone into the box" to explain away if she could the fair presumption. The respondent attempted to rely upon the proviso section 181. She should have shewn affirmatively that the note was not given, *i.e.*, endorsed and delivered with her assent as a continuing security. *Lennard's Carrying Company, Limited* v. *Asiatic Petroleum Company, Limited* (1915), A.C. 705 at p. 714, Viscount Haldane, L.C.; *Royal Exchange Assurance* v. *Kingsley Navigation Co.* (1923), A.C. 235 at p. 245, Lord Parmoor.

The note in question in this case was negotiated and the Bank is the holder thereof in due course. It is a customary way of obtaining credit from a bank and as provided by section 182 of the Act,—

"Where a note payable on demand is negotiated, it is not deemed to be overdue, for the purpose of affecting the holder with defects of title of which he had no notice, by reason that it appears that a reasonable time for presenting it for payment has elapsed since its issue."

MCPHILLIPS, J.A.

The defence which is pressed here is that the note was not presented in time. This point is, of course, met by section 182, if it can be said, as I consider it can be, that the note was held as a collateral or continuing security. Examining, however, the point, section 180, subsection 2, has to be considered:

"In determining what is a reasonable time, regard shall be had to the nature of the instrument, the usage of trade, and the facts of the particular case."

In the present case the facts well support, when the "nature of the instrument" is considered, a demand note carrying interest both after and before maturity, given to a bank—that the purport of it was to provide a security that would be held year in and year out "and the facts of the particular case." The present case well supports this view.

"In *Chartered Mercantile Bank of India, London and China* v. *Dickson*

(1871), L.R. 3 P.C. at p. 584, the question arose as to a note, which would now be within s. 86, and it was regarded as a mixed one of law and fact. The authorities on the subject were, it was stated (p. 579) but meagre. In this case the Privy Council overruled the decision of the lower Courts, holding that they had not paid due attention to matters of fact, which made delay in the case not unreasonable":

Byles on Bills, 18th Ed., p. 206. (See also *Wheeler* v. *Young* (1897), 13 T.L.R. 468).

In the *Bank of Ottawa* v. *Christie* (1916), 37 O.L.R. 330 (affirmed 646), it was attempted to distinguish the *Chartered Bank of India* case, on the ground that it was not based on any statutory provision. Attention is also called to the *Banque du Peuple* v. *Denicourt* (1896), 10 Que. S.C. 428, where it was held that if, with the assent of the endorser a note has been delivered as a collateral or continuing security, it need not be presented so long as it is held as such, but this fact must be clearly proved.

In Byles on Bills, at p. 206, we find it stated (citing *Brooks* v. *Mitchell, supra,* and Bayley, J. in *Barough* v. *White* (1825), 4 B. & C. 325 at p. 327):

"A common promissory note payable on demand differs from a bill payable on demand, or a cheque, in this respect: the bill and the cheque are evidently intended to be presented and paid immediately, and the drawer may have good reasons for desiring to withdraw his funds from the control of the drawee without delay; but a common promissory note payable on demand is very often originally intended as a continuing security, and afterwards indorsed as such (*Brooks* v. *Mitchell* (1841), 9 M. & W. 15). Indeed it is not uncommon for the payee, and afterwards for the indorsee, to receive from the maker interest periodically for many years on such a note. And sometimes the note is expressly made payable with interest, which clearly indicates the intention of the parties to be, that though the holder may demand payment immediately, yet he is not bound to do so."

And at p. 175, in Byles on Bills, section 86 (3) of the English Act being considered (which is section 182 of the Canadian Act), this is stated:

"A promissory note payable on demand is, it has been stated, quite unlike a cheque, since it is intended to be a continuing security, while a cheque is intended to be presented speedily (*per* Parke, B., *Brooks* v. *Mitchell* (1841), 9 M. & W. at p. 18)."

In that case the note was about fifteen years overdue. (See also *Glasscock* v. *Balls* (1884), 24 Q.B.D. 13; *Venter* v. *Smit* (1913), Transvaal P. 231; *Northern Crown Bank* v. *International Electric Co.* (1911), 24 O.L.R. 57. And at p. 176 of Byles on Bills, it is stated:

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"So the fact that a note is made payable with interest has been held to imply that it will be in negotiation for some time (*per* Bayley, J., *Barough* v. *White* (1825), 4 B. & C. at p. 327)."

Then as to the Statute of Limitations, I do not understand that the learned counsel for the respondent put much (if any) reliance upon the point. Here we have the case of a person secondarily liable only, and at p. 295, we find it stated in Byles on Bills:

"But as against parties secondarily liable no right of action arises until there has been a presentment for payment to the party primarily liable, and hence time will as against the drawer or indorser of a bill or the indorser of a note payable on demand run only from the time when the cause of action against him is complete (*In re Boyse* (1886), 33 Ch. D. 612; *Cf. In re Bethell* (1887), 34 Ch. D. 561; *Sparham* v. *Carley* (1892), 8 Man. L.R. 246)."

It is significant that in the present case the maker of the note entered no defence and the plaintiff is entitled to judgment against him, and if the defendant, the indorser, Minnie Jean McNeill, paid the note here sued upon she would be entitled to have assigned to her the plaintiff's judgment, and no question of the Statute of Limitations could arise. In any case, it could be no defence in an action brought by Minnie Jean McNeill against her husband William McNeill, if she paid the note.

The cause of action was not complete against the defendant Minnie Jean McNeill, the respondent in this appeal, until the 23rd of September, 1921, when notice of dishonour was given.

MCPHILLIPS, J.A.

I am of the opinion that it was amply established that the note sued upon was a continuing security and continued to be held as such. If I am right in this, then the question of whether the note was presented for payment within a reasonable time does not arise. Should I be in error in this, then there was presentment within a reasonable time, paying due regard to the nature of the instrument, *viz.*, a demand note negotiated with a bank bearing interest both after and before maturity at 7 per cent. per annum. In practice, "the usage of trade" and banking custom is to receive from the maker interest periodically for many years upon such a note, and although demand could be made immediately, still there is no obligation to do so (Bayley, J., *Barough* v. *White* (1825), 4 B. & C. at p. 327), and years may elapse before presentment or demand made for payment.

Then the facts of the particular case are to be considered and

weighed (*Shute* v. *Robins* (1827), M. & M. 133), and being considered and duly weighed it cannot, in my opinion, be said that the note was not presented within a reasonable time. Therefore, my conclusion upon the whole case is that the defendant Minnie Jean McNeill, the respondent in this appeal, should have been held liable by the learned judge in the Court below, to pay the note sued upon and should have entered judgment for the plaintiff accordingly. Being of that opinion, I would allow the appeal.

EBERTS, J.A. would dismiss the appeal.

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitor for appellant: *A. Whealler.*
Solicitors for respondents: *Craig & Parkes.*

LEW v. WING LEE.

Malicious prosecution—Verdict for damages exceeding amount claimed—Jury discharged—Subsequently amount reduced with acquiescence of plaintiff—Jurisdiction—New trial.

A charge against the plaintiff for unlawfully removing survey posts having been dismissed, he brought action for malicious prosecution and claimed $5,000 general damages. On the jury bringing in a verdict for $10,000 damages the judge below discharged the jury and after further argument and with the acquiescence of the plaintiff he reduced the verdict to $5,000.

Held, on appeal, reversing the decision of MCDONALD, J. (MARTIN, J.A. dissenting), that the trial judge has no jurisdiction to reduce the verdict even with the acquiescence of the plaintiff and there should be a new trial.

APPEAL by defendant from the decision of MCDONALD, J., and the verdict of a jury in an action for damages for malicious prosecution. The defendant is the manager of the Lund Yick Land Co., the company owning considerable property in the Chinese district in Nanaimo, and on granting leases they retained certain control over the properties so leased. The plaintiff acquired a piece of property adjoining the company's holding and facing on what was known as Pine Street. This

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street had been opened up by said company on what was part of its land. Friction arose at once between the company and Lew as he would not submit to certain charges made by the company against the holders of the company's leases and the company built a fence immediately in front of the plaintiff's lot on the street that the company had opened up on its own property. There had been a survey of the lots in 1908 but the posts had been removed and the plaintiff employed a surveyor named King to find the line between his lot and the company's, where he placed a post in March, 1920, and shortly after the company put a concrete post adjoining the surveyor's post. In October, 1922, some clearing was done under instructions of the plaintiff on his lot close to the line between the two lots and the posts in question disappeared. At the instance of the defendant company, King went back to fix the line and finding the posts removed he put in an iron post between the two lots. Wing Lee then as manager of his company laid an information against the plaintiff for removing survey posts. The charge was dismissed. The plaintiff then brought this action for damages for malicious prosecution and recovered $5,000 general damages and $990 special damages.

The appeal was argued at Vancouver on the 8th, 9th and 10th of October, 1923, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Argument

Sir C. H. Tupper, K.C., for appellant: The judgment was for $5,000 general damages and $990 special damages. The verdict is perverse. The defendant had reasonable and probable cause for bringing the charge against the plaintiff. On the question of reducing the amount of the verdict see *Watt* v. *Watt* (1905), A.C. 115 at pp. 119 and 121; *Chattell* v. *"Daily Mail" Publishing Company (Limited)* (1901), 18 T.L.R. 165. As to reasonable and probable cause and the onus of proof see *Walker* v. *South Eastern Railway Co.* (1870), L.R. 5 C.P. 640 at p. 644; *Lambert* v. *Great Eastern Railway* (1909), 2 K.B. 776. As to *bona fide* belief of the party making the charge see *Broad* v. *Ham* (1839), 5 Bing. (N.C.) 722; *Hailes* v. *Marks* (1861), 7 H. & N. 56; *Bradshaw* v. *Waterlow & Sons, Limited* (1915), 3 K.B. 527 at p. 535; *Abrath* v. *North-*

Eastern Rail. Co. (1886), 55 L.J., Q.B. 457. On general principles justifying the setting aside of a verdict see *Cox* v. *English, Scottish, and Australian Bank* (1905), A.C. 168 at pp. 169 and 170. On the question of excessive damages see *Greenlands, Limited* v. *Wilmshurst and the London Association for Protection of Trade* (1913), 3 K.B. 507 at pp. 514, 532, 533 and 563; *Taff Vale Railway* v. *Jenkins* (1913), A.C. 1 at p. 7. As to one's duty to prepare a charge see *Lister* v. *Perryman* (1870), L.R. 4 H.L. 521 at p. 539; *Archibald* v. *McLaren* (1892), 21 S.C.R. 588 at pp. 591 to 593. The jury must find the facts but the judge must decide whether on the facts so found there is reasonable and probable cause. As to effect of opinion of counsel on reasonable and probable cause see *Longdon* v. *Bilsky* (1910), 22 O.L.R. 4; *Abrath* v. *North Eastern Railway Co.* (1886), 11 App. Cas. 247; *Horsley* v. *Style* (1893), 9 T.L.R. 605. There must be actual malice.

Reginald Tupper, on the same side: On the question of special damages, the items allowed are excessive in certain cases: see *Wiffen* v. *Bailey and Romford Urban Council* (1915), 1 K.B. 600 at p. 610. All he is entitled to is on the same scale as in the Supreme Court. The witnesses that are compellable should only be paid the ordinary sums allowed.

Mayers, for respondent: There was evidence of malice and Wing Lew never for a moment believed in the charge he made. The company had a monopoly and Lew bought a lot adjoining the company's offices and would not submit to its authority. There was no legal evidence that the Attorney-General authorized the action, and the evidence of Lew's prosecution directed to malice. That there was not reasonable and probable cause see *Powell* v. *Hiltgen* (1900), 5 Terr. L.R. 16; *Fitzjohn* v. *Mackinder* (1861), 9 C.B. (N.S.) 505. As to power of Court of Appeal to reduce the damages see *Watt* v. *Watt* (1905), A.C. 115; *Lionel Barber & Co.* v. *Deutsche Bank (Berlin) London Agency* (1919), A.C. 304 at p. 315; *Persival* v. *Spencer* (1604), Yelv. 45; *Ray* v. *Lister* (1738), Andrews 385 at p. 388; *Pickwood* v. *Wright* (1791), 1 H. Bl. 643; *Usher* v. *Dansey* (1815), 4 M. & S. 94; *McHugh* v. *Union Bank of Canada* (1913), A.C. 299; *Fabriggs* v. *Mostyn* (1774), 2 W.

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Bl. 929; *Leith* v. *Pope* (1780), 2 W. Bl. 1327; *Knott* v. *Telegram Printing Co.* (1916), 27 Man. L.R. 336 at p. 351; (1917), 55 S.C.R. 631. As to the cost of defence, the question is what is reasonable cost: see marginal rule 1002 (9); Sedgwick on Damages, 9th Ed., 887; *Seattle Construction and Dry Dock Co.* v. *Grant Smith & Co.* (1918), 26 B.C. 397 at p. 403; *British Columbia Electric Rway. Co.* v. *Dunphy* (1919), 59 S.C.R. 263.

Argument

Sir C. H. Tupper, in reply: The case of *Watt* v. *Watt* (1905), A.C. 115 has scattered the old cases on this subject to the four winds of heaven.

Cur. adv. vult.

8th January, 1924.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: This is an unfortunate case. The defendant was urged, against his will, to lay the information which resulted in the bringing of this action for malicious prosecution, by provincial land surveyors, who appeared to have intervened in the professed interests of the public.

Then again, the jury, I think, shewed a decided bias against the defendant; their verdict was for $10,000 damages, whereas the plaintiff claimed but $5,000. The case is further complicated by the fact that instead of sending the jury back with instructions to keep their verdict within the pleadings, the learned judge discharged the jury.

After further argument, he appears on his own motion, but doubtless with the acquiescence of the plaintiff, to have reduced the amount of the verdict to $5,000. This, I think, he had no power to do. There should, therefore, be a new trial.

MARTIN, J.A.

MARTIN, J.A.: None of the objections taken to the verdict, and judgment thereupon entered, should, in my opinion, prevail. The most substantial of them is that relating to the reduction of the verdict by consent of the plaintiff only, but being of opinion that in the special circumstances, which disclose a persistent scheme of persecution, the reduced amount is not unreasonable. I think that it was open for the learned trial judge to adopt the course he did. This view is supported by authority, particularly by *Barber & Co.* v. *Deutsche Bank (Berlin) Lon-*

don Agency (1919), A.C. 304, wherein *Watt* v. *Watt* (1905), A.C. 115, a previous decision of the House of Lords, is explained, and the following observations by Lord Haldane, at p. 319, exhibit the general principle which should govern this case (quite apart from the power conferred in appeals for misdirection under the English rule 556) based upon the fundamental ground that the reduction by consent is not the "giving of a new verdict" by the Court, to do which would be an invasion of the province of the jury, "the constitutional tribunal for assessing damages":

"My Lords, if the question really were whether the 460*l.* could be deducted in this case, and the verdict treated as one for the balance only, I should feel much difficulty, in view of the decision by this House in *Watt* v. *Watt* (1905), A.C. 115, that the Court has no jurisdiction to assume the function of the jury by reducing the damages, and so giving a verdict itself, even with the consent of the plaintiff, if the defendant has not consented. But here it is not necessary to give a new verdict. The appellants, who were plaintiffs, are willing to forego judgment of 460*l.* of the amount the verdict awarded, without prejudice to their contention that the verdict was one for general damages, rightly arrived at, and not admitted to be excessive or to include wrong items. I think the case comes near the line, but I am content not to differ from those of your Lordships who think that deduction may be made in the judgment because of the assent given at the Bar by the appellants."

MARTIN, J.A.

And see Lord Chancellor Finlay at pp. 315-6, where he explains *Watt* v. *Watt*. The principle, as I understand it, is the willingness of the plaintiff "to forego judgment" to a certain extent of the verdict awarded.

Furthermore, I am of opinion that in any event the objection could have been removed by an amendment of the statement of claim and the respondent's counsel has, as a matter of precaution, asked us to allow that amendment to be made, and I think this application should be allowed, upon terms to be spoken to, as it was by the Court of Appeal in *Chattell* v. *"Daily Mail" Publishing Company* (1901), 18 T.L.R. 165, which, strangely, was not cited to the House of Lords in *Watt* v. *Watt*.

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

GALLIHER, J.A.: The jury found absence of reasonable and probable cause and malice. This brings us to the consideration of the amount of damages awarded. There were circumstances in this case which it is quite apparent the jury never considered,

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and which, in my opinion, they should have considered. I have no hesitation in saying that the verdict brought in by the jury, as to the amount of damages, is wholly unwarranted by the evidence and shews on its face bias and prejudice. I am satisfied, in the first place, that Wing Lee never had any intention of prosecuting the plaintiff for the removal of the surveyors' pin, but of course, if he allowed himself to be persuaded into laying that charge, either by the surveyors or any one representing the Crown, which appears to be the case, he must suffer the reasonable consequences of his act. It seems to me absurd that Wing Lee, even when engaged in the illegal act of removing the fence, would wantonly remove or cause to be removed, a boundary pin when we find that some time before he had employed a surveyor to fix the boundary line between the two properties, and I think the Crown would have been well advised, under all the circumstances, in not taking proceedings. But be that as it may, proceedings were taken and resulted in the acquittal of the accused Lew.

GALLIHER, J.A.

Now, Lew was summoned to appear and not placed under arrest; that a bench warrant was afterwards issued was due to his own act in disobeying the summons and for no good reason. He incurred certain expenses in defending himself, and these have been asked for as special damages and awarded him, but in addition, the jury awarded $10,000 general damages, which counsel for Lew asked to be reduced to $5,000, and was given judgment for that amount. The very unreasonableness of the amount awarded by the jury answers itself, and I think it is a proper case for a new trial.

MCPHILLIPS, J.A.
EBERTS, J.A.

MCPHILLIPS and EBERTS, JJ.A. would order a new trial.

New trial ordered, Martin, J.A. dissenting.

Solicitor for appellant: *A. Leighton.*
Solicitor for respondent: *F. S. Cunliffe.*

EDWARDS v. CLAPHAM.

MACDONALD, J.

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EDWARDS v. CLAPHAM

Nullity of marriage—Non-consummation—Refusal of woman to allow consummation—Inference of latent incapacity—Decree of nullity.

Where a petitioner who seeks to have a marriage annulled has proved wilful and persistent refusal of intercourse upon the part of the respondent and it appears from the evidence that the marriage cannot be consummated through "incapacity on the part of the respondent arising from nervousness, hysteria or uncontrollable aversion" a decree of nullity of marriage will be granted.

PETITION of the husband for nullity of marriage on the ground of the respondent's incapacity to consummate the marriage. The petitioner was married to the respondent on the 23rd of August, 1922. The medical inspectors reported that there was no apparent defect in either party. Heard by MACDONALD, J. at Victoria on the 1st of June, 1923, and on the 27th of November the petitioner being recalled by the Court gave the following evidence:

"At the time when the evidence was given on this trial, the doctors, as you remember, were called? Yes.

"And Dr. Raynor in his evidence said this: 'I judge that it was a case where she never would be willing to submit, that she had a mental condition there that apparently could not be changed.' Now I ask you candidly to tell us from your experience with your wife immediately following the marriage, whether you think you could have consummated the marriage except by use of force? I don't think so.

"I take it from that, that her whole attitude was such that unless you ruthlessly violated her person you could not obtain connection? Of course I liked the girl, and I didn't like to go too far, but I made sufficient attempts, and I tried to win her to me, but she flatly told me it was no use; she told me that the sexual act was repulsive to her. Statement

"I took that from your evidence. But you don't think that any physical effort on your part short of actual force would have been sufficient? I don't think so; I tried everything I knew.

"I am asking you candidly in the matter, that is all. Yes."

The further necessary facts are set out in the reasons for judgment.

Beckwith, for petitioner.

Respondent not represented.

27th November, 1923.

MACDONALD, J.: I have given this unfortunate marriage Judgment

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considerable thought and attention, since the evidence was given last June. The alliance has been a most unfortunate one. The petitioner was married to the respondent on the 23rd of August, 1922, but the marriage has not been consummated.

Petitioner seeks to have the marriage annulled. He has proved, beyond question, wilful and persistent refusal of intercourse, upon the part of the respondent. Counsel for the petitioner properly admits that such refusal would not, of itself, be a ground to support a decree of nullity of marriage. See *Napier* v. *Napier* (1915), P. 184, overruling *Dickinson* v. *Dickinson* (1913), P. 198. Does the evidence, then, disclose any other ground upon which the petition should be granted? Should I form the opinion that the marriage cannot be consummated? In *G.* v. *G.* (1912), P. 173, the husband filed a petition for nullity on the ground of his wife's frigidity, and the wife denied it. She alleged that the husband was incapable, and sought redress on that account. The inspectors reported that, as far as they could see, there was no impediment to consummation of marriage by either of the parties. The evidence of the parties was contradictory. Bargrave-Deane, J. in his judgment, after referring to the inconsistent stories of the parties, refrained from finding either of them guilty of perjury; but came to the conclusion that the marriage could not be consummated, and added (p. 174):

Judgment

"If for some reason which is not quite clear, but in fact, the Court is satisfied that the marriage cannot be consummated, then the Court is entitled to annul the marriage and not tie the two people together for the rest of their lives in a state of misery."

If this statement of the law were accepted, it might be applicable to the facts of this case. But I prefer to consider another ground taken by counsel for the petitioner in his able argument, *viz.*, that the marriage cannot be consummated through "incapacity on the part of the respondent arising from nervousness, hysteria, or uncontrollable aversion." In *F.* v. *P.* (*falsely called F.*) (1896), 75 L.T. 192, Sir F. H. Jeune, where there was no apparent defect in either party, and the respondent was not a virgin, on facts similar but not so strong as those here presented, did not consider the case as one of mere wilful refusal, and felt compelled to grant a decree of

nullity. He expressed his view of the matter as follows (p. 193):

"The ground 'wilful and wrongful refusal' is insufficient to my mind. It seems to be equally clearly held that, where the facts are that a woman refuses with no ground that anybody can see, except some incapacity in the more general sense of the word, one is entitled to say the facts point, not to wilful and wrongful refusal, but to some sort of incapacity, arising from nervousness, hysteria, or unconquerable aversion; all of which, I think, are insufficient to enable the case to be considered as one of mere wilful refusal, and compels me to give a decree."

While the latter part of this quotation might appear for the moment as somewhat inconsistent with the previous declaration of the law, I take it, that it does not control the more important statement, shewing the distinction which is drawn so plainly by such an eminent judge of the Probate and Divorce Court as Sir F. H. Jeune. It was accepted as the law by Gorell Barnes, J., in *B.* v. *B.* (1901), P. 39.

I feel, under the special circumstances of this case, that I am not departing from the law laid down in the later case of *Napier* v. *Napier, supra,* in thus following the judgment in *F.* v. *P., supra.* It has not been overruled. I am of opinion that the marriage should be annulled.

Judgment

The facts, I might mention, here presented, are stronger than those which prevailed with the learned judge in the case to which I have referred. They are of such a distinctive nature as to render *Napier* v. *Napier* inapplicable.

There will be a decree absolute of nullity of marriage.

Decree granted.

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MONTREAL TRUST CO. v. SOUTH SHORE LUMBER CO.

MONTREAL TRUST COMPANY v. SOUTH SHORE LUMBER COMPANY LIMITED AND THE KING.

Mortgage—Further advances—Taxes—Priorities—Costs—Crown Costs Act—Can. Stats. 1916, Cap. 11, Secs. 3, 13 and 24—R.S.B.C. 1911, Cap. 61.

A mortgage was given by the defendant Company in November, 1915, to secure a debenture debt and the debentures were immediately delivered to the Company's bankers to secure the current account at the bank, but the indebtedness for which the bank makes its claim in these proceedings began to accrue in October, 1919. Under The Business Profits War Tax Act, 1916, the defendant Company was assessed in 1922 for business profits taxes for the year 1919. It was held that the Crown in right of the Dominion has a lien for business profits tax in priority to the bank.

Held, on appeal, affirming the decision of MURPHY, J., that the assessment is a mere ascertainment of the amount due and under section 3 of the Act the lien attaches when the profits are earned irrespective of the assessment. The advances made by the bank after the lien of the Crown attached would therefore be subject to the Crown's prior rights.

West v. *Williams* (1898), 68 L.J., Ch. 127 followed.

Held, further, that the Crown Costs Act applies to the Crown in right of the Province only and the Crown (Dominion) as the successful party is entitled to the costs of the appeal.

APPEAL by plaintiff from a decision of MURPHY, J. of the 26th of May, 1923. The defendant Company was incorporated in British Columbia and in pursuance of its powers created an issue of $50,000 first mortgage bonds secured by a trust deed of the 18th of November, 1915, whereby the defendant Company conveyed all its assets to the plaintiff Company. The bonds were pledged to and have continually been in the possession of the Royal Bank of Canada since 1915, the bank having acted as the Company's bankers continuously since its inception. An action for administration and execution of the trusts of the trust deed was commenced on the 29th of November, 1922, and a receiver was appointed. Judgment was signed on the 7th of February, 1923, an order for taking accounts was made on the 29th of March, and the registrar's certificate was issued on the 3rd of May, 1923. On the 9th of May an application was made on behalf of the Minister of Finance (Dominion) to vary the

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certificate by reason of the finding that the property in and charged by the trust deed is subject to a lien to the Royal Bank in priority to a lien of His Majesty (Dominion) for business profits tax for the year 1919 under The Business Profits War Tax Act, 1916, said taxes being the sum of $7,536.93, the assessment for which was made in 1922. Although the bonds were pledged to the Royal Bank in 1915, the indebtedness for which the Bank claims priority began in October, 1919. The order was varied by MURPHY, J. in accordance with the application of the Minister of Finance.

Statement

The appeal was argued at Vancouver on the 1st and 6th of November, 1923, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Alfred Bull, for appellant: This business profits tax was for the year 1919, and was assessed in 1922. On a proper construction of section 24 the Legislature only intended to tax what a person could honestly say was his own. It cannot go back and oust the prior rights of a mortgagee: see Maxwell on Statutes, 6th Ed., pp. 381, 383 and 391. This was a hypothecation to secure past and future advances, a continuing collateral security. The cases of *Hopkinson* v. *Rolt* (1861), 9 H.L. Cas. 514; *West* v. *Williams* (1898), 68 L.J., Ch. 127 relied on by the trial judge do not apply to the facts here. Section 24 of The Business Profits War Tax Act, 1916, is not retrospective. The assessment for the 1919 tax was not until 1922 and there is no debt until assessment. Our rights took effect in 1915: see *In re Perth Electric Tramways, Limited* (1906), 2 Ch. 216; *Bradford Banking Company* v. *Briggs* (1886), 12 App. Cas. 29. As to costs the Crown Costs Act applies: see *In re Land Registry Act and Scottish Temperance Life Assurance Co.* (1919), 26 B.C. 504 at p. 505; *Rex* v. *Commissioners for Special Purposes of Income Tax* (1920), 1 K.B. 26; *Lovitt* v. *Attorney-General for Nova Scotia* (1903), 33 S.C.R. 350 at p. 368; *Regina* v. *Little* (1898), 6 B.C. 321; Halsbury's Laws of England, Vol. 6, p. 412, par. 630. When the Crown takes advantage of the Act the general rule as to costs may apply to the Crown. Apart from legislation the

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Crown is not entitled to costs. The Province has exclusive jurisdiction over the subject of costs.

Creagh, for respondent (the Crown): The Bank have notice that the Crown had a lien for taxes as on proper enquiry they would have ascertained as to taxes owing: See Halsbury's Laws of England, Vol. 27, par. 192; Vol. 21, par. 607. As to retrospective effect of statute see *O'Brien* v. *Cogswell* (1890), 17 S.C.R. 420. Our lien arose in 1919 and we have priority: see *West* v. *Williams* (1899), 1 Ch. 132; *Deeley* v. *Lloyds Bank Limited* (1912), A.C. 756. The Crown Costs Act does not apply to the Dominion: see *Gauthier* v. *The King* (1918), 56 S.C.R. 176.

Bull, in reply.

Cur. adv. vult.

8th January, 1924.

MACDONALD, C.J.A.: The Crown's claim is limited to one for priority over the plaintiff's mortgage for the amount due from the debtor, the mortgagor, for business profits taxes due the year 1919. The appellant mortgagee submits that the lien of the Crown under The Business Profits War Tax Act, 1916, did not attach until the year 1922, when first assessed by the Minister.

The first point to be determined is, when did the lien attach? Section 3 of the Act declares that:

"There shall be levied and paid to His Majesty a tax," etc.

That section has been re-enacted from time to time, but it is not suggested that the words quoted have been changed. Section 13 of the same Act charges the Minister with the duty of making an assessment, or in other words, of determining the amount of the tax payable for the particular taxation period, and section 24 makes the taxes imposed by the Act a lien on all the taxpayer's property. I am of opinion that the assessment does not fix the time when the lien attaches; the assessment is the mere ascertainment of the amount of the profits taxable. When taxes are imposed by section 3 and the profits for the period have been earned, whether an assessment has been made or not, the lien attaches.

MACDONALD, C.J.A.

The lien in question therefore attached in the year 1919, that is the year for which the taxes were imposed and were to be paid under section 3. The rule as to priority of the Crown's debts over others of the same degree is not, in my opinion, decisive of this case. It is not priority of debts that is in ques-

tion; what is in question is the priority of one security over another, a right *in rem,* not one *in persona.* When the subject has a duly-registered mortgage over his debtor's property, and the Crown has a statutory lien or charge upon the same property, their rights, in the absence of a declaration of priority in the statute, are, I think, governed by the ordinary rules applicable to charges generally. The mortgage in question is one to secure a debenture debt. Debentures were issued and delivered to the bank to secure a current account at the bank. It charges specific property and is also a charge on the floating property of the debtor. It did not become specific in respect of the latter until the end of 1922, when a receiver was appointed and then only subject to intervening rights. Therefore, if the whole of the mortgage moneys were advanced and owing at the time the Crown lien attached, the lien would attach to the floating property only. Moreover, I am of the opinion that the security for all moneys advanced prior to the lien and remaining unpaid, is not affected by the lien. The lien is on the property of the debtor, *i.e.,* on the debtor's interest in the property, and his interest was subject to the right of the mortgagee in respect of the unpaid advances made prior to the lien. These observations are, of course, directed to the security upon the specific property mentioned in the mortgage.

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The plaintiff was repaid its loans from time to time to a very large extent, and any new advances made after the lien of the Crown attached would be subject to the Crown's prior right: *West* v. *Williams* (1898), 68 L.J., Ch. 127.

On the question of costs, it was contended by the appellant that the Crown Costs Act, Cap. 61, R.S.B.C. 1911, applies to the Crown in right of the Dominion as well as to the Crown in right of the Province, and that therefore no costs of these proceedings, either here or in the Court below, could be awarded in favour of either party. If that Act had in express terms been made applicable to the Crown in right of the Dominion, I should have agreed with this contention. It reads as follows:

"No Court or judge shall have power to adjudge, order, or direct that the Crown, or any officer, servant, or agent of and acting for the Crown, shall pay or receive any costs in any cause, matter, or proceeding except under the provisions of a statute which expressly authorizes the Court or

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judge to pronounce a judgment or to make an order or direction as to costs in favour of or against the Crown."

In *Gauthier* v. *The King* (1918), 56 S.C.R. 176 at p. 194 Mr. Justice Anglin said:

"I think it may be accepted as a safe rule of construction that a reference to the Crown in a provincial statute shall be taken to be to the Crown in right of the Province only, unless the statute in express terms or by necessary intendment makes it clear that the reference is to the Crown in some other sense. This would seem to be a corollary of the rule that the Crown is not bound by a statute unless named in it."

With respect, I would adopt that as a sound canon of construction applicable to a case of this kind. It has been said that the Crown is one and indivisible. That is the ideal conception of the Crown, but in this country we have under our Federal system, a distribution of powers amongst the Dominion Parliament and Provincial Legislatures, "the Crown in right of the Dominion," and "the Crown in right of the Province," are expressions which may therefore mean different things.

MACDONALD, C.J.A.

The question is not one of jurisdiction, but one of construction, and therefore I think a limited construction must be put upon the words of this statute, in which there is no intimation that it was intended that the legislation should affect other than the Crown in right of the Province.

It was submitted that the Provincial Legislature had power to pass any legislation it might choose in respect of what the Courts of this Province might order or might not order in respect of costs of proceedings in those Courts. This, I do not doubt. The right of the common law Courts to award costs was given by a very old statute in England, and has been changed from time to time since, both in England and in this Province, and no doubt could be changed so as to deprive the Crown in right of the Dominion of any costs in civil proceedings, but as I have already said, it is a matter of construction, and I do not think the Legislature intended to go so far as that.

The respondent, therefore, should have the costs of the appeal.

MARTIN, J.A.

MARTIN, J.A. would dismiss the appeal.

GALLIHER, J.A.

GALLIHER, J.A.: I am in agreement with the conclusions of the Chief Justice in his reasons just handed down.

MCPHILLIPS, J.A.

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

EBERTS, J.A. would dismiss the appeal.

Appeal dismissed.

Solicitors for appellant: *Tupper, Bull & Tupper.*
Solicitor for respondent: *A. R. Creagh.*

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Indians—Action for goods sold and delivered—Garnishee—Partnership—Proceeds of sale of wheat grown on reserve—Registrar's order—Jurisdiction—R.S.C. 1906, Cap. 81, Secs. 99 and 102—R.S.B.C. 1911, Cap. 14, Sec. 20.

Section 99 of the Indian Act provides that no Indian shall be taxed on his real and personal property, except such property as he may own outside the reserve, and section 102 declares that no person shall take any security or obtain any lien or charge, whether by mortgage, judgment or otherwise upon an Indian's real or personal property which is free from taxation.

The plaintiff brought action in the County Court against an Indian living on a reserve for the price of goods sold and delivered to him and obtained a garnishee order from the registrar against one G. who lived off the reserve, to whom the defendant sold a crop of wheat that he had raised on the reserve and for which he had not been paid. On application to the County Court judge the garnishee order was set aside.

Held, on appeal, *per* MACDONALD, C.J.A. and MCPHILLIPS, J.A., affirming the decision of SWANSON, Co. J. (MARTIN, J.A. dissenting), that wheat while on the reserve is not subject to taxation nor the process of execution, nor does the language of the Act render the proceeds of a sale of the wheat subject to taxation.

Per GALLIHER and MCPHILLIPS, JJ.A.: That as the garnishee order was issued against J. S. Galbraith as garnishee and the material shews that the defendant's grain was sold to Messrs. J. S. Galbraith & Son which imports a partnership the registrar had no jurisdiction to make the order.

APPEAL by plaintiff from an order of SWANSON, Co. J., of the 17th of September, 1923, setting aside a garnishee order of the registrar of the Court at Vernon of the 15th of August, Statement

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1923. The plaintiff Association brought action in the County Court to recover $149.14 from the defendant who is an Indian residing on the Okanagan Indian Reserve for goods and supplies sold the defendant at various periods during the summer of 1921 and on the same day obtained a garnishee order from the registrar of the County Court at Vernon directed to J. S. Galbraith who owed the defendant certain sums for wheat sold to him by the defendant which he raised on his farm on the Indian reserve. It was held that the moneys were exempt from attachment under section 102 of the Indian Act.

Statement

The appeal was argued at Vancouver on the 9th and 13th of November, 1923, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

A. H. MacNeill, K.C., for appellant: The money garnisheed was owing to the defendant by a white man off the reserve. It does not come within the radius of section 102 of the Indian Act. You cannot enquire into how the debt arose: see *Rex* v. *Hill* (1907), 15 O.L.R. 406; *Sanderson* v. *Heap* (1909), 19 Man. L.R. 122; *Sero* v. *Gault* (1921), 50 O.L.R. 27 at pp. 32-3; *Attorney-General for Canada* v. *Giroux* (1916), 53 S.C.R. 172.

Brown, K.C., for respondent: The order should not have been made by the registrar but by a judge, as the defendant's creditor was a partnership: see section 20 of the Attachment of Debts Act, R.S.B.C. 1911, Cap. 4; *Joe* v. *Maddox* (1920), 27 B.C. 541; *Carleton Woollen Co.* v. *Town of Woodstock* (1907), 38 S.C.R. 411; *Murray* v. *Stentiford* (1914), 20 B.C. 162. On the application of section 102 of the Indian Act see *Simkevitz* v. *Thompson* (1910), 16 O.W.R. 865.

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MacNeill, in reply: The protection is only for what is on the reserve itself: see *Attorney-General for Canada* v. *Giroux* (1916), 53 S.C.R. 172 at p. 199. The man served as garnishee is the one man of the firm: see *Walker* v. *Rooke* (1881), 6 Q.B.D. 631.

Cur. adv. vult.

8th January, 1924.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: This is an appeal from an order setting aside a garnishee order attaching moneys owing to an

Indian for the price of wheat grown by him on an Indian reserve, and sold to a purchaser thereof on credit.

It is provided by section 99 of the Indian Act, Cap. 81, R.S.C. 1906, that no Indian shall be taxed on his real and personal property, except such property as he may own outside the reserve, and section 102 declares that no person shall take any security or obtain any lien or charge whether by mortgage, judgment or otherwise, upon an Indian's real or personal property, which is free from taxation.

The wheat while on the reserve would not, I think, be subject to taxation, nor to process of execution, and I am of opinion that the language of the Act does not render the proceeds of it subject to taxation. It might, I do not say it would, be different where the Indian received the proceeds and deposited it, say, in a bank outside the reserve, but here, the debtor was obliged to seek his creditor at home on the reserve and pay him there. But even apart from this technical rule, I think there is a clear intention shewn in the Act to exempt from taxation such a chose in action as we have here.

MACDONALD, C.J.A.

I would, therefore, dismiss the appeal.

MARTIN, J.A.: This appeal should, I think, with all deference to contrary opinions, be allowed, on the short ground that upon the evidence before us the only inference to be drawn is that this was a matter of business transacted outside the Indian reserve, and so the money due to the Indian arising therefrom was a debt owing to him outside the reserve, and therefore could be attached within the general principle to be extracted from the cases cited as to Indian property outside such reserves.

The formal objections to the proceedings should, I think, be overruled; the sufficiency of the affidavit is supported by the authorities I cited during the argument, *viz.*, *Walker* v. *Rooke* (1881), 6 Q.B.D 631, and Chitty's Forms, 14th Ed., 519. And it is moreover to be noted that the garnishee has admitted the debt and paid it into Court without any "dispute" or "suggestion" of non-liability or other claims, as contemplated and provided for by sections 12-17 of the Attachment of Debts Act, Cap. 14, R.S.B.C. 1911. If the person garnished, *viz.*, J. S.

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Galbraith, is in fact the person who comprises the firm doing business as J. S. Galbraith & Son, then the attaching order was rightly issued in his name alone as *Walker* v. *Rooke* (a decision of three judges of the Queen's Bench Division) shews, but if that fact is disputed by the respondent herein, that question can only be tried and determined as the statute directs in said sections cited, *viz.*, by an issue to be tried in the Court below; it cannot clearly be entertained by this Court by anticipating the statutory tribunal of first instance, and in the absence of the evidence that would be given at said trial.

GALLIHER, J.A.: I agree with Mr. *Brown's* submission that the registrar had no jurisdiction to issue the garnishee order.

While the garnishee order is issued as against J. S. Galbraith as garnishee, the affidavit of the defendant Harris, that the grain for which the money garnisheed is due, was sold to Messrs. J. S. Galbraith & Son, and that is not denied. Now, J. S. Galbraith & Son, imports a firm or partnership, and if it is not, the plaintiff could and should have shewn it. Taking it as a partnership, the garnishee order which has been vacated by the learned judge below, should have been made under section 20 of Cap. 14, R.S.B.C. 1911, the registrar, in my opinion, having no jurisdiction to make it. On that ground I would dismiss the appeal.

GALLIHER, J.A.

MCPHILLIPS, J.A.: I intimated during the argument of this appeal that I had no doubt that the order under appeal setting aside the garnishee order was rightly made, and upon further consideration I may say that I am still further convinced that SWANSON, Co. J. arrived at the right conclusion.

Mr. *A. H. MacNeill, K.C.*, in a very careful and forceful argument, presented the view that the moneys attached were not exempt under section 102 of the Indian Act, Cap. 81, R.S.C. 1906, the moneys being personal property subject to taxation under section 99 of the Act and therefore capable of being attached.

In support of this contention, *Avery* v. *Cayuga* (1913), 28 O.L.R. 517; *Rex* v. *Hill* (1907), 11 O.W.R. 20 at p. 22; *Sanderson* v. *Heap* (1909), 19 Man. L.R. 122; *Lovitt* v. *The*

King (1910), 43 S.C.R. 106 at p. 131; *Attorney-General for Canada* v. *Giroux* (1916), 53 S.C.R. 172 at pp. 198-9, and *Sero* v. *Gault* (1921), 50 O.L.R. 27 at foot of p. 32, and top of p. 33 were relied upon, and it was pressed that upon the facts the *situs* of the moneys was in the City of Vernon. The facts of the present case would not appear to me to admit of the authorities cited being of any value. Here we have a sale of grain made by an unenfranchised Indian residing upon the Okanagan Indian Reserve, No. 3 (Prairie Reserve), near Larkin, in the County of Yale. There is no evidence to warrant it being said that the wheat was withdrawn by Harris from the reserve, and I assume, as I am rightly entitled to assume in the absence of evidence to the contrary, that the sale was made upon the reserve and delivery made there. It is the requirement in law for the debtor to seek out his creditor and make payment of his debt to him, and that would be to make payment to Harris upon the reserve. It is too clear for argument that the present case is not one which will admit of the upholding of the garnishee process. Mr. *Brown,* counsel for the respondent, very effectively met the argument of the learned counsel for the appellant and relied upon the following authorities: Wharton's Law Lexicon, 11th Ed., p. 831, Taxation; *Carleton Woollen Co.* v. *Town of Woodstock* (1907), 38 S.C.R. 411; *Murray* v. *Stentiford* (1914), 20 B.C. 162; *Walker* v. *Rooke* (1881), 6 Q.B.D. 631.

MCPHILLIPS, J.A.

It is clear that the property of an Indian is not subject to any form of attachment if it be not taxable, and in the present case unquestionably no case has been made out to shew that the moneys or property in question are subject to taxation. It is idle contention, in my opinion, upon the facts of the present case to press the view and make the submission that the moneys due and payable are personal property outside of the Indian reserve. Nothing supports this and no property, in my opinion, can be said to be outside the reserve.

It is to be noted that the garnishee process, in any case, is ineffective in that Harris made the sale of his wheat to Messrs. J. S. Galbraith & Son of Vernon, and the garnishee order is against J. S. Galbraith only. This alone indicates the futility

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of the proceedings had and taken. The Indians are wards of the National Government (the Government of Canada) and the statutory provisions are aimed to provide statutory protection to the Indians and the public must govern itself accordingly, otherwise we would see the Indians overreached on every hand and the Government required, in even a greater degree, to provide for and protect the Indians from the rapacious hands of those who ever seem ready to advantage themselves and profit by the Indians' want of business experience and knowledge of world affairs.

MCPHILLIPS, J.A.

I do not import at all that the appellant here has taken any advantage of Harris; in truth, I assume, which I have no doubt the fact to be, that the appellant is rightly entitled to the claimed debt, *i.e.*, that it is a meritorious one, still, the business community and the public generally must understand that in doing busines with the Indians different considerations obtain, and it must be understood that legal process cannot be invoked against Indians when the subject-matter comes within the protective clauses of the Indian Act, and that is the present case.

The appeal, in my opinion, should stand dismissed, and the order of SWANSON, Co. J. affirmed.

Appeal dismissed, Martin, J.A. dissenting.

Solicitor for appellant: *R. R. Perry.*
Solicitor for respondent: *D. C. Tuck.*

BUNTING v. HOVLAND AND WATKINS.

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Principal and agent—Sale of mining property—Authority to sell—Finding a purchaser—Effective cause—Commission.

If the relation of buyer and seller is really brought about by the act of the agent, he is entitled to a commission although the actual sale has not been effected by him, but he must shew that some act of his was the *causa causans* or the efficient cause of the sale.

APPEAL by defendants from the decision of MURPHY, J. in an action tried by him at Vancouver on the 14th and 15th of June, 1923, for a commission for bringing about a sale of a group of mining claims situate in the Upper Salmon River Valley near Stewart, B.C., and known as the Unicorn group consisting of six claims and two fractions. The facts are sufficiently set out in the judgment of the trial judge.

Statement

J. H. Senkler, K.C., for plaintiff.
E. J. Grant, for defendants.

20th June, 1923.

MURPHY, J.: I find the facts as follows: On May 27th, 1922, plaintiff spoke of the Unicorn group to Trites with a view to making a sale to him. Trites then had an option on the Big Missouri which the Unicorn adjoins. Trites was sufficiently interested to request particulars. Plaintiff went to Watkins and got plan, data and price, and was authorized, in so far as Watkins could give such authority, to sell to Trites on the given terms. These, *inter alia,* called for a payment of $2,000 down, which fact did not appeal to Trites, but his interest in the property was not entirely destroyed, probably because it adjoins the Big Missouri. I think his condition of mind then was, if development work on the Big Missouri shewed that property up well, then he would make an examination of the Unicorn with a view to getting an option on it on the best terms obtainable. Trites returned to Hyder on July 23rd, 1922, and plaintiff again saw him and wished to accompany him to the Unicorn, which Trites was willing but not anxious he should do. As it turned out, however, plaintiff did not go, as Trites

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left with Pitts without again seeing plaintiff. Arriving at the Big Missouri, Trites found the development work thereon of an encouraging character. This, I think, is shewn by what occurred in the steamer cabin at Hyder on July 30th. On that date, Trites shewed plaintiff ore from the Big Missouri with which he, Trites, was much pleased. Because of the favourable shewing on the Big Missouri, Trites's interest in the Unicorn was sufficiently enhanced to induce him to look over that property as well as others in the vicinity of the Big Missouri. His interest in the Unicorn was deeper than in other properties then looked over, as shewn by his getting samples from it and, so far as appear in evidence, from no other properties. The reason, I think, was because the Unicorn adjoins the Big Missouri. On his return to Hyder on July 30th, he, as stated, saw plaintiff and gave plaintiff the impression, as was the fact, that he was in a receptive frame of mind with regard to making a deal for the Unicorn group, though not then prepared to go further. He told plaintiff he had samples which he intended to have assayed. This he did and returned to Hyder on August 6th. The assays had revealed nothing startling in the way of values. Arriving at Hyder, he was informed by plaintiff that Smith was there looking for properties and that if he, Trites, did not want the Unicorn plaintiff proposed to try to dispose of it to Smith. Trites did not wish to commit himself to a cash payment. Neither, I think, did he wish negotiations between Smith and plaintiff to be opened up. I do not think he told plaintiff in so many words he intended to make a deal for the Unicorn, but I think he did use language to plaintiff which led plaintiff reasonably to believe that he probably would be open to negotiations. I cannot see otherwise why plaintiff should have told defendant Hovland on the trail a day or so after this meeting, as I find he did, that the deal with Trites would go through. I think plaintiff knowingly put the case stronger than Trites's words justified, but that he felt sure, from Trites's language, he could effect the sale on some terms. I find the defendant Hovland did say the cash payment might be raised if the samples he had with him assayed well. Defendant Hovland, apart from this statement, did nothing to prevent plaintiff going on as agent for the sale of

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the property but was, on the contrary, anxious that plaintiff should so continue. He, in fact, ratified the agency given plaintiff by his co-defendant with the qualification as to a possible change in price. At no time did plaintiff have an exclusive agency. Plaintiff, I find, repeated, at the Unicorn property, to Watkins his assertion that he had made a deal with Trites. He did not see Trites, who was near by on the Big Missouri, because of what defendant Hovland had said as to a possible increase in the cash payment. He did, however, request that Watkins and his co-defendant come to Hyder to complete the deal, feeling sure this could be done on some terms. He returned to Hyder on August 10th, 1922, expecting Trites and the defendants would shortly follow him there. On August 13th or 14th defendants uncovered some rich ore on the Unicorn. They, as a result, determined to insist on a cash payment of $5,000. Knowing, as a result of what the plaintiff had told them, of Trites's receptive mood, as to taking an option on the Unicorn, and knowing also of Trites's presence on the Big Missouri and being eager to get a cash payment they had Winkler go to see Trites, with the result that a deal was made. At the time defendants did this, I hold they both knew that plaintiff would likely make a claim for commission.

The question is, on these findings, is plaintiff entitled to succeed? With a deal of hesitation, I have come to the conclusion that he is. The law is clear. It is laid down in *Burchell* v. *Gowrie and Blockhouse Collieries, Limited* (1910), 80 L.J., P.C. 41 at pp. 45 and 46. If the relation of buyer and seller is really brought about by the act of the agent, he is entitled to commission although the actual sale has not been effected by him. The plaintiff must shew that some act of his was the *causa causans* of the sale or was the efficient cause of the sale. Had the matter of this deal been suddenly presented to Trites by Winkler, without the previous efforts of plaintiff having been made, and without the knowledge communicated by plaintiff to Trites that Smith was looking for properties, I much doubt if Trites would have taken the property even after seeing the new ore uncovered. Undoubtedly that was the determining factor with him, but it would not have operated so

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readily if, indeed, it operated at all but for the previous work of the plaintiff. Plaintiff did much more than merely introduce the property to Trites. I find it was agreed plaintiff should get 10 per cent. of all cash payments made if he succeeded in placing the property, and give judgment for him for such amounts with costs.

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From this decision the defendants appealed. The appeal was argued at Vancouver on the 17th of October, 1923, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Mayers (*E. J. Grant,* with him), for appellants: We say first, the plaintiff failed to establish any contract on which he could sue; and secondly, that he was the effective cause of the sale. On the question of contract, the offer in this case was never accepted: see *Robins* v. *Hees* (1911), 19 O.W.R. 277 at p. 278; *Prentice* v. *Merrick* (1917), 24 B.C. 432; *Kennedy* v. *Victory Land & Timber Co., Ltd.* (1922), 3 W.W.R. 145. We say he was not "the efficient cause of the sale": see *Nightingale* v. *Parsons* (1914), 2 K.B. 621 at p. 626; *Barnett* v. *Brown and Co.* (1890), 6 T.L.R. 463.

Argument

J. H. Senkler, K.C. (*Buell,* with him), for respondent: The defendants had employed Bunting previously, and just before he first saw Trites he obtained full information with maps from Watkins, and then interviewed Trites to whom he gave the maps: see *Green* v. *Bartlett* (1863), 32 L.J., P.C. 261; *Burchell* v. *Gowrie and Blockhouse Collieries, Limited* (1910), A.C. 614. We contend the case of *Kennedy* v. *Victory Land & Timber Co., Ltd.* (1922), 3 W.W.R. 145 is in our favour. The steps taken by the plaintiff brought the owners into relation with the purchaser: see *Stratton* v. *Vachon* (1911), 44 S.C.R. 395; *Pettypiece* v. *Holden* (1919), 49 D.L.R. 386; *Lee* v. *O'Brien and Cameron* (1910), 15 B.C. 326; *Lalande* v. *Caravan* (1909), 14 B.C. 298; *Toulmin* v. *Millar* (1887), 58 L.T. 96.

Mayers, in reply.

Cur. adv. vult.

8th January, 1924. MURPHY, J.

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

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MARTIN, J.A.: With all due respect for contrary opinions, I think this appeal should be allowed. I regard the case (on facts which are really very little, if at all, in conflict on the crucial point) as being simply one where two agents are attempting to bring about a sale of property but there is an obstacle (here the cash payment) which has to be removed, and the agent who removed that obstacle herein was not the plaintiff, but Winkler, and therefore, the plaintiff was not the effective cause of bringing the negotiations to fruition.

GALLIHER, J.A.: I have read the appeal book through and think the judgment below can be maintained on both the law and the evidence.

GALLIHER, J.A.

I would dismiss the appeal.

MCPHILLIPS, J.A.: I am not of the opinion that this is a case where, in appeal, a different view upon the facts can be reasonably come to than that arrived at by the learned trial judge (*Coghlan* v. *Cumberland* (1898), 67 L.J., Ch. 402).

In the case of *Kennedy* v. *Victory Land & Timber Co., Ltd.* (1922), 3 W.W.R. 145, I was strongly of the view that a case had been made out for the allowance of a commission, but in that case there was some difficulty upon two points, *i.e.*, as to whether the plaintiff had any authority as agent to find a purchaser, and as to the sufficiency thereof in that the defendant was a company and it was pressed that no proper authority which would bind the company was shewn. I, however, was of the opinion that upon all the facts and circumstances, Kennedy had the necessary authority to find a purchaser and that he did succeed in introducing to the company a purchaser ready, able and willing to buy and who did in fact buy the property. Further, there was evidence upon the part of the purchasers that Kennedy was the person who had first brought the property to their notice. Notwithstanding this the judgment of this Court was reversed by the Supreme Court of Canada ((1922), 3 W.W.R. 683), but no written reasons were given. I can only conclude that the Supreme

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Court of Canada took the view that the agency was not established and Kennedy had no authority to find a purchaser and was consequently not entitled to a commission, as that was the view of my brothers the Chief Justice and GALLIHER, J.A., who dissented in this Court in the *Kennedy* case. Here, however, there is no difficulty of that kind; there is ample evidence of the agency and the bringing about of the relation of buyer and seller (*Burchell* v. *Gowrie and Blockhouse Collieries, Limited* (1910), 80 L.J., P.C. 41 at pp. 45 and 46).

Further, the present case has the elements to be found in *Toulmin* v. *Millar* (1887), 58 L.T. 96. The sale made was made behind the back of the plaintiff. I am satisfied that the plaintiff was the inducing and efficient cause of the sale. The learned judge in his reasons for judgment said:

MCPHILLIPS, J.A.

"Had the matter of this deal been suddenly presented to Trites by Winkler, without the previous efforts of plaintiff having been made, and without the knowledge communicated by plaintiff to Trites that Smith was looking for properties, I much doubt if Trites would have taken the property even after seeing the new ore uncovered. Undoubtedly that was the determining factor with him, but it would not have operated so readily if, indeed, it operated at all but for the previous work of the plaintiff. Plaintiff did much more than merely introduce the property to Trites."

I would dismiss the appeal.

EBERTS, J.A.

EBERTS, J.A. would dismiss the appeal.

Appeal dismissed, Martin, J.A. dissenting.

Solicitor for appellants: *E. J. Grant.*

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

REX v. BRIGGS.

MORRISON, J. (At Chambers)

1923

Nov. 27.

REX v. BRIGGS

Bail—Recognizance of—Application to County Court to estreat—Application for writ of prohibition—R.S.B.C. 1911, Cap. 17, Sec. 12 (2)—B.C. Stats. 1915, Cap. 59, Secs. 52 and 65.

On an application for a writ of prohibition directed to the County Court judge prohibiting him from proceeding on an application by the Crown for an order estreating a recognizance:—

Held, that the word "Court" as used in section 65 of the Summary Convictions Act means "County Court"; the procedure therefore to be followed on an application to estreat bail is to be found in section 12 (2) of the Bail Act and the application for a writ of prohibition should be refused.

APPLICATION for a writ of prohibition directed to the County Court judge prohibiting him from proceeding on the application of the Crown for an order estreating a recognizance on the ground that the County Court had no jurisdiction to make such an order and that the forfeiture proceedings should be had before the police magistrate.

The accused, with Thomas R. Hayes as surety, entered into a recognizance on the 7th of September, 1923, before a justice of the peace, in the sum of $3,000. The condition of the recognizance was as follows:

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"The condition of the above written recognizance is such that whereas the above bounden Fred G. Briggs was this day charged before me for that he did unlawfully sell liquor; and whereas the examination of the witness for the prosecution in this behalf is adjourned until the 8th of September, 1923. If, therefore, the said Fred G. Briggs appears before the presiding judge on the said 8th of September, 1923, at 9.30 o'clock in the forenoon, at the police court situated at 236 Cordova Street East, in the City of Vancouver, and so on from day to day until the disposal of the said charge," etc.

The hearing was adjourned from September 8th to September 14th, when the accused failed to appear, and the deputy police magistrate endorsed on the back of the recognizance his certificate in accordance with the provisions of the Summary Convictions Act, and transmitted the recognizance to the registrar of the County Court of Vancouver, as required by section 65 of the Summary Convictions Act. The registrar then made

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out a roll of forfeited recognizances and a motion was then made to the County Court for an order. Heard by MORRISON, J. at Chambers in Vancouver on the 1st of October, 1923.

Eyre, for the application: It is admitted that the application comes under the Summary Convictions Act, B.C. Stats. 1915, and the application to estreat the bail bond is governed by that Act and the procedure therein set out, it being under section 52 which is similar to section 739 of the Criminal Code, and sections 54 to 61 provide means of collecting the pecuniary penalty in a bond. The Bail Act is superseded by the Crown Rules which came into force in 1906. The County Court has no jurisdiction to enforce a bond in the way sought. If the County Courts Act does not apply the only procedure is by entering a plaint and issuing a summons.

Argument

Wood, for the Crown: The charge is for selling liquor and the procedure is governed by the Summary Convictions Act, section 65 of which provides that the justice shall certify on the back of the recognizance of the accused's non-appearance and transmit to the County Court where it is enforced in the same way as a fine. "Such Court" means County Court and as to the manner of enforcement of the recognizance see the Bail Act, R.S.B.C. 1911, Cap. 17, Sec. 12, Subsec. (2) which refers to the Crown Office Rules, 1886, in force in England. Rule 124 provides that no recognizance shall be estreated without the order of the Court or judge and the Court has discretion as to whether to order the estreat or not. The procedure adopted is as near as possible to the procedure laid down by these rules.

27th November, 1923.

MORRISON, J.: In my opinion the word "Court" to which reference has been made in this case, and as used in the Summary Convictions Act, B.C. Stats. 1915, Cap. 59, Sec. 65, means the County Court. Then the procedure to be followed, as is being sought in the present application by Mr. *Wood,* is to be found in section 12, subsection (2), of the Bail Act, R.S.B.C. 1911, Cap. 17.

Judgment

I therefore refuse the application for prohibition.

Application refused.

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STEVENS v. ABBOTSFORD LUMBER, &c. Co.

Damages—Fire—Starting on one property and spreading to another—Property destroyed in general state of disrepair—Measure of damages.

The plaintiff purchased 40 acres of land in 1912, the cleared portion being less than three acres, on which was a dwelling-house (built two years previously), out-houses, and an orchard of apple trees. The plaintiff did not live on the property but left it in the hands of a caretaker who made no improvements and the buildings and fences fell into a general state of disrepair. In 1919 a fire started on the defendant's property about half a mile away, spread, and sweeping over the plaintiff's lands destroyed the buildings, orchard and fences. In an action to recover $6,950 the trial judge assessed the damages at $1,800.

Held, on appeal, affirming the decision of MACDONALD, J. (MARTIN, J.A. dissenting), that the true value of the property destroyed is the measure of damages. The cost of replacement is not a proper estimate of damages, but it may be taken into account in arriving at the real value of the property at the time of its destruction, and as this was the view taken by the trial judge and the evidence was sufficient to sustain the judgment for the amount awarded the appeal should be dismissed.

APPEAL by defendant from the decision of MACDONALD, J. of the 8th of June, 1923, in an action for damages owing to the negligence of the defendant Company in allowing a fire to spread from its property to that of the plaintiff and destroying the buildings thereon, the orchard and hay crop. The plaintiff owned the south-west quarter of the south-west quarter of section 1, Township 13, New Westminster District, in the Municipality of Matsqui. He purchased the property in 1912 consisting of 40 acres from two and a half to three acres being cleared but with the stumps remaining. There was a dwelling-house (built two years previously), a barn, root-house, well, and orchard of apple trees. The plaintiff never lived on the property and it had not been worked as a farm since he purchased it having been left in the hands of a caretaker, the result being that the buildings and fences fell into a general state of disrepair. The defendant Company with offices at Abbotsford owned a property about a half a mile away upon which logging operations were carried on. Refuse, forest debris, and slash accumulated and

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in 1919 it was piled in a heap and set on fire by the defendant's employees. The fire was allowed to spread and it swept over the plaintiff's property destroying the buildings, orchard, well, and hay. The plaintiff brought action claiming $6,950, damages resulting from the defendant's negligence in allowing the fire to spread from its own property. The learned trial judge assessed the damages at $1,800.

Statement

The appeal was argued at Vancouver on the 13th, 14th and 15th of November, 1923, before MACDONALD, C.J.A., MARTIN and GALLIHER, JJ.A.

Argument

Davis, K.C. (*Harris, K.C.,* with him), for appellant: The question of liability will not be argued, only the amount and nature of damages. The plaintiff had 40 acres. It had been logged over and less than three acres cleared. The house was built in 1910. There was also a barn, root-house, well and orchard of apple trees. The fire was in the fall of 1919. The plaintiff bought the property in 1912 but never lived on it or worked it. It was always in the hands of a caretaker and was allowed to drift into a general state of disrepair. At the time of the fire the place had no substantial value. The proper measure of damage is the value to the owner, not the expense of restoring: see *Jones* v. *Gooday* (1841), 8 M. & W. 146; *Canadian National Fire Ins. Co.* v. *Colonsay Hotel et al.* (1923), 3 D.L.R. 1001 at p. 1003. The plaintiff should be in the position he was before the fire: see *Hosking* v. *Phillips* (1848), 3 Ex. 168; *Wigsell* v. *School for Indigent Blind* (1882), 8 Q.B.D. 357 at p. 363; *Whitwham* v. *Westminster Brymbo Coal and Coke Company* (1896), 1 Ch. 894 at pp. 899-900. Evidence of the effect of a fire on land varies, but in clearing land burning is resorted to. Nothing was done on the land for eight years so that the effect of the fire on the land has no bearing on the actual loss.

E. B. Ross (*Patterson,* with him), for respondent: Fifty fruit tres and the fence were destroyed. On the assessment of damages to timber see *Fulton* v. *Maple Leaf Lumber Co.* (1914), 17 D.L.R. 128; *McHugh* v. *Union Bank of Canada* (1913), A.C. 299 at p. 309. The true principle is the value of the buildings at the time they were destroyed, *i.e.,* the value

of the old houses: see Mayne on Damages, 9th Ed., 424; *Lukin* v. *Godsall* (1795), Peake Add. C. 15; *Dodd* v. *Holme* (1834), 1 A. & E. 493; *Hide* v. *Thornborough* (1846), 2 Car. & K. 250; *Crewe* v. *Mottershaw* (1902), 9 B.C. 246; *Morrison* v. *Commissioners of Dewdney Dyking District* (1922), 31 B.C. 23 at p. 30; *Creaser* v. *Creaser* (1907), 41 N.S.R. 480; *Murphy* v. *Wexford Co. Council* (1921), 2 I.R. 230; *Hornby* v. *New Westminster Southern Railway Company* (1899), 6 B.C. 588 at p. 595; Bacon's Abridgement, 7th Ed., Vol. 1, p. 104.

Argument

Davis, in reply: The witnesses are interested as they all have claims of the same nature.

Cur. adv. vult.

8th January, 1924.

MACDONALD, C.J.A.: This is a very simple case. Liability is admitted by the defendant, and the only question argued was the question of the proper amount of the damages.

Mr. *Davis* contended that the measure of damages was the difference between the selling value of the lands before the buildings and other improvements were destroyed, and the selling value after the fire. When pressed, Mr. *Davis* admitted that he meant nothing more than this: that the true value of the property destroyed was the measure of damages, and this, in my opinion, is the true measure of damages.

MACDONALD, C.J.A.

But Mr. *Davis* contended that the trial judge had estimated the damages on a wrong principle, namely, that of the cost of replacement, but I think this is not so. The cost of replacing the property may be taken into account in arriving at the real value of the property at the time of destruction. It is not the measure of damages, it is only a factor which may be considered as bearing upon the question, it is merely incidental to it. To know the cost of, say, the buildings in 1912 less the depreciation since, other factors remaining the same, would assist the judge in arriving at damages, which often must be largely a matter of opinion. I think this was the view taken by the learned trial judge, and as in my opinion, the

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evidence is sufficient to sustain the judgment for the amount awarded, I would dismiss the appeal.

MARTIN, J.A.: This appeal should, I think, with all due deference to contrary opinions, be allowed, because, in brief, I can only gather from the learned judge's reasons the inference that he did, in fact, assess the damages upon the wrong principle, in the circumstances before us, of replacement of the property that was destroyed by fire; and it is only upon that erroneous foundation (I speak with every respect) that such an allowance as $1,800 could be supported. The authorities cited by the appellant's counsel satisfy me that the only measure of damages applicable to the facts before us is the actual value of the property, and that I could not put at more than $1,000, the evidence of a greater amount being, to my mind, very far from satisfactory.

GALLIHER, J.A.: The *quantum* of damages only is in dispute. The learned trial judge has fixed these at $1,800, and unless I can say that he proceeded upon a wrong principle, I cannot see my way clear to reducing them.

While it is somewhat difficult to ascertain the exact basis upon which the learned trial judge proceeded in awarding $1,800 damages, as set out in his reasons for judgment, I find it difficult to conclude that he did so on a replacement basis, which, in my opinion, would, under the authorities, be wrong. If asked to point out what might induce me to think that he did so, I could only say that considering the amount awarded, and my appreciation of the evidence, it might seem that he had to some extent been influenced by a consideration of replacement cost. However, I have no right to go that far unless the reasons by express words or reasonable intendment, must lead me to that conclusion. I am unable to go that far. It may be that the learned judge below proceeded upon the principle that the measure of damages was the value of the improvements destroyed as they stood just before the fire occurred, and that would be my own view in the circumstances here. The improvements here were such as were necessary and in keeping with the uses to which the property was to be put. My view

as to the value on that basis might be different to that of the learned trial judge and still not justify me in setting aside the judgment.

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Appeal dismissed, Martin, J.A. dissenting.

Solicitor for appellant: *A. E. Bull.*
Solicitor for respondent: *W. H. Patterson.*

ARMES v. RUSSELL AND SCHWARTZ.

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Mines and minerals—Grubstake—Claims located after expiry of grubstake—Locality prospected during existence of grubstake—Claim that locations were discovered during grubstake—Fraud.

The plaintiff and defendants entered into a grubstake agreement whereby the plaintiff was to pay expenses and $4 per day to the defendants who were to prospect for minerals in the fall of 1921, in the Gun Creek District, the claims staked to be equally divided. The defendants were accompanied by the plaintiff's son on the trip and about the 12th of September they reached the mouth of Cascade Creek. While there on two occasions one of the defendants went up the Creek and came back claiming he had found nothing. Certain claims were staked and the party returned home before winter. In the following spring the defendants went out alone and staked a number of claims on Cascade Creek known as the "Massena" group between the 1st of April and end of July. The plaintiff said as there was some depth of snow on Cascade Creek between April and July the defendants must have discovered the ore on these claims in the previous fall when with the plaintiff's son as they could not have made the discovery in the spring owing to the snow and he was entitled to an undivided one-half interest in the claims. There was further evidence of conversations the defendants had with prospectors in the spring of 1922 bearing on the plaintiff's case. It was held on the trial there was evidence to find the lode had been discovered in the fall of 1921 and the plaintiff should succeed.

Held on appeal, reversing the decision of HUNTER, C.J.B.C., that the case was founded on suspicion and that the evidence of defendants' conversations with the prospectors was unsatisfactory not being conclusive as to which group of claims it referred to; that the facts constituting fraud must be clearly and conclusively established and circumstances of mere suspicion will not warrant the conclusion of fraud.

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Statement

APPEAL by defendants from the decision of HUNTER, C.J.B.C. in an action tried by him at Vancouver on the 12th to the 15th of March, 1923, for a declaration that the plaintiff is entitled to an undivided one-half interest in eight certain mineral claims staked by the defendants on Cascade Creek in April, 1922, and an undivided one-half interest in 25 other mineral claims staked on Cascade Creek aforesaid in the summer of 1922 at the instance of the defendants, an undivided one-half interest in some of which have been transferred to the defendants and an undivided one-half interest in the others which are held in trust for the defendants by the locators of said claims. The plaintiff claims that under a written agreement of the 3rd of September, 1921, in consideration of the plaintiff paying the expenses of the defendants and $4 per day they agreed to a one-half interest for their share in all claims staked by them. The agreement was to be in force during the fall of 1921. The plaintiff's claim is that in fact the defendants made the discovery of ore on Cascade Creek on the fall trip of 1921, but waited until the agreement had run out and going back in the following year they staked, or caused to be staked, the discoveries they had made while prospecting under the agreement. The facts are set out fully in the judgment of HUNTER, C.J.B.C.

A. H. MacNeill, K.C., and *C. J. White*, for plaintiff.
Maitland, and *Remnant*, for defendants.

1st June, 1923.

HUNTER, C.J.B.C.: The plaintiff and defendants entered into what was commonly known as a grubstaking contract, *i.e.*, a partnership for the purpose of acquiring mineral claims, as follows:

HUNTER, C.J.B.C.

"Lillooet, B.C.,
"Sept. 3rd, 1921.

"In consideration of James Armes of Vancouver agreeing to put up the expense to prospect in the Gun Creek District and pay us Henry Schwartz and Jos. Russell $4 per day we agree to one-half interest for our share in whatever claims may be staked. All claims to be owned jointly no matter in what names they may be staked.

"JAMES ARMES
"JOSEPH RUSSELL
"HENRY SCHWARTZ."

There had been a discovery in what is known as the White-water District by E. J. Taylor, who located the "Windfall" and other claims. It was this discovery which led to the agreement, the intention of the parties being that claims were to be located by the defendants for the benefit of the joint adventurers in the neighbourhood of the Taylor discovery.

Some claims were located in the Gun Creek District so called, and while the claims in dispute are not in that district, I have no difficulty in concluding that the parties, by mutual consent, evidenced by their subsequent action, extended the adventure into the adjoining country. No time limit is mentioned in the agreement, but it is clear enough that the parties understood that it was only to cover the trip which was undertaken in the fall of 1921.

During this expedition, which was undertaken by Harold Armes, son of the plaintiff, and the defendants, the plaintiff, James Armes, putting up the expense, certain claims not in dispute were located, known as the "Payshute" and the "Provincial" groups. Sixteen claims in the Cascade Creek region, known as the "Stone" group, were located in the following April and a number of others set forth in the statement of claim, some of which are known as the Massena group, were located in the following July and August. It is these claims which are in dispute, the plaintiff alleging that they should be deemed to have been located in accordance with the agreement as the defendants, although they had discovered mineral in place, fraudulently refrained from locating them in the fall of 1921, but deferred the staking until the following year, when they went in again without the knowledge of the plaintiff and in spite of an understanding with Russell that they were to go in again in the spring.

The plaintiff says that he met Russell in June, 1921, at Lillooet; that he agreed with him that he would put up the money necessary to restake some claims at Copper Mountain, which were about to expire because of failure to do the assessment work, in consideration of a certain number of claims being located for him and his associates; that they were at work under this arrangement all summer until the end of August,

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1921, and that then the agreement in question was entered into.

According to Harold Armes the party arrived at Granite Creek, a tributary of the Whitewater River, about September 12th, 1921, and after a day or two went up to the junction of Granite Creek and Cascade Creek, which is a tributary of Granite Creek, where Armes stopped to prepare camp while the defendants went up the Cascade and returned after an absence of four hours, saying that they could not find anything. The next day they all went up Cascade Creek to Mona Lake, Armes and Russell prospecting around the lake while Schwartz proceeded in the direction of the Massena Group and returned after an absence of two hours, but he did not report anything found. The next day Russell and Armes went across Whitewater River, returning about 6.00 p.m., while Schwartz again went up Granite Creek and did not return till the day after, but did not say that he had found anything. The following day Russell and Armes again went across the Whitewater while Schwartz went elsewhere or stayed in camp. They then went back to Lillooet, Armes and Schwartz staying there and Russell going on to Vancouver. Armes went to Vancouver on October 15th and returned in December to work at the Ample mine for his father, and Russell was employed at the mine from January until the 25th of March, 1922. According to Armes it was understood that they were to go in again in the spring, but Russell left suddenly without saying anything to Armes and about a week later he received a letter from Russell saying that he was going in. When he returned he told Armes that he had staked some claims adjoining the Provincial Group which had already been located by the partnership, but did not say he had been in to Cascade Creek. Russell resumed work at the Ample mine but never said anything to Armes about what he had done at Cascade Creek. Shortly afterwards Armes met one Latimer at Lillooet who recounted a conversation which he had with Russell, hereinafter referred to. In August, 1922, Armes and a Seattle engineer named Jamme went in to do assessment work on the Provincial Group and on the way out Armes met Russell, and in consequence of his conversation with Latimer asked Russell where his new strike was. He replied that it

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was up Rowbottom Creek (another tributary of Granite Creek, lower than Cascade Creek), which aroused Armes's suspicion. While on the Provincial group Armes proceeded up to Cascade and found Russell and Schwartz working on the ground where he had seen Schwartz during the September trip, and which forms part of the Massena group. He expressed surprise to Schwartz, who remarked it took two weeks to find what they had.

Law, a mining broker, says he got a letter from Russell in December, 1921, stating that he knew of some very good claims that could be staked, and that he would go out in the spring and stake them for $1,500, also enclosing a map shewing them to be on Cascade Creek and sending a sample of ore, exhibit 5, which being rich in gold he kept and produced in Court. Later on, in the fall of 1922, Russell told Law that this sample was got in the Cascade area but not from the ground in dispute, but on ground still unstaked.

Latimer says that about the end of March, 1922, he met Russell and Schwartz on their way in and, after some talk about a claim which he had staked, Russell stated that they were out the previous fall with a cheap fellow (this was not the term used) who grubstaked them, and that if they had staked they would have had to give him a half interest. Five or six days later Latimer met Armes, to whom he related the conversation which he had with Russell as already stated. In September, 1922, Latimer met Russell in a store in Lillooet and told him he talked too much, to which Russell replied that his evidence would not hurt him.

Gibson, prospector, met Schwartz in Lillooet in the fall of 1921, who said that he had got very good pannings on the shore of a little lake at the head of Cascade Creek, which was evidently Mona Lake, and that he was going in again in the spring to locate around the lake "or where he had got the gold."

Jamme, the mining engineer, says that some time in September, 1921, Russell came to his office in Seattle and told him that Schwartz had been out one night and a day or two days up at the head of Granite Creek and found gold near "that lake," meaning Mona Lake, and again that "he found gold on the shores of the lake," and wanted Jamme to go in and stake there.

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According to Taylor, the locator of the "Windfall," when Russell and Schwartz went in in April, 1921, there were from five to twenty feet of snow at the head of the Granite Creek except a few points where the snow had blown off in the winter, and Allaire, a prospector, says that as late as June, 1922, there was about a foot and a half of snow at the mouth of Cascade Creek and that he found some of Russell's stakes about four hundred or five hundred yards up the creek, but could not go any further up on account of the snow which had thawn, and that there was too much snow in June to do any prospecting; and McIntyre, another prospector, says that there was from two to three feet of snow about the 20th of June at the head of Granite Creek, and that there was so much snow on Cascade Creek that they could not do any prospecting.

For the defence, Russell says that he left Lillooet on September 15th and came out September 27th and was paid off on October 19th, and he says that the sample which Law was led to believe came from Cascade Creek came from the Potato Gal near Battlement Creek and not from Cascade Creek. He says that he told Harold Armes on the 25th of March, in the presence of a teamster named Durban, that he was figuring on going into the Whitewater River. According to him, on April 3rd when he and Schwartz started locating the Stone group on Cascade Creek, there were about three feet of snow and he did not find mineral in place or anything of value. He says they located the Stone group of 16 claims in one day and then later staked the Massena group and others in July, and still others, including the Gold Hill group, in August, but the latter group was in fact located in July. He says he returned to Lillooet about April 10th and that he met Armes, who asked him where he had been, and that he shewed him on a map where he had staked. He admits that, if nothing had come of the enterprise, the arrangement made with the plaintiff was better by $4 a day and found than the deal by which he secured the right to use the names of the holders of the free-miner certificates for the purpose of the April staking, and he also says that he discovered mineral in place at each of the discovery posts of the Stone group, *i.e.*, of the whole 16 claims.

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Schwartz says that he told Armes when up Cascade in September, 1921, after panning around Mona Lake, that the pannings looked good and that they ought to stake around the Creek, to which he says Armes said nothing, which is denied by Armes. He says that they could not find any ledge and could not see anything for snow. They then went back to camp 7 and, on the 25th, left for Lillooet after Armes and Russell had staked the Province and Payshute groups on the previous day. According to him, he and Armes did not get on well together, as Armes wanted ~~him to do~~ the cooking and they had a difficulty over $20 which Schwartz said he paid to an Indian for the use of some horses. He admits that he said nothing to Armes when he left Lillooet to go back in April, but that he and Russell had been talking about it nearly all winter. He says that, after trying to stake claims nearer Taylor's claims they went on to Cascade, reaching there on April 3rd; that they cut posts that afternoon and staked the Stone group the next day, which took all day, and that outside of a lunch they had nothing to eat until they reached Davidson's about eight miles away, on the night of the 5th. Although he kept a diary he says also that they got back to Davidson's on the 4th, and also that they got some food with a .22 rifle and that they were at Cascade a day and two nights; that they left Davidson's on the 6th and reached Lillooet on the 12th. He says that he went in again with Russell and Russell's son in July, arriving at Cascade on the 18th, and on the 24th the son, Leonard Russell, brought in some rock which led to the staking of the Gold Hill (or Massena) group and other claims, 17 in all, the last of which was staked on August 16th. He also says that before they arrived in March that two men offered a $100 for a half-interest in each of two claims to be staked for them. The boy, Leonard Russell, says that he brought in a piece of mineral from the top of a ridge about a mile or a mile and a half from where they were working on the 24th of July, and that his father and Schwartz both broke it up in a mortar and panned it and that they went up the following day and staked the Gold Hill claims Nos. 1 to 4, and he says that he thinks he got the rock from No. 3 Gold Hill claim.

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Prosser says that Russell told him in July that the Cascade claims were no good, that he was going to stake some that were good. In rebuttal Harold Armes says that the teamster Durban was not present, as alleged by Russell, when Russell said that he told Armes in his presence on the 25th of March that he was going in, as Durban had left the Ample mine on the 18th, and he produced his time book in verification of this statement. He also says that there was never any discussion about staking at Cascade as he himself had not seen anything and that neither of the defendants had told him that they had found anything, nor was there any shortage of provisions as they said, and that it was at their suggestion that they came out.

It is not necessary to go further into the evidence. It is, of course, clear that Russell must have made false statements about the place when he got the specimen, exhibit 5, either to Law, who was a credible and disinterested witness, or to the Court.

It is enough to say generally that the evidence for the plaintiff was credible and straight forward, while that of the two defendants was deceptive and evasive on material points, and to say particularly that I accept the evidence of Harold Armes where it is in conflict with that of the defendants.

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I am satisfied that the April locations in the Cascade Valley were made *clam et clandestim* with the intention of defrauding the plaintiff and were based on the knowledge gained during the currency of the partnership agreement. Admittedly the claims were staked over snow anywhere from three to twenty-five feet deep. It is idle for the defendants to say or suggest that they discovered mineral in place in the case of each of the 16 claims, which were all located on the same day. If they discovered mineral in place it was in September, 1921, while they were under the partnership obligation. The consequence is that the locations were either a fraud on the statute or on the plaintiff, but it is a familiar principle that in a civil action a man is not allowed to say he did a thing wrongfully for the purpose of defeating his adversary when he could have done it rightfully. I have, therefore, no difficulty in coming to the conclusion that the Stone group should be declared to be a partnership location and the plaintiff should be assured his interest in that group in accordance with the agreement.

The later locations, which range from July 25th to August 16th, present some difficulty. According to the evidence for the defendants, it was by reason of the fact that Russell's son had found a piece of mineralized rock that the Massena group were located while they were working on the Stone group in July. The boy may, or may not, have found the rock as alleged, but I place no confidence in that. Harold Armes is quite positive he saw Schwartz going over the ridge in the direction of the Massena group on the September trip. I think the truth of the matter is they intended to locate the other claims in April or as soon as they could, but that they were prevented by the conditions, the snow being much too deep, as the later locations, speaking generally, are either higher or at any rate more inaccessible than the April locations, and that they deferred the staking until the conditions were better, and in this connection I note that the plans shew the Red Onion on a glacier and the map issued by the Dominion department of mines shews the elevation of this region to run from 6,000 to 7,000 feet.

At any rate a contract of partnership is founded on *uberrima fides* and the defendants, although bound to use their knowledge for the benefit of the partnership, were clearly guilty of a fraud on the plaintiff in respect of the April locations. How can I reasonably exclude the later locations, some of which adjoin the April locations, from the scope of the fraudulent intention when the conditions made their location in April difficult, if not impossible, and the only other suggestion is the doubtful story of the boy? If the defendants had candidly admitted their chicanery with regard to the April locations, they might possibly have been in a better position with regard to the later ones, but their course has made it impossible for the Court to accept their evidence for any purpose. It seems to me that the circumstances called on the defendants to satisfy the Court that the scope of the fraud is to be confined to the April locations, and that the later locations were not made by reason of information got and concealed on the September trip, but had a wholly independent origin.

There will, therefore, be judgment, as prayed, for the plaintiff with costs.

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From this decision the defendants appealed. The appeal was argued at Vancouver on the 16th, 19th and 20th of November, 1923, before MACDONALD, C.J.A., MARTIN, GALLIHER and EBERTS, JJ.A.

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Maitland (*Remnant,* with him), for appellants: The defendants were prospectors. The Massena group were the only claims of value and they were not staked until July, 1922. Our submission is the evidence goes no further than to raise a suspicion in the mind of the Court. It must be shewn the discovery was made in the fall of 1921, and evidence of this is entirely wanting.

Argument

A. H. MacNeill, K.C. (*C. J. White,* with him), for respondent: Under section 32(1) of the Partnership Act, R.S.B.C. 1911, Cap. 175, a partner must account for all benefits derived from a partnership: see Lindley on Partnership, 8th Ed., 367-9; Pollock on Partnership, 11th Ed., 94-5. He is bound to disclose all benefits he receives: see *Dunne* v. *English* (1874), L.R. 18 Eq. 524; *Dean* v. *MacDowell* (1878), 8 Ch. D. 345 at p. 354. When these claims were staked the ground was covered with snow. They must have made the discovery in the previous year.

Maitland, in reply, referred to Kerr on Fraud and Mistake, 5th Ed., pp. 474, 478, 480 and 486.

Cur. adv. vult.

8th January, 1924.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The plaintiff's case is founded, I think, on suspicion. The defendants and the plaintiff's son prospected an extensive tract of country under a written agreement between the plaintiff and the defendants. They went into the district for the purpose of relocating the "Grey Copper" claims, which had previously been the claims of defendants, but had been allowed to run out, and also to prospect for other claims in the neighbourhood of Gun Creek. They prospected on Denain Creek, a tributary of the Whitewater River, and found nothing which they thought worth locating. They then went to the mouth of Granite Creek, and prospected there. This was in the vicinity of the "Taylor" claim, discoveries in which

caused the rush of prospectors to that locality. They prospected on Cascade Creek, a small tributary of Granite Creek, but staked nothing. Upon returning to the mouth of Granite Creek, on the Whitewater River, seven claims were staked by them, after which, the prospecting season being over, they came out, and it is admitted that if the defendants had acted in good faith towards the plaintiff their obligations were then at an end.

But it is said that they did not act in good faith towards the plaintiff, but must have discovered valuable ground which it had been their duty to have located, but which they refrained from doing with the fraudulent intention of locating the same for themselves during the following prospecting season. They did go up the following season and located, *inter alia,* the claims in question in this action. These are near the head of Granite Creek, and an attempt was made to prove that the ground had been prospected by one of the defendants when working under the contract, but the evidence is by no means satisfactory upon this point, but be this as it may, the plaintiff's case is practically founded upon a conversation between the defendant Russell and a witness, Latimer, from which we are asked to believe that the defendants were guilty of the fraud charged. Giving full credence to Latimer's evidence, it is no proof that a fraud was perpetrated in respect of the claims in question. What was said to Latimer had reference to property on Denain Creek, many miles distant from the claims in question. That conversation at most shews that Russell had not a very high appreciation of his duty towards the plaintiff. It might very properly affect his credibility, but that is not of importance to me, since I would accept the trial judge's finding against his credibility, where there is any conflict of evidence. The difficulty with this conversation is, that it proves nothing except the state of Russell's mind. The burden which is cast upon the plaintiff with respect to proof of fraud is set out in Kerr on Fraud and Mistake, 5th Ed., 477:

"The facts constituting fraud must be clearly and conclusively established. Circumstances of mere suspicion will not warrant the conclusion of fraud."

The reference to something "further down," in the Latimer conversation, could have no reference to any claim near the

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head of Granite Creek. It was suggested by Mr. *MacNeill* that the Whitewater River is further down, but that interpretation of the words would not help the plaintiff.

The appeal should be allowed.

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MARTIN, J.A. would allow the appeal.

GALLIHER, J.A.

GALLIHER, J.A.: With deference, I think the evidence here amounts to suspicion only. One circumstance that impresses me very strongly is, that notwithstanding the fact that a number of prospectors were going into this region in the spring and early summer of the season following the one when it is alleged the defendants discovered and fraudulently concealed the discovery of this group of claims in question, the defendants located several other claims in this latter season before locating the ones in question. It is hardly reasonable to suppose that had they discovered and failed to locate these claims during the season when the contract was in force, that they would have taken the risk of allowing these claims to lie on the chance of other locators staking them until so far on in the season. One would naturally conclude they would locate at the earliest possible time. On the whole, I think the case is one where the judgment below should not stand. Suspicion, even to the extent it is demonstrated here, does not, I think, warrant the plaintiff in succeeding.

I would allow the appeal.

EBERTS, J.A.

EBERTS, J.A. would allow the appeal.

Appeal allowed.

Solicitors for appellants: *Maitland & Maitland.*
Solicitors for respondent: *McLellan & White.*

BANK OF HAMILTON v. ATKINS AND ATKINS.

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BANK OF HAMILTON v. ATKINS

Practice—Costs—Separate actions by the same plaintiff against the same defendants—Second action in Court of Appeal—Set-off by a judge of the Supreme Court—Jurisdiction—B.C. Stats. 1921 (Second Session), Cap. 11, Sec. 2.

The plaintiff brought action against the defendants on a promissory note and obtained judgment for the amount of the note with costs, but it remained unsatisfied. Later the plaintiff brought another action on a guarantee against the same defendants in which it was successful on the trial but the judgment was reversed in the Court of Appeal with costs against the plaintiff. An application to a judge of the Supreme Court to set off the costs obtained in the second action against the sum due the plaintiff on the judgment in the first action was granted.

Held, on appeal, affirming the decision of McDONALD, J., that there was jurisdiction in the Court below to make the order.

Per MACDONALD, C.J.A.: The case is concluded in favour of the respondent by *Royal Bank of Canada* v. *Skeans* (1917), 24 B.C. 193, the only difference being that in that case the order was made by this Court, but this circumstance makes no difference.

Per MARTIN, J.A.: The order is not an attempt to vary the judgment of this Court but a process of enforcement *pro tanto* of the two judgments concerned in the attainment of which end the judgment of this Court is, under section 2 of the Court of Appeal Act Amendment Act, 1921 (Second Session), to be viewed as a judgment of the Court below.

APPEAL by defendants from the order of McDONALD, J. of the 7th of September, 1923, whereby the plaintiff Bank was allowed to set off the costs obtained by the defendants against the plaintiff pursuant to a judgment of the Court of Appeal in this action against the amount due the plaintiff from the defendants under a judgment in a previous action. The facts are that on the 28th of June, 1922, the plaintiff Bank obtained a judgment on a promissory note dated the 27th of September, 1921, against Thomas E. Atkins and his wife for $2,773.81 and the judgment has never been satisfied. Prior to and at the time of obtaining judgment the Bank held as security for the defendants' debt certain real property subject to an undertaking to reconvey upon payment of the debt. On the 30th of March, 1923, the Bank commenced action against said defendants to recover $10,000 and interest by virtue of a guarantee

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of the 11th of March, 1920, signed by the defendants guaranteeing the indebtedness of the Gibson Lumber and Shingle Company Limited. The Bank obtained judgment on the trial but it was reversed on appeal to the Court of Appeal and the defendants taxed their costs at $1,110.30. An application to set off these costs against the amount of the former judgment was granted.

Statement

The appeal was argued at Vancouver on the 15th and 16th of November, 1923, before MACDONALD, C.J.A., MARTIN, GALLIHER and EBERTS, JJ.A.

Argument

A. H. MacNeill, K.C., for appellants: The appeal was allowed by this Court with costs and the costs were taxed under that judgment. The Court below by granting a set-off is varying an order of this Court and it has no such jurisdiction. The application might have been made to this Court but it is too late now. In *Royal Bank of Canada* v. *Skeans* (1917), 24 B.C. 193 the application was made to this Court within proper time. First, the judge has no jurisdiction, the solicitor's lien has attached; secondly, it is too late for this Court to deal with it: see *Russell* v. *Russell* (1898), A.C. 307; *Preston Banking Company* v. *William Allsup & Sons* (1895), 1 Ch. 141; *Barnett* v. *Port of London Authority (No. 2)* (1913), 82 L.J., K.B. 918.

Brown, K.C., for respondent: This is substantially the same case as *Royal Bank of Canada* v. *Skeans* (1917), 24 B.C. 193, except that the order is made by a judge of the Court below but subsection (2) of section 26 of the Court of Appeal Act as amended in 1921 (Second Session) provides for this; see also *Edwards* v. *Hope* (1885), 54 L.J., Q.B. 379. To make this order is not a variation of the judgment of the Court of Appeal: see *Reid* v. *Cupper* (1915), 2 K.B. 147; *Young* v. *Mead* (1917), 2 I.R. 258; *Ex parte Griffin. In re Adams* (1880), 14 Ch. D. 37; *Baskerville* v. *Brown* (1761), 2 Burr. 1229; *Puddephatt* v. *Leith (No. 2)* (1916), 85 L.J., Ch. 543; *Meynall* v. *Morris* (1911), 104 L.T. 667; *Re Harrald; Wilde* v. *Walford* (1884), 51 L.T. 441; *Jenner* v. *Morris* (1863), 11 W.R. 943; *Goodfellow* v. *Gray* (1899), 68 L.J., Q.B. 1032; *Sutherland* v. *Rural Municipality of Spruce Grove No. 519*

(*No. 2*) (1919), 1 W.W.R. 281; *Bridges* v. *Smyth* (1831), 8 Bing. 29; *Bristowe* v. *Needham* (1844), 7 Man. & G. 648; *Barker* v. *Braham* (1773), 2 W. Bl. 869.

MacNeill, in reply.

Cur. adv. vult.

8th January, 1924.

MACDONALD, C.J.A.: This case is concluded in favour of the respondent by *Royal Bank of Canada* v. *Skeans* (1917), 24 B.C. 193, a decision of this Court which is on all fours with it, except that in *Royal Bank of Canada* v. *Skeans* the order of set-off was made by the Court of Appeal, whereas, in this case, it was made by a judge of the Supreme Court, but this circumstance does not, in my opinion, make any difference.

MACDONALD, C.J.A.

The appeal should be dismissed.

MARTIN, J.A.: Briefly, I regard the order appealed from as not an attempt to vary the judgment of this Court, but as a process of enforcement *pro tanto* of the two judgments concerned in the attainment of which end at least, our judgment is, by virtue of the Court of Appeal Act Amendment Act, 1921 (Second Session), Cap. 11, to be viewed as a judgment of the Court below, section 2 of said Act having been complied with.

MARTIN, J.A.

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

GALLIHER, J.A.

EBERTS, J.A. would dismiss the appeal.

EBERTS, J.A.

Appeal dismissed.

Solicitor for appellants: *F. G. Crisp.*
Solicitor for respondent: *J. N. Ellis.*

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IN RE SUCCESSION DUTY ACT AND INVERARITY, DECEASED

IN RE SUCCESSION DUTY ACT AND INVERARITY, DECEASED.

Constitutional law—Revenue—Succession duty—Province of British Columbia—Domicil in British Columbia—Property outside Province—Direct taxation—R.S.B.C. 1911, Cap. 217—British North America Act, 1867 (30 & 31 Vict.), Cap. 3, Sec. 92.

Deceased at the time of his death was domiciled in British Columbia and his estate consisted of property within and without the Province the outside property consisting largely of stocks in companies in China and in England. His whole estate was assessed under the Succession Duty Act. A petition by the administratrix to confine the assessment to the property situate within the Province was dismissed.

Held, on appeal, affirming the decision of GREGORY, J., that under the Succession Duty Act the tax is a direct one within the powers conferred upon the Province by the British North America Act and is in terms effective to impose succession duty upon the estate both within and without the Province.

Cotton v. *Regem* (1914), A.C. 176, distinguished.

APPEAL by Margaret Ann Inverarity, testatrix of the estate of Arnold J. M. Inverarity, deceased, from the decision of GREGORY, J., of the 14th of March, 1923, dismissing her petition for a declaration that the said estate of A. J. M. Inverarity does not have to pay succession duty on property both real and personal situate outside the Province of British Columbia, that the Minister of Finance shall only assess for succession duty the property within the Province and that said Minister has no power to assess movable property situate outside the Province. A. J. M. Inverarity died in British Columbia on the 24th of May, 1922, and had his domicil in British Columbia and by his will the petitioner was appointed executrix and trustee of his estate. The estate consists of property in British Columbia and personal property to the value of $131,532.99 outside the Province consisting of shares in the Shanghai Dock and Engineering Company, the Chinese Engineering & Mining Company and other companies in Shanghai; also shares in the Chartered Bank of India, Australia and China, and shares in navigation companies in England and China.

Statement

The appeal was argued at Vancouver on the 21st and 22nd of November, 1923, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

W. J. Taylor, K.C., for appellant: This is an indirect tax and the Province has no right to impose it: see *Cotton* v. *Regem* (1914), A.C. 176 at p. 193.

Killam, for respondent: British Columbia was his domicil. The *Cotton* case is distinguished from this as shewn in *Burland* v. *The King* (1922), 1 A.C. 215; *Smith* v. *Levesque* (1923), S.C.R. 578; 3 W.W.R. 388; *In re Succession Duty Act and Walker, Deceased* (1922), 30 B.C. 549. We say we never had an indirect tax: see *Rex* v. *Lovitt* (1912), A.C. 212. The maxim *mobilia sequuntur personam* applies and the tax is a direct one: see *Smith* v. *The Provincial Treasurer for the Province of Nova Scotia and the Province of Quebec* (1919), 58 S.C.R. 570; *Re Doe* (1914), 19 B.C. 536.

Argument

A. B. Macdonald, K.C., for the Crown (Dominion) referred to *Burland* v. *The King* (1922), 1 A.C. 215.

Cur. adv. vult.

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MACDONALD, C.J.A.: It was admitted by counsel that the Succession Duty Act of this Province, Cap. 217, R.S.B.C. 1911, is, in terms, effective to impose succession duty upon the property in question, and therefore counsel for the appellant confined his argument to the submission that the legislation was *ultra vires.* For this submission he relied upon *Cotton* v. *Regem* (1914), A.C. 176. In that case the Privy Council held that under the statute of Quebec there in question, the tax was upon transmission, an intangible thing, and not upon the property itself, and was therefore not direct taxation within the powers conferred upon the Provinces by the B.N.A. Act; they therefore held, the statute to be *ultra vires.* The same contention is made in this case, but under a statute materially different. Section 5 of our statute enacts that:

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"The following property shall be subject, on the death of any person, to succession duty as hereinafter provided."

This makes the tax a direct one. It is not a tax on trans-

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mission, but transmission having taken place, the tax is levied upon the property transmitted. It is true that the Crown may demand payment from the applicant, whoever he may be, for letters probate as a condition precedent to the grant thereof, but the provisions of the Act in this respect relate to procedure, and do not, until complied with by payment or security, relieve the deceased's estate from the tax, or the Crown lien upon it, or relieve the beneficiary of his obligation to pay it.

This distinction forms the basis of the recent case in the Privy Council, of *Burland* v. *The King* (1922), 1 A.C. 215; (1922), 1 W.W.R. 100. The cases in the Supreme Court of Canada are not in point.

MACDONALD, C.J.A.

The appeal should be dismissed.

MARTIN, J.A.

MARTIN, J.A. agreed in dismissing the appeal.

GALLIHER, J.A.

GALLIHER, J.A.: I have reached the same conclusion as the Chief Justice, whose reasons for judgment I have read and in which I concur.

MCPHILLIPS, J.A.
EBERTS, J.A.

MCPHILLIPS and EBERTS, JJ.A. agreed in dismissing the appeal.

Appeal dismissed.

Solicitors for appellant: *Taylor & Brethour.*
Solicitor for respondent: *J. W. Dixie.*

JONES v. COHN AND CANARY.

MORRISON, J.

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JONES v. COHN

Practice—Mortgagor and mortgagee—Recovery of land—Joinder of causes of action—Marginal rules 188 and 189.

A mortgagee, upon default of payment of interest and principal, brought an action for foreclosure, for a receiver and for possession. The mortgagor moved to set aside the writ and service thereof on the ground that the writ was issued without leave of the Court or a judge and did join causes of action for recovery of land and for relief, namely, foreclosure, possession and appointment of a receiver contrary to marginal rules 188 and 189. The motion was dismissed.

Held, on appeal, affirming the decision of MORRISON, J., that the motion was properly dismissed as the claim for possession means possession in due course of law there being nothing to indicate a demand for immediate possession and the prayer for a receiver is complementary to the foreclosure proceedings and not in itself a cause of action.

APPEAL by defendant Cohn from the order of MORRISON, J. of the 17th of October, 1923, dismissing a motion on behalf of the defendant Cohn to set aside the writ of summons and service of same and subsequent proceedings. The action was brought on the 24th of September, 1923, to have an account taken of what was due in principal and interest under a mortgage of the 13th of May, 1912, from the defendant Cohn to the plaintiff on certain lands in New Westminster District, that the said mortgage may be enforced by foreclosure or sale, for a receiver, for possession, for a *lis pendens,* and for payment by the defendant Cohn of the amount found due under the covenant of the said Cohn in the said mortgage. Interest on the mortgage has been due since the 13th of August, 1923, and the principal was also due. The defendant Canary is the holder of a second mortgage. On the 26th of September a motion was launched for the appointment of a receiver to have an account taken and to fix an occupation rent. On the 28th of September the defendant Cohn moved to set aside the writ and service of same on the grounds that the writ was issued without leave of the Court or a judge and did join causes of action for recovery of land and for relief, namely, foreclosure, possession, appointment of a

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MORRISON, J. receiver, etc., contrary to Order XVIII., rr. 1 to 7, Supreme Court Rules.

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Jonathan Ross, for the motion.

Symes, contra.

MORRISON, J.: The action herein and out of which the present application arises is one for foreclosure of a mortgage on lands and the endorsement also claims for an accounting, appointing of a receiver and possession.

The sequence of material events after the issue of the writ seems to be as follows: On the 26th of September, 1923, a notice of motion was launched for the appointment of a receiver, to have an account taken and to fix an occupation rent. On the 28th a motion was launched on behalf of the defendant, seeking to set aside the writ on the ground that inasmuch as substantial claim is for the recovery of land that other claims must not be united thereto in violation of Order XVIII., r. 2.

The plaintiff may, under Order XVIII., r. 1, unite in the same action as many causes of action as he likes. That is, he may join several causes of action against the same parties, but he may not join several unconnected actions against distinct parties: *Burstall* v. *Beyfus* (1884), 26 Ch. D. 35. To this rule there are two exceptions, *viz.*: actions for the recovery of lands and claims by a trustee in bankruptcy: Order XVIII., rr. 2 and 3. Rule 2 provides:

MORRISON, J.

> "That nothing in this Order contained shall prevent any plaintiff in an action for foreclosure or redemption from asking for or obtaining an order against the defendant for delivery of the possession of the mortgaged porperty to the plaintiff on or after the order absolute for foreclosure or redemption, as the case may be, and such an action for foreclosure or redemption and for such delivery of possession shall not be deemed an action for the recovery of land within the meaning of these Rules."

The meaning of that is that a claim for possession can be joined along with one for foreclosure or redemption without leave, the plaintiff, however, is asking to have a receiver appointed, and it is submitted on behalf of the defendant that this is another way of getting possession.

Doubtless the appointment of a receiver may be one of the precedent steps necessary to be taken on the way to securing possession. The application for such appointment, without

leave, does not give ground for setting aside the writ. In the circumstances of the present case, I have the jurisdiction to entertain such an application given by the Laws Declaratory Act, Cap. 133, R.S.B.C. 1911, Sec. 29, nor do I agree that the plaintiff is bound first to invoke Order LV., r. 5, by way of originating summons.

The application to set aside writ is refused.

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From this decision the defendant Cohn appealed. The appeal was argued at Victoria on the 25th of January, 1924, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Jonathan Ross, for appellant: The writ was issued without leave and joined causes of action for recovery of land with other relief, namely: foreclosure, possession, appointment of receiver. This is contrary to marginal rules 188 and 189. When the writ asks "for possession" it must mean immediate possession: see *Phillips* v. *Phillips* (1900), 44 Sol. Jo. 551 at p. 552; *Mason* v. *Westoby* (1886), 32 Ch. D. 206; *Wrixon* v. *Vize* (1842), 3 Dr. & War. 104 at p. 120. The mortgagor is in possession and cannot be ousted until final order for foreclosure: see *Heath* v. *Pugh* (1881), 6 Q.B.D. 345 at p. 360. Having commenced foreclosure action you must exhaust that before you apply for a receiver or possession: see *Wood* v. *Wheater* (1882), 52 L.J., Ch. 144; *Keith* v. *Day* (1888), 39 Ch. D. 452.

Argument

Symes, for respondent, was not called on.

MACDONALD, C.J.A.: We do not desire to hear Mr. *Symes.* As far as the claim for possession is concerned, it means possession at the proper time; there is nothing in the endorsement itself to indicate that demand is being made for immediate possession.

And as to the receiver, that is simply a prayer for a particular relief, that the rents and profits shall be received and paid to the creditor. And that is really not a cause of action, but something which is complementary, I think, to the foreclosure proceedings. There is nothing else appealed from. It

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is the joinder of those two alleged claims, or alleged causes of action, that is complained of. Therefore the appeal should be dismissed.

MARTIN, J.A.: I have nothing to add to what the Chief Justice has said beyond referring, as a matter of record, to the two cases that I cited during the argument, *viz.*: *Mason* v. *Westoby* (1886), 32 Ch. D. 206, and *In re Prytherch* (1889), 42 Ch. D. 590 at p. 601, wherein *Mason* v. *Westoby* is approved and distinguished to the extent that as to the appointment of a receiver it is treated as a matter of discretion and not of compulsion: immediate possession is not asked for but possession simply, which means the granting of that remedy in due course of law.

GALLIHER, J.A.: As the matter is before us on appeal, it seems to me that we cannot treat it as a case of a misjoinder of causes of action under marginal rule 105.

MCPHILLIPS, J.A.: I agree.

Appeal dismissed.

Solicitors for appellant: *Fleishman & Ross.*
Solicitor for respondent: *A. Whealler.*

THE ATTORNEY-GENERAL OF THE PROVINCE OF BRITISH COLUMBIA AND THE MINISTER OF LANDS OF THE PROVINCE OF BRITISH COLUMBIA v. ROBERTSON & PARTNERS, LIMITED.

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ATTORNEY-GENERAL OF BRITISH COLUMBIA v. ROBERTSON & PARTNERS, LIMITED

Forest Act—Fire—Permit—Fire spread from fire started under permit—Cost of fighting—Liability of permittee—B.C. Stats. 1912, Cap. 17, Secs. 109, 111 and 127.

Section 109 of the Forest Act empowers the Provincial Forest Board to issue permits authorizing the use of fire, and provides that the permit shall be subject to "every condition, provision, restriction and regulation which in the case of any permit the Provincial Forest Board may deem necessary or expedient and may incorporate in such permit"; and "any person contravening any of such conditions . . . . shall be guilty of an offence against this Act."

A permit was issued subject to certain conditions and at the end contained the following: "Warning: The permittee is responsible for all damage and for all fire-fighting costs resulting from fire set under authority of this permit."

In an action to recover the expenses incurred in fighting a fire that spread from a fire started by the permittee, the Crown contending that the clause headed "Warning" was to be read as a condition within section 109 aforesaid, or if not, it was to be read as a contract between the Crown and the permittee, the plaintiff obtained judgment on the trial.

Held, on appeal, reversing the decision of MORRISON, J. (MARTIN, J.A. dissenting), that on its true construction the warning clause cannot be construed as a condition within section 109 and the Forest Board had no authority to make a contract of this nature for the Government nor was it intended to be in the nature of a contract.

APPEAL by defendant from the decision of MORRISON, J. of the 19th of April, 1923, in an action to recover $5,563, expenses incurred by the Department of Lands in July and August, 1921, in fighting and extinguishing a fire resulting from the defendant's neglect to observe the provisions of section 111 of the Forest Act or alternatively for breach of the conditions of a fire permit issued to the defendant on the 15th of July, 1921, or alternatively for money paid by the plaintiffs to the use of the defendant. The defendant is a firm of contracting engineers and under a contract with the Minister of Public Works the

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members of the firm were constructing a road between Penticton and Oliver in the summer of 1921. On the 10th of July, 1921, a fire permit was issued to the firm to burn slashings and underbrush over an area of four acres near McIntyre Creek for five days and on the 15th of July a further permit was issued for fifteen days. On the 10th of July the engineers set fire to a pile of slashings and underbrush and on the 19th of July a strong wind coming up the fire spread in the vicinity. The officials took charge, and on the morning of the 20th the fire was under control and a man in the defendant's employ was put in charge of a certain section to keep the fire there under control. Later, however, the fire spread from this section to the neighbouring hills where the officials had to fight the fire until the end of August, when it was extinguished. The sum claimed above was the expense incurred in fighting this fire. The learned trial judge gave judgment for the amount claimed.

The appeal was argued at Vancouver on the 15th of November, 1923, before MACDONALD, C.J.A., MARTIN, GALLIHER and EBERTS, JJ.A.

Symes, for appellant: We say first, there was no liability; and secondly, if there was, it must be confined to cost of first fire, the cost of which would not exceed $500. There is no liability at common law so that any claim they have must arise under the statute.

Argument

Mayers, for respondents: The first question is as to the true construction of the permit; and secondly, whether the contents of the permit come under the statute. They chose to get a permit and renewal, and section 109 of the Forest Act is perfectly clear. The same rules apply when the Crown is one of the contracting parties. It is not right to make any conjecture as to the motives which may have actuated Parliament to pass a statute: see *Rex and Provincial Treasurer of Alberta* v. *C.N.R.* (1923), 3 W.W.R. 547 at p. 551. Having applied for a permit it amounts to a contractual relationship between the department and the defendant. If they charge us with negligence as to not having proper guards on the 19th of July it should be pleaded.

Symes, in reply: It is not a question of damages but a

statutory obligation. The warning words are to make people careful. If he is correct we are in a worse position with a permit than without one. The elements of a contract are wanting.

Cur. adv. vult.

8th January, 1924.

MACDONALD, C.J.A.: Unless the "warning" in the permit granted to the defendants should be regarded as a condition or provision within section 109 of the Forest Act, Cap. 17 of the statutes of 1912, or as a contract with the Government to pay the costs incurred by the Government in putting out fires caused by the defendants under the permit, it is difficult to see how the judgment can be sustained.

Section 127 of the Act, as it stood at the time of the fire, applies to cases where there has been wilful neglect of the defendant to use his utmost endeavours to prevent the spread of fire. Now, it was not contended in this case that there was any such wilful neglect, and therefore, in my opinion, that section has no application to this case.

Then again, section 111 was relied upon by counsel for the Crown to justify the claim in this action, but that section, in my opinion, has no application either, as a careful reading of it, I think, will shew. It was not intended to apply to cases like the present, where the burning was under a permit.

I then have to consider whether section 109 gives the right which is claimed in this action. That section empowers the Provincial Forest Board to issue permits and provides that the permit shall be subject to "every condition, provision, restriction or regulation, which in the case of any permit, the Provincial Forest Board may deem necessary or expedient and may incorporate in such permit." The section provides that any person contravening any of such conditions, etc., shall be guilty of an offence against the Act.

The permit in this case was issued subject to "compliance with the following conditions: five men to watch fires during the day, two men at night to watch fires, until extinguished, the acreage to be burned over is four acres," and at the end it contains the following:

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"Warning: The permittee is responsible for all damage and for all fire-fighting costs resulting from fire set under authority of this permit."

The permit is issued by the Board and it is not denied that if there is anything in the permit or in said section 109, to found this action, then the plaintiff must succeed. It is contended that the clause headed "Warning," is to be read as a condition within section 109, or if not so, then it is to be read as a contract between the Crown and the defendants. I cannot give effect to either of these contentions. In the first place, the Forest Board had no authority to make a contract of that kind for the Government. Moreover, I do not think it was intended to be in the nature of a contract. It was the Board's interpretation of the duty of the defendant, probably with said section 127 in mind, and its wish to warn the defendant of its duty. The Board, however, is not the tribunal to determine the construction of the Act: we have to do that. And on its true construction, I think this warning clause cannot be construed as a condition within that section.

MACDONALD, C.J.A.

The appeal should be allowed, and the action dismissed.

MARTIN, J.A.

MARTIN, J.A. would dismiss the appeal.

GALLIHER, J.A.

GALLIHER, J.A.: I agree with Mr. *Symes's* contention that what comes under the head of "Warning" in the permit, is not a condition, provision, restriction or regulation within section 109 of Cap. 17 of 1912 (Forest Act). I think it is no more than a drawing to the attention of the permittee the fact that he makes himself liable under some provision of the Act. The only section of the Act (and which was then in force) is section 127, and the words there are, "wilfully neglects," etc. No such case has been made out here upon the evidence.

The appeal should be allowed.

EBERTS, J.A.

EBERTS, J.A. would allow the appeal.

Appeal allowed, Martin, J.A. dissenting.

Solicitor for appellant: *A. Whealler.*
Solicitor for respondents: *J. W. Dixie.*

VANCOUVER MILLING & GRAIN COMPANY LIMITED v. UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION.

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Shipping—Damaged goods—Bill of lading—Shipped in good order and condition—Deviation—Transhipment to vessel other than provided for—Faulty stowage—Liability.

By bill of lading issued to a company in China the defendant acknowledged receipt and shipment on board its ship "Keystone State" of 2,000 cases of fresh eggs in apparent good order and condition, and agreed to transport the said eggs by the said ship or any other vessel operated by or on account of the defendant or the United States Shipping Board from Shanghai to Vancouver. Prior to the issue of the bill of lading the Pacific Steamship Co. which was operating and managing the defendant Company's ships, issued 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 a mate's receipt acknowledging receipt of 2,000 cases of fresh eggs "in good order" for "Vancouver *via* Seattle." The "Keystone State" arrived at Seattle and the eggs on being unloaded were found in good order except 22 cases that required recoopering. Six days later the eggs were loaded on the "Eastholm" a vessel that "was not operated by the defendant Company or the United States Shipping Board," and taken to Vancouver where on being unloaded were found in a very bad condition. It was found by the trial judge that owing to improper stowage on the "Eastholm" the eggs were exposed to the salt water which was the cause of their damaged condition on arrival in Vancouver; that the defendant committed a breach of its contract in transhipping the eggs to the "Eastholm" and having done so it cannot rely upon the special terms contained in the bill of lading exempting it from liability.

Held, on appeal, affirming the decision of McDONALD, J. (McPHILLIPS, J.A. dissenting), that the evidence supports the finding that the damage to the eggs was owing to the contact with sea water through improper stowage on the voyage from Seattle to Vancouver.

Held, further, that having transhipped the cargo to the "Eastholm" a vessel "not operated by or on account of the defendant Company or the United States Shipping Board" the defendant is guilty of a fundamental breach of its contract and is liable as a common carrier.

Held, further, that there was a material deviation from the contract in which case the transaction is governed not by the contract but by the common law and on this basis the defendant is liable.

Statement

APPEAL by defendant from the decision of McDONALD, J. of the 13th of April, 1923 (reported 32 B.C. 269) in an action

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for damages to a shipment of 2,000 cases of eggs from Shanghai to Vancouver. By bill of lading of the 12th of December, 1921, issued by the defendant to the Far East Trading Company 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 the defendant agreed with said company to transport the eggs by the 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 same in like apparent good order and condition. Prior to the issuing of the bill of lading the Pacific Steamship Co. which was operating and managing the defendant Company's ships issued 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 arriving on the 30th of December following. The cargo of eggs was unloaded and placed in a shed and on the 6th of January was loaded on board the steamship "Eastholm" a vessel owned, and operated by Frank Waterhouse & Co. which arrived in Vancouver on the 7th of January. The eggs were unloaded and the plaintiff who purchased the eggs and to whom the bill of lading had been transferred gave a receipt for the eggs with a notation thereon as follows: "All cases more or less stained—condition of contents unknown." The evidence of the officers of the "Keystone State" was that the eggs when taken on board at Shanghai were in apparent good order and the officers whose duty it was to check the delivery did not see any stains on the cases or anything to indicate that the eggs were not in good order and condition and that they were properly stowed so that they could not come in contact with the salt water. Witnesses from the dock in Seattle swore that with the exception of 22 cases that required re-coopering there was nothing to indicate that the shipment was not in good order and condition. On the arrival of the "Eastholm" at Vancouver it was apparent from the evidence that the whole shipment was in very bad con-

dition, many of the cases being wet with salt water. It was held by the trial judge that the plaintiff was entitled to recover the difference between 35 cents per dozen the market value if the eggs had arrived in good condition, and 10 cents per dozen being the value of the eggs in the condition in which they did arrive.

The appeal was argued at Vancouver on the 23rd to the 26th of October, 1923, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Davis, K.C., for appellant: These were Chinese eggs and the operation of the collecting and shipping was such that they could not be fresh eggs. The term "apparent good order" means such as can be ascertained by an outside view of each case. The life of an egg is from 2 to 3 months. The evidence shews the eggs were in a very doubtful condition when shipped from China. There is not sufficient evidence upon which the learned judge below could properly find the damage occurred between Seattle and Vancouver. Chinese eggs do not last as long as the American egg. The condition of the eggs on arrival at Vancouver shews they were not fresh eggs when shipped from Shanghai and the transfer to another ship at Seattle and shipment to Vancouver had no bearing on the condition in which they were found.

Argument

Craig, K.C., for respondent: As to what effect should be given to a statement in a bill of lading see *Smith & Co.* v. *Bedouin Steam Navigation Company* (1896), A.C. 70 at p. 74; *The Folmina* (1909), 212 U.S. 354 at p. 362; *The Rosalia* (1920), 264 Fed. 285. When they have receipted for goods in "good order" the burden is on the carrier to shew where the damage was done when the goods arrive in a damaged condition: see *Nelson et al.* v. *Woodruff et al.* (1861), 66 U.S. 156 at p. 178. On the application of "apparent good order" to the view of the outside of the cases see *Compania Naviera Vasconzada* v. *Churchill & Sim* (1906), 1 K.B. 237; *Higgins* v. *Anglo-Algerian S.S. Co.* (1918), 248 Fed. 386; *The Ida* (1875), 32 L.T. 541. Fifty cases shew evidence of rough handling as the contents were broken and dripped over other

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cases. The expression "beyond the seas" means beyond the jurisdiction: see *Boulton* v. *Langmuir* (1897), 24 A.R. 618; *Lane* v. *Bennett* (1836), 1 M. & W. 70. As to the effect of the Harter Act in the State of Washington see Scrutton on Charterparties and Bills of Lading, 10th Ed., 466; *Walters* v. *Joseph Rank, Limited* (1923), 39 T.L.R. 255. Where a carrier commits a fundamental breach of the terms of a bill of lading he cannot rely upon the special terms contained in the bill of lading and he becomes an insurer. The fundamental breach was the transfer of the cargo at Seattle to an outside ship, in which case it makes no difference when the damage happened: see *The Sarnia* (1921), 278 Fed. 459; *Globe Navigation Co.* v. *Russ Lumber & Mill Co.* (1908), 167 Fed. 228. We also say there was fundamental breach in "deviation" to Seattle and in not closing the hatches coming across the Pacific: see *Paterson Zochonis & Co.* v. *Elder Dempster & Co.* (1923), 1 K.B. 420. They started for Seattle and never intended to go to Vancouver: see Scrutton on Charterparties and Bills of Lading, 10th Ed., pp. 283-5; *Leduc* v. *Ward* (1888), 20 Q.B.D. 475; *Glynn* v. *Margetson & Co.* (1893), A.C. 351 at p. 354. Evidence to vary a bill of lading is inadmissible: see *The Delaware* (1871), 14 Wall. 579.

Davis, in reply: The burden of proof is on the respondent. It must shew the condition of the goods when shipped or that they were damaged by our negligence. The words "apparent good order" refer to packages and do not mean anything. *The Ida* (1875), 32 L.T. 541 is our case.

Cur. adv. vult.

8th January, 1924.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I think there was evidence upon which the learned trial judge could reasonably find that the fault was that of the defendant. About 20 cases of the eggs were in a damaged condition when the shipment reached Seattle, and these cases had to be re-coopered there. Some cases were broken and these broken cases may have been pretty evenly distributed among the whole shipment, though there is no evidence on this point either way. The broken eggs leaking through the cases, together with their confinement in the hold of the

vessel, may account to some extent for the condition the eggs were found to be in on arrival at Vancouver. But however this may be, there is no doubt about this, that during the voyage from Seattle to Vancouver, the cases of eggs had been subjected to contact with sea water, and were not sound when unloaded there.

I attach very little importance to the tests made with other eggs in Vancouver, which were relied upon by defendant's counsel. But there is, in my opinion, another ground which would disentitle defendant to succeed in this appeal. The bill of lading contains this provision:

"Shipped in apparent good order . . . . at Shanghai . . . . to be transported by the ship 'Keystone State,' . . . . to be carried upon said vessel or any other vessel operated by or on account of the United States Shipping Board Emergency Fleet Corporation or United States Shipping Board, with leave to sail with or without pilots, to tranship to any other vessels operated by said corporation, or said Board, or for its account, to lighter from vessel to vessel and from vessel to shore, to tranship either by rail, lighter or otherwise."

The bill of lading also contains this clause:

"And 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."

It was conceded that the "Eastholm" was not one of defendant's ships, nor was it operated on defendant's account. Unless, therefore, defendant has brought itself within the contract in transhipping the eggs at Seattle for carriage to Vancouver on the "Eastholm," there has been a fundamental breach of it. I do not think that on a proper construction of that contract the right given "to tranship either by rail, lighter or otherwise" governs this case.

MACDONALD, C.J.A.

The other section of the contract above quoted forms part of a clause thereof, dealing with deviation caused by *force majeure,* and I think the words quoted must be read in that connection.

If, therefore, I am right in thinking that there was a material deviation from the contract, the case must then be judged as one not governed by the contract but by the common law, and on that footing the defendant is liable.

As regards the damages: I think the amount awarded must be reduced. The plaintiff was offered 14 cents per dozen for

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the eggs, but by reason of delay caused by their fruitless endeavour to obtain the consent of the defendant to the sale, it eventually had to sell them for a less price. I think the defendant's conduct did not contribute to this result. The damages should be reduced accordingly.

With this variation, the appeal should be dismissed. Costs to the appellant of the issue of damages, and to plaintiff of that of liability.

MARTIN, J.A. would dismiss the appeal.

GALLIHER, J.A.: I will first proceed to determine what onus, if any, was cast upon the plaintiff, to shew the condition in which the shipment of eggs in question here was received by the carrier, and to what extent that onus has been discharged.

The case of *Smith & Co.* v. *Bedouin Steam Navigation Company* (1896), A.C. 70, is scarcely analogous. There, it was a shipment receipted for of 1,000 bales of cotton. On arrival at the ship's destination the shipment was 12 bales short. These bales were checked in by the company's employees and receipted for by the mate on information received from the checker. There, it was a question of a proper tally. The bales of cotton were in evidence and it was only necessary to count them correctly. The House of Lords held that the receipt constituted such *prima facie* evidence of its correctness, that proof by the defendant was necessary to displace it, and not finding such proof, gave judgment for the plaintiffs for the value of the shortage.

GALLIHER, J.A.

Here, of course, without opening the cases and examining the eggs, the condition of the eggs inside the cases could not be ascertained, nor as I understand is this done unless outside indications are that something is wrong with the shipment. To all outward appearances the shipment at Shanghai, according to the evidence, was all right and they are signed for in good order as fresh eggs. The bill of lading recites—"Shipped in apparent good order, 2,000 cases of fresh eggs." Now, what is the proper meaning to attach to the words "shipped in apparent good order," or as receipted for "in good order and fresh eggs." Under the circumstances, I should say these words mean that

so far as outward appearances indicated the shipment was in good order, as stated. But, assuming this to be the true meaning, the eggs arrived at their destination in Vancouver in a damaged condition, after being transhipped from Seattle to Vancouver by a steamer other than the one on which they were shipped from Shanghai.

I have read the evidence carefully of both plaintiff and defendant's witnesses, both as to the condition from outward appearances, when the eggs were landed at Seattle, and their condition a day or two after they were delivered at Vancouver, and as I have concluded that I would not be justified in reversing the trial judge, that the eggs were damaged by salt water and on the trip between Seattle and Vancouver, it would serve no good purpose to go into that evidence in detail.

There is in the *Bedouin* case, *supra,* a remark by Lord Halsbury, at page 76, which I think might be applied here in reference to the voyage from Seattle to Vancouver, and is in these words:

"It is not the first time in my experience that I have heard a whole body of evidence given from which, if you believed it, the logical conclusion would be that the goods were not lost at all, and yet they were lost, and this fact must be accounted for."

I think it must be taken that the learned judge has found that from all outward appearances the cases containing the eggs arrived at Seattle in good order, clean and free from salt water stain (with the exception of a few broken cases) and yet, when they arrived in Vancouver, broken egg stains and salt water stains were in evidence, some wet and some dry, and a number of these, upon being opened, disclosed mustiness and mould on the eggs and fillers, as well as dampness.

The evidence of the captain and crew of the "Eastholm," on which the eggs were transhipped, say no salt water could have got to the shipment on the trip, yet they were in the condition described on arrival, and to paraphrase Lord Halsbury's words slightly, the evidence, if believed, would lead to the logical conclusion that no salt water got to the shipment on that trip, and yet the cases in some instances bore evidence that salt water had reached them.

I will pass up defendant's expert evidence by remarking that

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the tests were made under what appears to me to be entirely different conditions, and do not assist me very much.

Now, while the plaintiff has not shewn other than as indicated in the written documents, that the eggs themselves were in good condition when shipped and properly packed, yet it has shewn by its evidence, in the opinion of the learned trial judge (and as I said before, I will not disagree with him), that the condition in which the eggs arrived in Vancouver was caused by sea-water action, and not because the eggs were not fresh when shipped. I think that discharges any onus that may have rested on it, within the decision in *The Ida* (1875), 32 L.T. 541. The head-note in that case is as follows:

"There is no rule of law by which the consignee of goods under a bill of lading, stating goods to have been shipped in good order and condition, but containing the words 'quantity and quality unknown,' is bound to shew that the goods were shipped in good order and condition, or fail in his suit against the shipowner for damage done to the cargo; but failing proof of the condition of the cargo when shipped, the consignee is bound to shew that the damage which it sustained is traceable to causes for which the shipowner is responsible."

Assuming this to be so, Mr. *Davis* still contends that the shippers are relieved of liability by reason of the provisions in the last five lines of clause 6 of the conditions in the bill of lading, as follows:

"And 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."

GALLIHER, J.A.

And also upon these words on the face of the bill of lading:

"To tranship either by rail, lighter, or otherwise."

These latter words give them the right to tranship, and assuming that they gave them the right to tranship on the "Eastholm," as here, that does not relieve them of any liability that would have attached to them if they had been carried on their own vessel to Vancouver.

We have then to deal with the first above mentioned clause (clause 6) in the conditions. This clause is in these words:

"Also, that if, on account of weather, surf, earthquake, epidemic, quarantine, riot, war or other disturbance, blockage or interdict of the port of destination, command of government or governments, or any cause beyond the control of the carrier, 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 which he may consider safe, or retain same on board until the vessel's return trip, or transfer same to another vessel, steam, motor or sail, at risk and expense of shipper, owner, or consignee of the goods; such landing or transfer shall be deemed a final delivery under this contract, and upon a letter being put into the post-office addressed to the shipper, or consignee, if named in the bill of lading, stating the landing and where deposited, or to what ship the transfer is made, the carrier shall be relieved from all responsibility; and such goods shall be liable and a lien held thereon for all extra expenses incurred in consequence;

"(Stamped across back)
"Deliver to the office of
"Vanc. Mill & Grain Co. Ltd.
"upon payment of all charges
"*For* The Bank of Nova Scotia
"Vancouver, B.C.
"without recourse
"M. Scott
"Vancouver Milling & Grain Co. Ltd.
"H. W. Ellis

and 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."

Certain circumstances and conditions that might arise and under which certain latitude and discretion are given to the master or carrier, are there laid down, but Mr. *Davis,* as I understood him, contended that the last five lines first quoted by me were by reason of the wording thereof, *e.g.,* "under any and all circumstances," "but at shipper's risk," not governed or limited by the exceptions in the first part of the clause, but were in fact at large.

GALLIHER, J.A.

I think, with deference, they must be read in connection with the remainder of the clause. If that were not so, then the master or carrier could, by his own act, relieve himself from the responsibility he undertook. At common law the carrier would be an insurer. He can, of course, by special contract, modify that liability, but in interpreting that modification so as to give it an effect which would create a contract which was never in the minds of both parties, would be contrary to both law and justice, and even if it were in the mind of the carrier, such a contracting, as I understand the American authorities, and the English authorities as well, would not be given effect to. It would be unreasonable and contrary to the true intent of the parties.

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A further question arose as to whether the damages should not be assessed as upon a basis of sale at 14 cents per dozen, and not 10 cents, at which the eggs actually were sold.

The plaintiff had an offer of 14 cents and the insurance company was agreeable to that going through, but when the plaintiff approached the defendant for the same purpose, it disclaimed any liability and refused even, without prejudice, to entertain any proposition. During these negotiations the offer was withdrawn and the eggs sold at 10 cents some four or five days afterwards. The object, of course, was to minimize damages.

Under these circumstances, and considering the short time the offer of 14 cents was open, and the efforts made by the plaintiff to arrive at a basis by which damages would be minimized, I do not feel disposed to penalize them by deciding that they should at once have accepted the offer of 14 cents.

GALLIHER, J.A.

In my opinion the appeal fails.

McPHILLIPS, J.A.: This appeal is, in a most voluminous form, a mass of evidence, and evidence as to foreign law (American), yet, with deference to the very elaborate arguments so ably advanced at this Bar, I cannot but say that the points to be determined are really devoid of much opportunity for disagreement. The goods consisted of 2,000 packages, contents stated to be "Fresh Eggs." They were enclosed in crates not capable of examination and were not examined. The bill of lading had the usual condition "that the carrier should not be concluded as to the statement herein of quantity, quality, weight, contents and value."

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The voyage of the ship was from Shanghai, China, to the port of Vancouver, British Columbia, in transit to Ottawa, the goods to be delivered "in like apparent good order and condition." The plaintiff is the transferee of the bill of lading, the shipper being the Far East Trading Co., Inc., at Shanghai, China. It was provided (paragraph 15) of the additional stipulations and agreements to the bill of lading, that all questions arising under the bill of lading should be settled according to the principles of law of the United States. In my opinion this provision does not really give any difficulty, as in all material matters necessary for decision in the present case I

see no variance in the law. In passing, I may say that I am of the opinion that the statute of the United States known as the "Harter Act" applies to the shipment in question in this action, yet, I am not of the view that even that Act changes or alters what would otherwise be the determining principles of law which are to be applied to the present case. The Harter Act, U.S. 1893, in section 3, in part, we find this language:

"Nor shall the vessel, her owner or owners, charterers, agent or master be held liable for losses arising from damages of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality or vice of the thing carried or from insufficiency of package. . . . ."

It was also provided in the additional stipulations and agreements to the bill of lading (paragraph 6) 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."

Further it is set forth in the bill of lading:

"With leave . . . . to tranship to any other vessel operated by the said Corporation or said Board, or for its account . . . . to tranship either by rail, lighter or otherwise."

And further provision that the carrier should not be liable—

"For risk of craft, hulk or transhipment . . . . nor for any loss or damage caused by the prolongation of the voyage, not for damages of any kind to articles perishable in their nature that the carrier shall not be concluded as to the correctness of statements herein of quantity, quality, weight, contents and value. . . . ."

MCPHILLIPS, J.A.

Now, the contention of the respondent is that the judgment of the Court below is right and that the learned judge arrived at the proper conclusion when he held that there was liability upon the appellant for damages to the consignment as claimed by the respondent, being damages arising consequent upon the transhipment to the "Eastholm" at Seattle, Washington, U.S.A., for transit to Vancouver, B.C., and the action of sea water, the finding of the learned judge being in these words:

"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."

In my opinion there was the right in the appellant under the terms of the bill of lading to tranship, as was done, but if I should be in error in this, even then nothing took place consequent upon the transhipment and transit of the consignment

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by the "Eastholm" to Vancouver, which imposes liability upon the appellant, *i.e.*, was not the *causa causans* of the deterioration of the eggs and their manifest condition at the end of the voyage.

The learned counsel for the appellant, in his very able argument, while not abandoning in any way but adhering to his contention that under the terms of the bill of lading and the Harter Act there was no liability established, very courageously submitted that if the appellant was to be held to be in the position of liability at common law, that even upon that view of the matter, no liability had been established.

It is clear that at common law there is no responsibility for loss or damage consequent upon an inherent quality or defect of goods carried in the case of perishable goods, and in the present case the goods come within that category, the carrier is not answerable for their decay or deterioration, nor is the carrier liable when the goods have been shipped in an unfit condition (*The Ida* (1875), 32 L.T. 541; *The Bancore* (1896), 65 L.J., P. 97). No doubt if there were adventitious causes introduced by the carrier, not traceable to an inherent quality or defect, and not arising from the ordinary development of that quality or defect, which could lead to the claimed damage, that would alter the situation. The question is, did any such thing take place which would throw liability upon the carrier? (*The Freedom* (1869), 38 L.J., Adm. 25; (1871), L.R. 3 P.C. 594; *Clark et al.* v. *Barnwell et al.* (1851), 53 U.S. 272). In this connection it may be successfully said, as I view the evidence relative to the transhipment to the "Eastholm" at Seattle, and the delivery of the goods in Vancouver, that the evidence is wholly insufficient to support the finding of fact of the learned trial judge. Nothing occurred upon the voyage which could be said to have had any effect upon the eggs enclosed in the crates, that is no adventitious causes introduced or chargeable to the carrier were established. As to the goods being "in good order," etc., that only means externally, as far as they could be seen, *i.e.*, in good order outside (*The Peter der Grosse* (1875), 1 P.D. 414; *Crawford and Law* v. *Allan Line Steamship Co.* (1911), 81 L.J., P.C. 113; (1912), A.C. 130; 3

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Asp. M.C. 195. It is to be noted though that the view as expressed by James, L.J., that the admission that the goods appeared to be in good condition outside, threw upon the appellant the onus of proving that the damage did not arise whilst the goods were on board the ship or in their custody, or that it came within the exceptions of the bills of lading cannot be held to be the law applicable in the present case, as the contrary view was expressed in *The Ida* (1875), 32 L.T. 541).

The submission, therefore, is in the present case following *The Ida, supra,* that the respondent (the plaintiff) was bound to make out a *prima facie* case either by shewing that the cargo was in good condition when shipped, or that the damage could be traced to some default of the shipowner. This, in my opinion, was not shewn; further, the appellant (the defendant), in my opinion, upon the evidence adduced from the officers and crew of the "Eastholm," the evidence of Cullington, the marine surveyor, and the elaborate and scientific tests made by the appellant as to mould occurring consequent upon wetting by salt water in transit from Seattle, established that the balance of probabilities was wholly in favour of the belief which, in my opinion, is incontrovertible, that the state of the eggs was not attributable at all to anything that occurred in transit from Seattle to Vancouver, but arose from the inherent quality or defect in the eggs, *i.e.,* decay and deterioration took place because of staleness of the eggs or the results of ordinary processes going on in the eggs themselves without the aid of causes introduced by the shipowner. It is quite apparent that the respondent did not adduce evidence sufficient in its nature to discharge the onus that rested upon it to trace the damage to some default of the shipowner. If the eggs were in such condition at the outset of the voyage as would not ensure their delivery in a commercial state at the end of the voyage, their decay and deterioration cannot be said to be a happening that can be charged against the appellant, the shipowner. There is, in my view, upon an analysis of the evidence not sufficient evidence upon which to find there was default upon the part of the shipowner, which gave rise to the condition in which the eggs were found when delivered at Vancouver. Further, the proof demon-

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strating that the damage was traceable to the default of the shipowner was affirmative proof that the respondent was bound to give, otherwise the action should be dismissed. The evidence as I read it establishes beyond the question of any reasonable doubt, that the eggs became deteriorated or wasted owing to bad packing, being too stale, or owing to the onset of some deterioration inherent in the eggs. This being the case, even if it could be said that any such risks were not excepted, yet there would be no liability upon the shipowner. In the case of a shipment of oil-cake we find Sir J. Napier saying (see *The Freedom* (1871), L.R. 3 P.C. 594 at p. 600):

> "It would be unreasonable to make the shipowners responsible for deterioration or damage caused by latent imperfection or defects in the oil-cake, which could not be supposed to have been known to them at the time of the shipment."

(See also *Nugent* v. *Smith* (1875), 45 L.J., C.P. 19; *Great Western Railway Company* v. *Blower* (1872), 41 L.J., C.P. 268; *Kendall* v. *London and South Western Railway Company* (1872), 41 L.J., Ex. 184; *Williams* v. *Lloyd* (1628), W. Jones 179; 82 E.R. 95; *Farman* v. *Adams* (1711), Bull. N.P. 69; *Warden* v. *Greer* (1837), 6 Watts 424; Ang. Carr. 211; *Nelson* v. *Stephenson* (1856), 5 Duer. 538; *Internationale Guano-en-Superphosphaatwerken* v. *Macandrew & Co.* (1909), 78 L.J., K.B. 691; *Lister* v. *Lancashire and Yorkshire Railway* (1903), 72 L.J., K.B. 385; *The Ida* (1875), 32 L.T. 541; *The Bancore* (1896), 65 L.J., P. 97).

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Baldwin v. *London, Chatham and Dover Railway Co.* (1882), 9 Q.B.D. 582, was a case where the plaintiff was held not to be entitled to recover the value of some rugs which had been delayed in transit and had become rotten, owing to being packed in a damp state (also see *Hudson* v. *Baxendale* (1857), 27 L.J., Ex. 93; *per* Cleasby, B.; *Barbour* v. *South Eastern Railway* (1876), 34 L.T. 67; *North Eastern Railway Company* v. *Richardson and Sisson* (1872), 41 L.J., C.P. 60; *Bradley* v. *Waterhouse* (1828), M. & M. 154; *Edwards* v. *Sherratt* (1801), 1 East 604).

There was no bad weather between Seattle and Vancouver, the eggs were well protected from sea water (the marine surveyor supports this), the eggs could not have got into the state

they were between Seattle and Vancouver, the time itself was too short to bring any such condition about, only three days. It is significant that Faull, called by the respondent, the C.P.R. foreman at the wharf, who saw the consignment of eggs when they were on the "Eastholm" at the wharf does not mention wetness. Then Ricky, also a witness for the respondent, the food inspector for the Government of Canada, did not speak of wetness, he said:

"From the odor of the pack, I judged they were not fit for human consumption, and my business is to examine them and submit a sample to the analyst for his report."

This examination was less than three days from the time the shipment was made from Seattle, and it is apparent when the evidence is considered that mould could not get on the eggs by contact with salt water within three days. The tests made shew that the contention made by the respondent as accounting for the state of the eggs and the finding of fact as made by the learned trial judge cannot be accepted with approval. The evidence of Thornfield, the egg inspector for the Government of Canada, speaks to the tests made under his supervision, so as to be able to estimate the effect of sea water on the eggs, and the contention made by the respondent as accounting for the condition of the eggs. It may be said that the tests do not at all support the contention of the respondent. Further, Thornfield speaks of the very doubtful quality of Chinese eggs and had experience with them and remarks upon eggs produced under unsanitary conditions—the experience with Chinese eggs, which the eggs were in the present case, had been that they were of very doubtful quality and they deteriorated very rapidly.

MCPHILLIPS, J.A.

The preponderance of evidence unquestionably establishes that the eggs were properly stowed on board the "Eastholm," that no damage occurred to the eggs while on board her by sea water or other cause, and an entire absence of evidence that the damage was traceable to any default of the shipowner. What the evidence does reasonably establish is this: that the damage which occurred to the eggs was due to decay and deterioration, the results of ordinary processes going on in the eggs themselves without the aid of causes introduced by the shipowner. This

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being the case, the respondent was not entitled to succeed in the action and the learned trial judge arrived at a wrong conclusion. The appeal, in my opinion, should be allowed and the action dismissed.

EBERTS, J.A. would dismiss the appeal.

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitors for appellant: *Davis & Co.*
Solicitors for respondent: *Craig, Parkes & Tysoe.*

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SCOTT v. CITY OF NANAIMO

SCOTT v. THE CORPORATION OF THE CITY OF NANAIMO.

Practice—Notice of appeal—Not sufficient time to perfect order for security before hearing—Application to put case further down on list—Granted.

Notice of appeal was served on the 22nd of December for the next sitting of the Court of Appeal commencing on the 8th of January following. Respondent's solicitor immediately demanded security for costs by letter to which he received no reply. After vacation he gave notice of motion for an order to enforce payment of security but did not obtain the order until the morning of the 8th of January. He then applied on the same day to the Court of Appeal to put the case at the bottom of the list of appeals in order to have sufficient time to make effective his order for security.

Held, MARTIN and MCPHILLIPS, JJ.A. dissenting, that there were reasonable grounds for making the application in the circumstances and as the extension can be made with no great prejudice to the appellant the application should be acceded to.

Statement

MOTION to the Court of Appeal to put the case at the bottom of the list of appeals as security for costs had not been furnished by the appellant after demand was made therefor and the respondent had not sufficient time within which to perfect his order for security for costs. Judgment was given in the Court below on the 25th of October, 1923, and notice

of appeal was served on the respondent's solicitor on the 22nd of December. Respondent's solicitor immediately demanded security for costs by letter, and on receiving no reply he immediately after vacation served notice of motion for an order for security for costs. The order was made on the 8th of January, 1924, being the first day of the sitting of the Court of Appeal.

The motion was heard at Victoria on the 8th of January, 1924, by MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Statement

F. A. McDiarmid, for the motion: The notice of appeal was served just before vacation and we then had only sufficient time to demand security. After vacation we proceeded as quickly as we could but were unable to obtain an order for security for costs until this morning. We have a right to security for costs and should have a reasonable time after notice of appeal to perfect our order for enforcing it.

Argument

Mayers, contra, referred to *Shipway* v. *Logan* (1916), 22 B.C. 410.

MACDONALD, C.J.A.: When I can see a reasonable excuse in the circumstances, and no great prejudice to the appellant, as in this case, I will grant the application. I think it is a clear case for applying that practice.

MACDONALD, C.J.A.

MARTIN, J.A.: I have already expressed my view during the argument, *viz.*: that we ought to go on with the hearing of the appeal now before us, and it is too late to stop it because the position of the matter is, in essentials, exactly within the principle we laid down in *Shipway* v. *Logan* (1916), 22 B.C. 410, which, as I understand, settled the practice, and counsel is entitled to rely on it.

MARTIN, J.A.

GALLIHER, J.A.: The circumstances of this case, I think, warrant Mr. *McDiarmid's* application being acceded to. It is a very short time since notice of appeal was given; vacation intervened. It is not an absolute excuse, I admit, because it could have been got in vacation. As I understand the *Shipway* v. *Logan* case, where we laid down that rule, there was not

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an application for security for costs, and there was not an order for security for costs. Now Mr. *McDiarmid* comes before us having demanded security for costs, and with an order that that security be given. He comes before us at the earliest moment he can come before us in that position, and under the circumstances I have no hesitation whatever in saying that his request should be acceded to. Of course, I can understand Mr. *Mayers* opposing it strongly; it means in effect that he would have his case heard without security for costs being put up. Of course, if he is entitled to maintain that, that is his business, and he is perfectly proper in bringing that before us.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I take a similar view to that of my brother MARTIN. In all these matters of practice we ought to have as much certainty as possible. I think that a solicitor instructing counsel in this case should have drawn the attention of counsel to the practice, and that is, as I understand it, that if a case is on the peremptory list (and I look upon this as being in that category) that the Court will not listen to any postponement of argument on the ground that security has not been put up. The party having such an order must move expeditiously.

EBERTS, J.A.

EBERTS, J.A.: I would agree that the case be placed further down on the list.

Motion granted,
Martin and McPhillips, JJ.A. dissenting.

VANCOUVER HARBOUR TRADING COMPANY v. OGAWA, OVERSEAS TRADING COMPANY, AND THE ROYAL BANK OF CANADA.

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VANCOUVER HARBOUR TRADING CO. v. OGAWA

Sale of property—Delivery cash against documents—Invoice—Bill of lading —Unpaid vendor — Advance by bank — Knowledge — Evidence — Can. Stats. 1913, Cap. 9, Secs. 86 to 90.

T., acting as agent for a Japanese lumber purchasing Company employed O. for the purpose of obtaining an order of lumber from the plaintiff Company. The plaintiff agreed to supply the lumber and it was loaded in two separate deliveries on the S.S. Kinkasan Maru on the 12th and 18th of April, 1922, respectively, "cash against documents," the purchase price being $4,648.73. On both deliveries the invoices were made out to O. and the bills of lading to T. and in both cases the documents were taken by O. to the Cordova Street branch of the defendant Bank. O. gave a cheque on his account at the Cordova Street branch on the 12th of April for the freight which was paid, and on the 18th of April after final delivery of the lumber he gave a cheque drawn on the Cordova Street branch for $4,335.17 on account of the contract to the plaintiff. This cheque the plaintiff deposited in its account at the East End branch of the defendant Bank on the 18th of April but it was returned on the 20th "not sufficient funds." O., having deposited all documents with the Cordova Street branch of the Bank on the 20th of April, obtained an advance of $4,500. The plaintiff subsequently took a promissory note from O. for the price of the lumber payable on demand, and after the lumber was sold the Bank paid the plaintiff $1,786.93 on account of the price of the lumber. The note given by O. was not paid. In an action against O. and the Bank for the balance due on the contract O. was held to be liable but the transaction between O. and the Bank was held to be of the ordinary banking character, the Bank having had no notice of the plaintiff's claim to a lien such as to create any liability.

Held, on appeal, affirming the decision of MORRISON, J. (MCPHILLIPS, J.A. dissenting), that there was no evidence to support the contention that the Bank had made the advance to O. with knowledge of the plaintiff's position as an unpaid vendor.

APPEAL by plaintiff from the decision of MORRISON, J. of the 22nd of March, 1923, in an action to recover $2,861.80 balance of the price of lumber sold to S. Owaga trading as the Overseas Trading Company cash against documents and delivered on board the S.S. Kinkasan Maru at Vancouver, the

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documents having been handed to the defendant Bank with knowledge of the plaintiff's lien for the purchase price. The facts are that one Tohda Tsutsumi acting as agent for a Japanese company desiring to purchase lumber employed S. Ogawa with a view to making a purchase of lumber from the plaintiff Company. The plaintiff agreed to supply the lumber and two deliveries were made on board the S.S. Kinkasan Maru cash against documents, one on the 12th of April, 1922, to the value of $4,279.88 and the second on the 18th of April following to the value of $368.85. The invoices were made out to S. Ogawa and the bills of lading to Tohda Tsutsumi. The documents in relation to both deliveries were taken by S. Ogawa to the Cordova Street branch of the Royal Bank of Canada where he kept his bank account, and after the first delivery he gave a cheque for the freight charges which was paid at the Cordova Street branch. On the second delivery of lumber on the 18th of April being made S. Ogawa gave the plaintiff a cheque for $4,335.17 on account of the purchase price of the lumber and the plaintiff deposited the cheque at the East End branch of the Royal Bank of Canada where it kept its account. On the 20th of April the cheque was returned "not sufficient funds." On all documents being deposited in the Cordova Street branch of the defendant Bank by S. Ogawa after the final delivery of the lumber on board the S.S. Kinkasan Maru, the manager gave Ogawa an advance of $4,500 on the 20th of April. After the cheque given the plaintiff for the lumber was refused, the plaintiff received from S. Ogawa a promissory note for $4,648.73 payable on demand. After the lumber had been sold in Japan the defendant Bank under instructions from S. Ogawa paid the plaintiff $1,786.93 on account of the price of the lumber. The sum claimed is the balance due.

Statement

The appeal was argued at Vancouver on the 2nd, 5th and 6th of November, 1923, before MACDONALD, C.J.A., MARTIN and MCPHILLIPS, JJ.A.

Cassidy, K.C., for appellant: Whether there was a vendor's lien ahead of the Bank must be decided on the evidence irrespective of the pleadings: see *Banbury* v. *Bank of Montreal* (1918), A.C. 626; *Tennant* v. *The Union Bank* (1892), 19

Argument

A.R. 1 at p. 8; Annual Practice, 1923, p. 346; Odgers on Pleading & Practice, 8th Ed., 267-8; *Laberge et al.* v. *Merchants Bank of Canada et al.* (1917), 1 W.W.R. 115. They did not get a title as against us to this bill of lading and my contention is they had notice of our not having been paid for the lumber in question. The Bank must have the applicant sign schedule C of the Act. The Bank must take *bona fide*: see Falconbridge on Banking, 2nd Ed., 238; Maclaren on Banks and Banking, 4th Ed., 253-4. The vessel with the lumber did not sail until some days after we had notified them of our lien. There was a *locus poenitentiæ*: see *Powell* v. *Lowenberg* (1893), 3 B.C. 81 at p. 84; *Cahn* v. *Pockett's Bristol Channel Steam Packet Company* (1899), 1 Q.B. 643; *Shepherd* v. *Harrison* (1871), L.R. 5 H.L. 116 at p. 130; *Clarkson* v. *Dominion Bank* (1919), 58 S.C.R. 448 at p. 451. On claim to recover proceeds of conversion see *Fine Art Society* v. *Union Bank of London* (1886), 17 Q.B.D. 705 at p. 708; Bullen & Leake's Precedents of Pleadings, 6th Ed., 623.

Alfred Bull, for respondent (Royal Bank of Canada): There was nothing in the pleadings as to a vendor's lien. Ogawa was acting as a principal and not as an agent. The advance was made on the 20th of April to Ogawa at the Cordova Street branch of the Bank without any knowledge of the plaintiff's claim for the cost of the lumber. Ogawa's cheque to the plaintiff was on the Cordova Street branch but was deposited by the plaintiff in his account at the East End branch of the same Bank and was not dishonoured at the Cordova Street branch until after the advance to Ogawa. After the cheque was refused the plaintiff came to terms with Ogawa and accepted a note from him for the price of the lumber. This is a waiver of the right to now charge the Bank on the original transaction.

Argument

Cassidy, in reply.

Cur. adv. vult.

8th January, 1924.

MACDONALD, C.J.A.: The lumber was shipped by the plaintiff "cash against documents," but instead of sending the documents of title to a bank to be delivered to the consignee, on payment

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of the price of the lumber, they were sent to the consignee himself, thus enabling him to obtain an advance on them from the defendant Bank.

The only question, therefore, is, did the Bank act fraudulently? It was contended on behalf of the plaintiff that it did, but I think there was no evidence to sustain that contention.

I would, therefore, dismiss the appeal.

MARTIN, J.A.: I agree that this appeal should be dismissed, because on the facts before him the learned judge could only, I think, have reached the conclusion that he did reach respecting the transaction which, I am satisfied, was in all respects legal on the part of the respondent Bank.

MARTIN, J.A.

MCPHILLIPS, J.A.: This is an appeal in an action brought for the conversion of a bill of lading covering a shipment of lumber sold, as the appellant claimed, to one Ogawa, trading under the name and style of the Overseas Trading Company.

The respondent, the Royal Bank of Canada, claiming, and its contention being upheld by the learned trial judge, that it had become possessed of the bill of lading and the right to the lumber which was shipped to Japan on the S.S. Kinkasan Maru, by the customary and usual transaction under the Bank Act, in pursuance of sections 86 and 88, and advances are claimed to have been made in respect of two securities held under sections 86 and 88 under date respectively the 12th and 20th of April, 1922, the advance claimed to have been made on the later security being the specific sum of $4,500.

Upon the argument at this Bar both of the learned counsel, on behalf of the appellant and respondent, submitted that Ogawa, *i.e.*, the Overseas Trading Company, was the real principal in the transaction of the purchase of the lumber from the appellant, and the one with whom the respondent carried out the transactions under the Bank Act. It would appear that at one time during the currency of the transactions, an effort was made to raise funds to finance lumber purchases through Tohda Tsutsumi, who was accredited but not really given a "bank credit" by the Yokohama Specie Bank, Ltd.; in any case this came to nothing, the respondent actively participating in an

effort to bring this about, but it was fruitless. Then, to the knowledge of the respondent, Ogawa was negotiating for lumber to ship to Japan, but to the knowledge of the respondent, was without funds to complete any such purchases of lumber and had no source from which funds would be available. Further, Ogawa was a customer of the respondent, and he was, during the material time of the transactions with the respondent, its debtor. This was the position of affairs when the particular transaction here under review came to be entered into.

The appellant made a sale of lumber to Ogawa, aggregating in purchase price $4,648.73, and the lumber was placed aboard the S.S. Kinkasan Maru at the port of Vancouver, for transport to Nagasaki, Japan, and billed "Overseas Trading Company, order of Royal Bank of Canada, Tohda Tsutsumi notify Kaname Husamura, Nagasaki, Japan." The appellant made the sale and carried out the shipment upon the basis of "cash against documents," and upon the evidence this was well known to the respondent, the Bank. I so read the evidence, and it is impossible for the respondent to effectively contend to the contrary. It knew its customer's state of account and the difficulty already met with in attempting to finance purchases of lumber. Nevertheless, although the respondent became possessed of the documents of title covering the shipment of lumber under the detailed circumstances, the attempt is to make out a case of advances in ordinary course and without notice to the Overseas Trading Company, whereby the respondent was entitled to the shipment freed from any trust or responsibility to the appellant, the unpaid vendor, and the learned trial judge so held. I do not propose to, in detail, go over all the facts but to state the effect of the evidence as it presents itself to me.

MCPHILLIPS, J.A.

The evidence shews that the respondent became possessed of the documents of title covering the shipment of lumber from Ogawa in conformity with the well-understood agreement, *i.e.*, "cash against documents," and the cheque given by Ogawa, the Overseas Trading Co., dated the 18th of April, 1922, payable to the appellant was deposited in the East End branch of the Royal Bank, Vancouver, the bank of the respondent, on the same day, and not until the 20th of April, 1922, was the

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cheque returned unpaid and marked "N.S.F." Before this, although it is claimed after the advance was made to Ogawa, the appellant through its accountant made complaint to one Christie, the manager of the Bank, that the cheque was taken as cash to the knowledge of the Bank, and the documents covering the shipment were asked to be delivered up to the appellant, and these documents were there and then seen by the appellant's accountant, Christie shewing them to him. All that Christie said then was, "You will have to wait a little time, there is trouble." It is inconceivable that this transaction was carried through by the respondent without the knowledge that the appellant was an unpaid vendor and if the transaction can be supported under the Bank Act there would remain to the appellant, as given by the Bank Act, the vendor's lien (section 89, subsection 2).

Now the advance claimed to have been made by the respondent, was made on the 20th of April, 1922, and the security taken is under section 88 of the Bank Act, from the "Overseas Trading Co., S. Ogawa," the signature of Tohda Tsutsumi also appearing thereon, but it was admitted at this Bar that Ogawa was the real person with whom the Bank dealt throughout. At this time Ogawa was a customer of the Bank and presumptively the state of his account was known to the Bank—would assuredly be known—and on the 18th of April the cheque above referred to was on deposit in the Bank by the appellant and not yet paid (the Bank must be held to have known this), nevertheless, on the 20th of April, 1922, the Bank carries through this transaction and advances to Ogawa $4,500, utterly regardless of this cheque being unpaid, and which the Bank must be held to have known was a cheque covering the purchase price of the identical lumber against which it made this advance. Can it be said, upon this state of facts, that the Bank acted *bona fide* in the matter? In my opinion, there can be only one answer and that in the negative (*Cole* v. *North Western Bank* (1875), L.R. 10 C.P. 354 at pp. 362-3).

MCPHILLIPS, J.A.

Upon the facts of the present case the respondent, the Bank, cannot be admitted to have been entitled to take the securities upon which it relies, as it must be held to be affected with notice

that Ogawa was only entitled to the shipment of lumber upon the known terms of the sale, *viz.*, "cash against documents," and the respondent cannot escape from being held to have known this, therefore the respondent must be held to have no lien as against the owner, the appellant (*City Bank* v. *Barrow* (1880), 5 App. Cas. 664).

It is impossible for the respondent here to contend that it acquired the documents of title to the lumber in good faith (*Navulshaw* v. *Brownrigg* (1852), 2 De G.M. & G. 441; *Sheppard* v. *Union Bank of London* (1862), 7 H. & N. 661; *Portalis* v. *Tetley* (1867), L.R. 5 Eq. 140), and without notice that Ogawa was prevented from dealing with the lumber save upon the known terms, *viz.*, "cash against documents." The respondent must be held to have known this and Ogawa was, under the circumstances and to the knowledge of the respondent, acting *mala fide* against the owner of the lumber, that is the appellant (*Cahn* v. *Pockett's Bristol Channel Steam Packet Company* (1899), 1 Q.B. 643 at p. 653; *Shepherd* v. *Harrison* (1871), L.R. 5 H.L. 116; *Clarkson* v. *Dominion Bank* (1919), 58 S.C.R. 448 at p. 451, Sir Louis Davies, C.J., "cases in which the loan had necessarily to be advanced to enable the borrower to obtain possession of the goods so that he might give the bank the security"). Unquestionably, the only way the respondent could have got a secure pledge and the right to the documents of title to the lumber, was by seeing to it that the purchase price of the lumber got to the owner, that is the appellant. In my opinion, the appellant should succeed in the appeal, the respondent to be declared to have no lien upon the lumber as against the appellant, the owner; that it be further declared that the lumber was the property of the appellant and was sold by the respondent with notice of that fact, and that the proceeds of the sale should be accounted for to the appellant. Even if it could be said that the security taken by the Bank, the respondent, has validity, it is subject upon the facts of the present case to section 89 (2) of the Bank Act, which reads as follows:

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"Provided that such preference shall not be given over the claim of any unpaid vendor who had a lien upon the products or stock, goods, wares and merchandise at the time of the acquisition by the bank of such warehouse

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receipt, bill of lading, or security, unless the same was acquired without knowledge on the part of the bank of such lien."

Here, undoubtedly the Bank had notice that the appellant was an unpaid vendor. At p. 269 of Maclaren on Banks and Banking, 4th Ed., this is stated:

"The effect of the subsection [89 (2)] is that if the bank has notice of the claim of the unpaid vendor it will rank after him; if it had not such notice at the time it acquired its lien it will have priority over him. The rule laid down in the case of *Tennant v. Union Bank of Canada* (1894), A.C. 31, would uphold the constitutionality of this provision, which overrides the civil law of the Province."

MCPHILLIPS, J.A.

In my opinion, the learned text-writer correctly states the governing law. Therefore, upon this view, the respondent should account to the appellant to the full extent of the unpaid purchase price of the lumber.

For the foregoing reasons, I would allow the appeal.

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitor for appellant: *J. A. Russell.*

Solicitors for respondent: *Tupper, Bull & Tupper.*

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CAMPBELL v. STOREY

CAMPBELL v. STOREY.

Contract—Limited company—Brother and sister sole owners—Agreement that brother purchase sister's shares—To be paid for from moneys received from sale of real property in which they were jointly interested—Evidence—Onus.

The plaintiff, who with her brother owned all the stock equally in a limited company brought action against her brother under an alleged verbal agreement whereby he was to purchase all her shares in the company at par (1,582 shares, $100 per share, par value) he to pay for the shares by giving $25,000 that he had drawn from the company, his profits from the sale of certain real estate in which they were jointly interested and the profits that he would later derive from the business of the company. The defence was that he did not enter into a binding contract to purchase the shares but that he had voluntarily promised to purchase his sister's stock in the case of a favourable sale of the real property in which they were jointly interested. It was

held on the trial that there was a binding contract and the defendant was liable.

Held, on appeal, reversing the decision of MORRISON, J., that the onus of proof of the contract alleged was on the plaintiff and that as against the defendant's statement of what the arrangement was the plaintiff's evidence did not establish a binding contract on the part of the defendant to purchase the shares.

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APPEAL by defendant from the decision of MORRISON, J., of the 28th of April, 1923, in an action for an order for the sale of certain properties in which the plaintiff and defendant were co-partners and directing payment of the proceeds of the sale up to $158,200 to the plaintiff in pursuance of a verbal agreement whereby the defendant agreed to purchase from the plaintiff all her shares in Storey & Campbell Limited, and to pay for them from the proceeds of the sale of the properties in which they were jointly interested. The plaintiff is the defendant's sister and her husband (now deceased) had been in partnership with the defendant under the firm name of Storey & Campbell. Mr. Campbell died in 1919, his widow being sole beneficiary. The defendant carried on the business and the parties then agreed to form a limited company, the shares being divided between the plaintiff and the defendant. The plaintiff had in all 1,732 shares of a par value of $100 each. The plaintiff claims that Storey promised to buy her shares at their par value and that he would pay her from his share of the moneys realized on the sale of certain real property in which they were jointly interested, and that under this agreement he did purchase 150 of her shares for which $15,000 was paid, leaving a balance of 1,582 shares in the plaintiff's hands.

Statement

The appeal was argued at Vancouver on the 29th of October, 1923, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Davis, K.C., for appellant: The learned judge below found there was a verbal contract whereby Storey was to purchase his sister's shares at par. The defendant's version is that the promise to purchase was contingent entirely upon the favourable sale of the properties in which they were jointly interested,

Argument

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that he never bound himself unconditionally to purchase the shares. The general depression precluded any possibility of carrying through the contemplated purchase.

J. W. deB. Farris, K.C., for respondent: The learned judge below found on the evidence that there was a binding contract and his finding should not be disturbed. The reasoning in the case of *Synge* v. *Synge* (1894), 63 L.J., Q.B. 202 at p. 204 would apply.

Davis, in reply.

Cur. adv. vult.

8th January, 1924.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I concur in the judgment of my brother GALLIHER.

MARTIN, J.A.

MARTIN, J.A. would allow the appeal.

GALLIHER, J.A.

GALLIHER, J.A.: The first point to decide is whether the agreement sued on was, as Mr. *Farris* argues, a binding agreement, or as Mr. *Davis* submits, merely an expression of intention by his client to purchase Mrs. Campbell's shares from certain mentioned sources from time to time as he saw fit, or felt that he could do so, without in any way binding himself so to do.

The agreement sued on is stated to be one consummated upon a certain auto drive which took place subsequent to the meeting in Mr. Donaghy's office, where the parties were for the purpose of signing an agreement by which the property and assets of the Storey & Campbell partnership were to be transferred to the newly incorporated company of Storey & Campbell, Limited, and which fixed also the respective number of shares to be allotted to Storey and Mrs. Campbell respectively. This was on June 25th, 1920, and was signed on that day. Mrs. Campbell states in more than one place in her evidence that the agreement was made during the auto drive, and while some of her evidence might seem to point to the fact that there was an agreement prior to this, I think on the whole that what she had reference to was negotiations and discussions which finally terminated in an agreement. Now, what was that agreement? If it was as Storey says, and Mr. *Davis* urges, that is an end of the matter and the appeal must be allowed. If the evidence

substantiated the statement in the particulars I would agree that a contract out and out was made to buy Mrs. Campbell's shares, but though I have weighed and balanced the testimony very carefully, I cannot come to that conclusion. I realize in taking that view I am disagreeing with the learned trial judge, but with great respect, I feel myself impelled to do so on the evidence. Storey's evidence is directly contrary to the view that such a contract was made. This might be disbelieved by the learned trial judge, but he does not say so.

We must then examine as to whether Mrs. Campbell's evidence is consistent with the statement in her particulars, or whether it is not, in effect, consistent with what Storey himself says was the agreement. The statement in the particulars is as follows:

"The agreement was the result of negotiations which had taken place for some time between the plaintiff and the defendant, and during which negotiations the defendant had made various proposals to purchase the plaintiff's interests in the firm of Storey & Campbell. On the day upon which the agreement was made the plaintiff asked the defendant, after he had made an offer to buy her shares in Storey & Campbell, Limited, how he, the defendant, was going to pay for the said shares. To this the defendant replied in these words as near as the plaintiff can remember: 'I will use $25,000 which I drew from Storey & Campbell to pay you and we will sell our property and when we do I will give you my share, and I will make further payments to you out of the profits of Storey & Campbell, Limited, and I will allow you out of Storey & Campbell, Limited, while you are interested the sum of $200 or $250 per month, which ever you like, for living expenses.' The plaintiff replied 'All right, that is all right.'"

GALLIHER, J.A.

This would indicate, as I view it, a purchase of the shares and a method and time for paying for them. To what extent does plaintiff's evidence support this? Turning first to her evidence:

"I agreed that I would sell my shares to him at par under that agreement, that he would give me $25,000 that he drew from Storey & Campbell and when we sold the real estate, that he would use his profits from the realization out of the real estate and profits he would derive from Storey & Campbell Limited's business.

"He would do what with that? He would buy my stock from time to time and I asked him then, which I did many other times, as to how long that would take to buy my shares, 'Well,' he said, 'I should say from two to three years, because you know what the profits were last year, our profits were $78,000 or $76,000, and it won't take long to do it that way.' He said, 'I am just as anxious to buy as you are to sell.'"

The words "he would buy my stock from time to time," and

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again, "how long that" (meaning the sources from which the money was to come) "would take to buy my shares," reading the words literally, they would seem to support Storey's evidence that he was to buy them from time to time as money was available from these sources. But if we could take the view that though she used the words, "buy from time to time," she really meant the agreement was to buy her shares, and from time to time pay for them in the manner indicated, that would be in accordance with the particulars. If I could find support for that view in the rest of her evidence, I would be inclined to give effect to it. Her evidence is rather difficult to analyze, but nowhere can I find direct support in a way that is not also consistent with Storey's statement, while on the other hand, in speaking of the transfer of 150 shares which Storey actually bought, she uses these words:

"I transferred the 150 shares under the agreement that we had made as to how he was to buy my interest in Storey & Campbell, Limited."

And again:

"I sold my shares [the 150] to him about the 17th of March or thereabouts."

"I never raised any objection as to how he was going to carry me out of my difficulties, and it was only through this way he could do or would do it, by me giving up shares from time to time."

"As near as I can remember his words were that we would sell our real estate and that from what his share was out of the real estate he would buy my shares in the limited company at par."

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"He was trying to shew me how easy it would be for him to buy my shares, that he was drawing a salary and that he would take the profits of the business and the profits of his share of the real estate and give it to me for my share in the business."

"And he explained to you very carefully that that was what he was going to buy the shares from? Yes."

Now all of these expressions—"that he was going to buy my shares"; "how easy it would be for him to buy my shares"; "he would buy my shares in the limited company at par"; "he would do it by me giving up shares from time to time," coupled with the method discussed as to how this could be done, are all consistent with the defendant's version of the agreement, and do not enable me to detract from the effect of the specific words used by plaintiff in her evidence, and to which I have before adverted.

This, without taking into consideration the evidence of Mr.

Donaghy and Mr. Morgan at the meeting in Mr. Donaghy's office, because giving that its fullest effect, it occurred at a time prior to the making of the agreement, and though the defendant may have said what the witnesses say he did, he might later have yielded to persuasion and made the agreement alleged. As to the likelihood of whether he did so or not, Mr. Donaghy's evidence might be an element to consider. It may well be that Mrs. Campbell believed she had secured the agreement she contends for and she may have been unfortunate in the language used in giving her evidence, but the onus was on her to establish that, and unless she has sheeted it home to the defendant, which I cannot find upon the evidence she has, I must hold that the action fails.

GALLIHER, J.A.

McPHILLIPS, J.A.: I formed the opinion upon the argument of this appeal, that no contract such as was alleged and given effect to by the learned trial judge, was established. Upon further consideration, I remain of the same opinion. The onus was upon the plaintiff to establish the contract and that onus was not discharged.

It is not the Province of the Court to make a contract for the parties. Further, no contract is capable of being established where it is evident there was the absence of mutuality, and that was this case (*Jordan* v. *Norton* (1838), 4 M. & W. 155; *Hutchison* v. *Bowker* (1839), 5 M. & W. 535). At most, all that could be said to have been stated was that out of moneys derived from the sale of properties, *i.e.*, real estate, shares of the plaintiff would be bought, but the appellant refused to so. contract. It never went beyond some sort of understanding that the appellant looked forward to the carrying out of such a policy, but he declined to so contract or enter into any concluded contract in the matter, and in such a case it cannot be said there is any enforceable contract (*Hussey* v. *Horne Payne* (1879), 4 App. Cas. 311; 48 L.J., Ch. 846; *Bristol, Cardiff, and Swansea Aerated Bread Co.* v. *Maggs* (1890), 44 Ch. D. 616; 59 L.J., Ch. 472).

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The situation was one of difficulty for the plaintiff, following upon her husband's death. Owing to the want on her part of any business training, and I appreciate the anxiety of the

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plaintiff, it resulted in nervousness and even distrust of her brother, the defendant, but this distrust was wholly unwarranted, as everything points to the defendant doing as he had always done—his very best in the true interests of the business, and heroically meeting the changed conditions. It needed great judgment to determine upon the future policy and economy of management, and it is clear that the defendant brought great skill and judgment, as in the past, to bear upon all the complex happenings. Decisions had to be come to that the plaintiff could not, without experience, intelligently pass upon, and everything points to the defendant acting impartially throughout. In any case, the plaintiff has failed to make out her case as launched and that alone determines things, and the result must be a dismissal of the action.

MCPHILLIPS, J.A.

Whilst that must be the result, the preservation of the business and its properties, as well as the conservation of the interests of the plaintiff, call for the exercise of great skill and judgment, and I feel justified in saying that the defendant will proceed in a way which will accomplish the best results and mean the preservation of all the property that warrants protection. I have dealt with matters extraneous to the point of law which I consider is determinative of this case. I do so because of the great regret I have that the Court is powerless to elucidate or unravel the complications that the plaintiff is impressed with, but in passing let me say, that many of them are more imaginative than real, and I express the hope, which I confidently believe will be realized, that the defendant will so administer matters that the plaintiff will not be a serious loser, and whatever losses do occur will necessarily be borne and affect the plaintiff and defendant in accordance with their respective holdings, *i.e., pro rata.*

I would allow the appeal.

EBERTS, J.A.

EBERTS, J.A. would allow the appeal.

Appeal allowed.

Solicitors for appellant: *Davis & Co.*
Solicitors for respondent: *McGeer, McGeer & Wilson.*

SHAW v. WESTMINSTER THOROUGHBRED ASSOCIATION LIMITED.

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Negligence — Exhibition grounds — Race-course — Dangerous place — Gate partly open gives way to weight of horse — Plaintiff injured — Plaintiff's knowledge of horses—Contributory negligence—Liability.

The plaintiff took his wife, daughter and friend by automobile to the exhibition grounds to a race-meet. The daughter and friend went in to see the races while he and his wife remained outside. Later he strolled in to where the stables were and from there along a road which led to a gate a short distance away inside of which was the race-track. Seeing some people looking through he walked over to the gate and while standing there a horse in a race bolted and coming towards the gate struck it. The gate smashed outwards, hitting the plaintiff violently. He was knocked down his thigh bone being broken. The plaintiff was an experienced horseman having at one time owned a race-horse. It was held by the trial judge that the defendant was negligent in permitting the gate to be partially open when a race was in progress but the plaintiff was guilty of contributory negligence, he being an experienced horseman and standing close to the gate while a race was in progress.

Held, on appeal, affirming the decision of McDONALD, J. (McPHILLIPS, J.A. dissenting), that the plaintiff saw and appreciated the negligent condition of the gate and from his experience he knew of the tendency of horses to bolt in a race and was guilty of contributory negligence in standing where he did outside the gate.

APPEAL by plaintiff from the decision of McDONALD, J. of the 27th of April, 1923, dismissing an action for damages for injuries sustained at the Hastings Park race-track. Hastings Park belonged to the City of Vancouver and has for some years been held under lease by the Exhibition Association for exhibition purposes. About two years ago the Exhibition Association subleased to the defendant Association. In September, 1922, the defendant Association was carrying on a horse-racing meet, and on the 4th of September, 1922, the plaintiff took his wife, daughter and a friend to the track in an automobile. His daughter and friend went in and he waited in his car outside. After about half an hour's waiting he got out of his car and strolling around strayed into where the stables were. While there he was attracted to the gate

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entering the race-course close by where 15 or 20 persons were standing. He got into the crowd close to the gate which was about 5½ feet high with openings through which they could see inside. While standing there a horse in one of the races stumbled and on recovering itself turned out from the track, struck the gate and smashed it out. It struck the plaintiff violently, knocked him down and broke his thigh.

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MCDONALD, J.: By Crown grant bearing date the 2nd of August, 1889, that parcel of land known as Hastings Park was granted to the Corporation of the City of Vancouver upon trust that the same should be maintained and preserved by the said Corporation for the use, recreation and enjoyment of the public.

By an indenture of lease, dated the 24th of October, 1918, the City leased the said Hastings Park (with certain exceptions not material to this action) to The Vancouver Exhibition Association for a term of five years. By a further lease, dated the 17th of December, 1920, the Vancouver Exhibition Association, with the consent of the City of Vancouver, leased unto the Westminster Thoroughbred Association Limited, the defendant in this action, that portion of Hastings Park "usually known and described as the race-track, grand-stand, club-house, paddock, horse-stables, and all other buildings, erections and areas commonly used at Hastings Park in connection with race-meets," for the purpose of holding in each of the calendar years 1921, 1922 and 1923 two race meetings.

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On the 4th of September, 1922, the plaintiff went to Hastings Park with his wife in his automobile. During the afternoon he left his car and strolled about the Park through the stables and along a roadway which brought him to the gateway leading on to the race-track, through which gateway horses were brought to and from the track. When the plaintiff arrived there, a running race was about to commence. The gate in question consisted of two sections, each about 9 feet wide, swinging on hinges, when closed meeting at the centre. The northerly gate, when being opened and closed, dragged on the ground. A chain and lock had been provided for fastening the gates when closed, but the gatekeeper employed by the defendant, in order

to save time in opening and closing the gates, when horses and persons interested in them were passing to and fro, did not use the chain and lock but used a piece of rope which, from time to time, he threw over the end posts of the gates when closed. I find, as a fact, that when the plaintiff came to the gates they were opened so that they did not meet by about seven or eight inches. There were some 25 or 30 persons, including the plaintiff, standing outside the gate seeing what they could of the race without having paid the fee for entrance to the grand-stand. In my opinion, they had a right to stand where they were and the defendant Company conducting the race in question was negligent in permitting the gates to stand partially opened while a running race was in progress. As the plaintiff stood about one foot from the gate and not far from the starting post, one of the horses bolted, ran for the gate, struck against it, causing the gate to strike the plaintiff, which resulted in serious injuries to him.

Notwithstanding the above finding, I am of opinion that the plaintiff cannot succeed for the reason that he was guilty of contributory negligence in standing where he did during the progress of the race. The plaintiff is a retired physician but it appears in evidence that he was a man of considerable experience with horses and, in fact, had at one time owned a race-horse. The plaintiff saw the exact condition in which the gate was. On his own evidence, he saw no one in charge of the gate and yet, with his knowledge of horses, it seems to me that when he stood where he did, he took his chance of being injured.

MCDONALD, J.

It was contended for the defence that the plaintiff was a trespasser. I do not think that is so, as the roadway on which he stood was not leased to the defendant to the exclusion of the public, of whom the plaintiff was one.

The action is accordingly dismissed, but in case I should be wrong, I think it advisable to assess the damages and I do assess them at $2,500.

From this decision the plaintiff appealed. The appeal was argued at Vancouver on the 20th and 21st of November, 1923,

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

Argument

J. A. MacInnes, for appellant: Horse-racing is in itself dangerous and must be kept under proper control. There was not sufficient care here. The gate not having sufficient strength should have been guarded. The principle in *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330 applies: see also *Byrne* v. *Boadle* (1863), 2 H. & C. 722; *Tarry* v. *Ashton* (1876), 1 Q.B.D. 314. If there was negligence on the part of the defendant the real cause of the accident was the defective gate.

W. J. Taylor, K.C., for respondent: There was no concealed danger here of any kind. He knew horse-racing was in progress: see *Fairman* v. *Perpetual Investment Building Society* (1923), A.C. 74. He was a trespasser and guilty of contributory negligence. He went in without paying to see the races, and was a trespasser.

MacInnes, in reply referred to *Attorney-General* v. *Corporation of City of Victoria* (1884), 1 B.C. (Pt. 2) 107; *Parsons* v. *Toronto R.W. Co.* (1919), 45 O.L.R. 627.

Cur. adv. vult.

8th January, 1924.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I think the bolting of the horse was not an occurrence which the defendant was bound to foresee and provide against, but if it was, then the plaintiff saw and appreciated the condition of the gate which the horse struck, thereby injuring the plaintiff, who stood by it.

The plaintiff was himself a horse-owner, having at one time owned and raced horses. The gate in question was loosely fastened, and when the horse struck it, it swayed outwardly, striking the plaintiff who stood there, and caused the injury complained of. The facts, therefore, are that the plaintiff saw and appreciated the negligent (if it was negligent) condition of the gate; he knew as much as the defendant of the tendency of horses to bolt in a race, he was therefore guilty of contributory negligence in standing where he did outside the gate.

I would, therefore, dismiss the appeal.

MARTIN, J.A.: I agree that this appeal should be dismissed, the learned judge below having, I think, on the unusual facts before him, reached the right conclusion, even admitting the right of the plaintiff to take the obviously dangerous position that he did, close up to the gate in question.

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

MCPHILLIPS, J.A.: I would allow this appeal, being of the opinion that the plaintiff is entitled to recover.

The learned trial judge found that the defendant was guilty of negligence, but dismissed the action upon the ground that the plaintiff had been guilty of contributory negligence. I am in entire agreement with the learned trial judge in finding the defendant guilty of negligence, and as well with the further finding that the plaintiff was not a trespasser in being where he was. It is clear upon the evidence that the plaintiff, as one of the public, had a perfect right to be at the point where the accident occurred. The public right was conserved and declared by the original grant from the Crown of Hastings Park to the Corporation of the City of Vancouver, and no lease would in any of its terms be valid or of any effect which derogated from or attempted to affect the public right. The public right is a paramount right. These words appear therein:

"Upon trust to the express use, intent and purpose that the said hereditaments and premises hereby granted shall be maintained and preserved by the said Corporation and their successors for the use, recreation and enjoyment of the public."

I, however, with great respect to the learned trial judge, cannot agree with him in his holding that the plaintiff was guilty of contributory negligence in standing where he did during the progress of the race. The evidence weighed carefully, in my opinion, does not support the finding of fact of the learned trial judge, which is in the following terms:

"The plaintiff saw the exact condition in which the gate was. On his own evidence he saw no one in charge of the gate and yet with his knowledge of horses, it seems to me that when he stood where he did, he took his chance of being injured."

In arriving at a conclusion upon the evidence, care must be taken to segregate the evidence. Some of it is evidence after the event, and it is said it is easy to be wise after the event.

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What has to be determined is, what were the facts before the event, *i.e.*, the striking of the gate by the race-horse bolting from the track, thus causing the gate, insecurely fastened as it was, to strike the plaintiff and result in painful and serious injuries to him. In a careful analysis of the evidence, it, in my opinion, does not warrant the holding that there was contributory negligence. The plaintiff was not aware of the insufficiency of the fastening of the double gates (this he could not see), and it is to be noted that right at that point there were some 30 or 40 persons round about the entrance to the track. The plaintiff in his evidence said:

"I was looking across the track and all at once I could see the horse within about four feet of me, galloping forward. I then made my turn and I just got sideways when I was struck on my right side, struck on my left side and thrown on my right . . . . I heard the gate rattle right against me."

"You say he [the horse] hit the middle of the—— The middle of the north gate put it that way.

"What you heard was the horse crashing against the gate? The gate then struck me.

"You didn't see it but you think it did? Well I was turning away from the gate and something hit me."

The plaintiff was, by the force with which he was struck, thrown about five feet from the gate. The most that the plaintiff had noticed was that the tops of the gates shewed that they were ajar some seven or eight inches, but that would not necessarily convey to his mind that the gates were insecurely closed, as it is a fair assumption to conclude that if the chain and padlock had been used to hold the two gates together, the accident would never have happened, and upon this point it is the uncontradicted evidence that the chain and padlock supplied by the defendant was, through the negligence of its servant, not being used, but a rope instead.

In further evidence of the plaintiff, he said:

"You allege, doctor, that this gate was not closed, that it was left open, have you any knowledge of that? I will not say it was left open, for I have no knowledge of it. I didn't think it was very fast shut.

"Mr. Thorpe, who has been examined, I suppose you have heard his examination? Yes.

"He says it was closed with a rope. It could have been, but I did not see any rope myself.

"You say that this horse bolted and ran away? I didn't see the horse.

"You don't know how it happened? The only thing I saw of the horse

was, I just saw a flash of the horse at the left hand side of the gate, and the next I knew I was lifted and thrown about five or six feet."

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Now, as to the point of contributory negligence, it is well to remember that it may be overstated. Sir Frederick Pollock, in the Law of Torts, 12th Ed., has said at p. 464:

"It does not mean that a man who does not take ordinary care for his own safety is to be in a manner punished for his carelessness by disability to sue any one else whose carelessness was concerned in producing the damage. Any such view is contradicted by the common practice of our Courts founded on constant experience of the way in which this question presents itself in real life. 'The received and usual way of directing a jury . . . . is to say that if the plaintiff could, by the exercise of such care and skill as he was bound to exercise, have avoided the consequence of the defendant's negligence, he cannot recover' ([*Dublin, Wicklow, and Wexford Railway Co.* v. *Slattery* (1878)], 3 App. Cas. at p. 1207)."

The plaintiff may be guilty of negligence and it may have contributed to the accident, still, if the defendant could have by the exercise of ordinary care and diligence have avoided the mischief which happened, the plaintiff's negligence is no excuse (Lord Penzance, *Radley* v. *London and North Western Railway Co.* (1876), 1 App. Cas. 754 at p. 759; also see *The Bernina* (1886), 12 P.D. 36; 56 L.J., Adm. 38; affirmed (1888), 13 App. Cas. 1; 57 L.J., Adm. 65 and *Little* v. *Hackett* (1886), 116 U.S. 366, 371). The fact was that a large number of persons were looking on at the races at this point. This was well known to the defendant and they had the right to be where they were. What was the responsibility in the circumstances that rested upon the defendant? The question was very tritely put by Lord Sumner in the Judicial Committee in *British Columbia Electric Railway Company, Limited* v. *Loach* (1916), 1 A.C. 719, 727:

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"Is not one of desert or the lack of it, but of the cause legally responsible for the injury."

Can there by any doubt here? Unquestionably the gates were insecurely maintained (negligently maintained) but not to the manifest knowledge of the plaintiff, no more than to the others congregated there. The real insecurity was the negligence of the defendant in not properly securing the gates. The fact that they were a few inches apart would not demonstrate the insecurity, the insecurity was the absence of the chain and padlock provided but not used.

In *Tuff* v. *Warman* (1857), 2 C.B. (N.S.) 740; 109 R.R.

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865, Willes, J., left the question of the want of a look-out to a jury in this way (and was supported in appeal): whether it "directly contributed to the accident." In the appeal (1858), 5 C.B. (N.S.) 573 at p. 585; 27 L.J., C.P. 322; 116 R.R. 779, the question was stated in rather more elaborate language:

> "Whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary and common care and caution, that, but for such negligence or want of ordinary care and caution on his part, the misfortune would not have happened."

I cannot persuade myself that the plaintiff in the present case was in any way guilty of any class of negligence which disentitles him to succeed. The case of *Radley* v. *London and North Western Railway Co.* (1876), 1 App. Cas. 754; 46 L.J., Ex. 573, is instructive in considering the present case. There the House of Lords, after very considerable variance of opinion in the Courts below, laid down that it is not every negligence on the part of the plaintiff which contributes to any extent to the harmful happening will disentitle the plaintiff recovering, but it must be such negligence that the defendant could not, by the exercise of ordinary care, have avoided the result. In the *Loach* case, there was negligence in the plaintiff but had the brakes been in a proper state of repair the accident would not have happened. In the present case, if the gates had been properly secured, and secured as the defendant intended they should be, but not so secured because of default of the servant, for which it is answerable, the accident, it may be safely said, would not have happened, and because of this default of the defendant liability may rightly be imposed upon him. (Also see *Ellerman Lines, Ld.* v. *H. & G. Grayson, Ld.* (1919), 2 K.B. 514; 88 L.J., K.B. 904, affirmed in the House of Lords (1920), A.C. 466; 89 L.J., K.B. 924). Here the onus was on the defendant to establish that the plaintiff was negligent, and further, that the plaintiff by the exercise of ordinary care could have avoided the defendant's negligence (*Bridge* v. *Grand Junction Railway Co.* (1838), 3 M. & W. 248; 49 R.R. 590). What was it that the plaintiff could be said to have been required to do in the present case? Was it to stand ten or 20 feet back from the gates, because the gates

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might give way? To do even that, might not in a conceivable case have saved him, the horse might come through and strike him down. Of course, it could be easily said if he had not been there at all no accident would have taken place. The defendant is liable for the defective condition of the gates, the public were entitled to assume that they were good and efficient, and the plaintiff is entitled to succeed unless it can be said that the defendant's negligence was in no way a proximate cause of the accident; it need not be the whole proximate cause of the damage (Pollock on Torts, p. 472). Clearly the defendant's negligence was a proximate cause, and that being so, the plaintiff is entitled to succeed. This phase of the law is illuminatively dealt with by Lord Birkenhead in *Admiralty Commissioners* v. *S.S. Volute* (1922), 1 A.C. 129, 136; 91 L.J., P. 38 (and see Lord Finlay's and Lord Shaw of Dunfermline's express approval at p. 145). In *Royal Exchange Assurance* v. *Kingsley Navigation Co.* (1923), A.C. 235 at p. 244, Lord Parmoor said:

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> "The train of causation . . . . is unbroken, and as pointed out by Lord Shaw in *Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society* (1918), A.C. 350, 369, the proximate cause of a loss is not necessarily the cause nearest in time."

It cannot be said that the plaintiff was "in the main the cause of the injury" (Pollock on Torts, p. 473; L.Q.R. Vol. 5, p. 87, Mr. W. Wills, and *Murphy* v. *Deane* [(1869)], 101 Mass. 455). If this were a case of the plaintiff needlessly exposing himself and undertaking an obvious risk, then undoubtedly, the plaintiff should not succeed, but can it be said that the plaintiff did any such thing? It is only necessary to go carefully through the evidence and any such contention is immediately displaced—it is a wholly fallacious submission. There was a duty upon the defendant to exercise a high degree of care in reference to the gates, *i.e.*, to see to their stability and to exercise careful supervision over them. The facts shew that there was negligence in this regard, the gates were unstable and not effectively locked or closed, instead of using, as was intended, a chain and padlock, a loop of rope was used merely throwing same over the tops of the uprights of the double gates as they met in the centre. The

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gates should have been closed with the chain and padlocked, and kept in alignment with the fence of the enclosure. Anything which would indicate ease of breaking through from the track was an invitation to the horses upon the track to bolt, and the point at which they would bolt would be towards these gates, the point they entered at, and if the gates were not properly closed all the greater invitation to bolt. The evidence demonstrates that there was great laxity in the maintenance of these gates and it is not at all surprising that the accident which occurred did take place, and it would seem to comport with common sense that there should be liability for the harm complained of, unless it could be said that the plaintiff recklessly exposed himself to an obvious risk. The facts though, establish nothing of the kind, the plaintiff was rightfully where he was, in the midst of 25 or 30 others at that particular point, all on-lookers, and it was well known to the defendant that the public were accustomed to congregate there, as they had the right to do, and view the races in so far as they could be viewed at that point. The defendant as the lessee of the race-track was under an obligation or duty to the public rightfully upon the ground outside the enclosure to carry on the race-meet without danger to the public, *i.e.*, to so operate as to not create or maintain a state of things dangerous to the public, of whom the plaintiff was one. The defendant was in no way entitled to bring about a situation of danger so as to debar the public from safely going upon ground open to the public. The public had the absolute right to be where they were, and it follows the plaintiff was rightly there.

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The defendant unquestionably was under the legal obligation to maintain a state of things which would afford safety for the purposes to which the area in occupation was used—that would be to the full extent that reasonable care in construction and maintenance would ensure—and not endanger those lawfully upon the premises. The facts shew that the defendant created a state of things dangerous to the public, and the plaintiff, one of the public, suffered serious personal injuries by reason of the negligence of the defendant, and I cannot see that there was any contributory negligence shewn or anything in the nature

of negligence that could be imputed to the plaintiff, certainly the case is not one where the plaintiff exposed himself to any obvious risk. Being of this opinion, I would, as I said at the outset, allow the appeal, and as to the cross-appeal, would dismiss the same and judgment should be entered for the plaintiff for the sum at which the damages were assessed by the learned trial judge if it should be held that the defendant was liable, *viz.*, $2,500.

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EBERTS, J.A. would dismiss the appeal.

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitors for appellant: *MacInnes & Arnold.*
Solicitors for respondent: *Ellis & Brown.*

[IN BANKRUPTCY].

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IN RE READY & CASS.

Conveyance of land—Husband to wife—Preferential assignment—Suspicious circumstances—Evidence—Bona fides.

When a conveyance from a husband to his wife is questioned as being a fraud on his creditors and suspicion touching the reality or *bona fides* of the transaction arises from the circumstances in which the transaction took place, then the fact of relationship itself is sufficient to put the burden of explanation upon the parties interested and their testimony must be scrutinized with care and suspicion.

Koop v. *Smith* (1915), 51 S.C.R. 554 followed.

MOTION by the trustee in bankruptcy for the creditors of the partnership firm of Ready & Cass for an order declaring the conveyance made in September, 1923, by Stanley S. Ready to his wife Irene M. L. Ready of a property known as 2174 Cadboro Bay Road, Oak Bay, B.C., being lot 8 of section 28, Victoria District, Map 999, fraudulent and void as against said trustee in bankruptcy and for an order for delivery up by

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the said Irene M. L. Ready to said trustee in bankruptcy of the said premises and for an order for payment by the said Stanley S. Ready and his wife to said trustee of the sum of $340 being the proceeds of the sale of certain furniture belonging to said partnership. The further necessary facts are set out in the reasons for judgment. Heard by MURPHY, J. at Victoria on the 6th and 7th of February, 1924.

Sinnott, for plaintiff.
Fowkes, for defendant.

14th February, 1924.

MURPHY, J.: If the facts herein were as presented to the solicitor, who advised the transfer and drew the documents to effect same, I would agree that the transaction could not be impeached by the trustee in bankruptcy. But in my opinion, when all the facts are considered, the trustee is entitled to succeed.

Ready is an experienced business man, and is not unfamiliar with liquidation proceedings, the company in which he was interested in England having been voluntarily wound up, paying about 12 shillings on the pound. His wife is also not without some knowledge of business, for she was one of the active representatives of the firm of Ready & Cass, and on one occasion at least (for I accept the evidence of Finlayson on this point) inspected goods with a view to buying for said firm. In *Koop* v. *Smith* (1915), 51 S.C.R. 554, it is stated to be a maxim of prudence based upon experience, that in such cases as the one at Bar a tribunal of fact may properly act upon that when suspicion touching the reality or the *bona fides* of a transaction between near relatives arises from the circumstances in which the transaction took place, then the fact of relationship itself is sufficient to put the burden of explanation upon the parties interested and that in such a case the testimony of the parties must be scrutinized with care and suspicion. Now, what are the facts here? Not long after the voluntary liquidation of the company in England, in which Ready was interested, his wife in the space of two months had placed to her credit in a London bank over $10,000 and of this all but £150 went to her credit between August 12th and September 5th, 1921.

Judgment

Some 18 years ago, previous to her marriage, she received something over £300 from her mother's estate, and this, with savings from a £50 a year dress allowance, is given as the source of this money. It was first invested in her husband's firm, then in a millinery business conducted by her two sisters. Admittedly no accounts were made up between the wife and the sisters. Further, it is stated, some of this money may have come from a Bournemouth bank account, but if it did, no evidence as to its original source was given. Almost immediately after these credits were made, husband and wife removed to Alberta, where the wife opened an account with the Merchants Bank with a credit of $8,868.47. All but $550.70 of this money was drawn out between October 8th, 1921, and February 15th, 1922. Amongst other withdrawals was the sum of $4,000 to purchase a farm. The deed was made out to the husband. No explanation of why this was done is given, although it is stated in an affidavit filed during the proceedings that this was a mistake.

It is contended herein that the husband is a trustee for the wife in reference to this property. Furniture was also bought and paid for out of the wife's bank account.

In August, 1922, the husband came to Victoria and traded the Alberta farm for the premises in question herein. Again the documents were drawn in the husband's name. No explanation as to why this was done is given, except a suggestion that the lawyer merely acted on the Alberta farm documents. But if these were a mistake, it is strange the husband did not see that same was corrected in the papers regarding the Victoria property.

Judgment

The husband continued the mercantile business in Victoria which he had started in Alberta, taking in his brother-in-law as a partner. His wife and the partner's wife were active in this business as field representatives. The wife appeared in the Victoria telephone directory as concerned in drygoods business, the address given as hers being that of the firm of Ready & Cass. This firm is insolvent and creditors will meet with heavy loss. I accept the evidence of Walker that the husband told him the Victoria property was his. I also accept the evidence of Finlayson that the wife informed him the Victoria

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property was an asset to which creditors of the firm of Ready & Cass could look. Thompson's statement corroborates that of Walker, that Ready, in order to obtain credit, was representing the Victoria property as his. The letter (Exhibit 21) might occasion pause if this evidence stood alone, but it is not inconsistent with Thompson's evidence, and he was given no opportunity to explain it, as it was not found until after he had left the city. But as I say, I accept Walker's evidence. This evidence of Thompson and Walker cannot, of course, be held as directed against the wife, but it does shew what Ready thought the position was, unless, indeed, he was committing a crime, which is not to be presumed. The evidence of Finlayson, however, has, if believed, as I do believe it, a direct bearing on the wife's position. His memory was to some extent, but not greatly, at fault, in reference to the card presented to him by the wife, which card he was not confronted with when in the box—again, because it was not in counsel's possession at that time.

Judgment

My view of the matter is that, assuming the money really belonged to the wife (which in view of *Koop* v. *Smith, supra,* I do not consider proven), she purchased the Alberta property and placed it in her husband's name, not as trustee for her but that he might have a means of making a livelihood for the family. Her own evidence in reference to the Alberta transfer, I think, bears this out. I do not attach much importance to the interview with Lowe. It seems to have been a rather casual matter so far as he was concerned, which it certainly would not have been had a full statement of facts been given him.

The Victoria furniture is in the same position as the Victoria realty, and in my opinion the trustee is entitled to recover it or the proceeds thereof.

The case of *In re Trenwith* (1922), 3 W.W.R. 1205, decides the husband cannot now lay claim to this furniture under the provisions of the Homestead Act.

Costs to the trustee.

Judgment for the trustee.

REX v. WESSELL.

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Feb. 22.

REX v. WESSELL

Criminal law—Sale of liquor—Conviction—A stipendiary magistrate also a barrister appears for Crown on prosecution—Prohibition under section 399 of Municipal Act—Met by section 91(3) of Government Liquor Act—B.C. Stats. 1914, Cap. 52, Sec. 399; 1921, Cap. 30, Secs. 26 and 91(3).

Accused was convicted by a stipendiary magistrate at Prince George on a charge of selling liquor contrary to section 26 of the Government Liquor Act. On the hearing of the charge another stipendiary magistrate, who was also a barrister, appeared as counsel for the prosecution on behalf of the Crown. On an application for a writ of *habeas corpus* it was submitted on behalf of accused that a stipendiary magistrate is prohibited under section 399 of the Municipal Act from appearing on a prosecution of this nature, and the conviction should be quashed.

Held, that the objection raised by reason of section 399 of the Municipal Act is met by section 91(3) of the Government Liquor Act and the appeal should be dismissed.

HABEAS CORPUS proceedings on a conviction by Mr. G. Milburn, a stipendiary magistrate at Prince George, on a charge of selling liquor contrary to section 26 of the Government Liquor Act, B.C. Stats. 1921, for which he was sentenced to serve six months at Oakalla gaol with hard labour. Two stipendiary magistrates live in the county of Cariboo in which Prince George is situate, Mr. G. Milburn and Mr. J. M. McLean, the latter being a barrister and solicitor. On the hearing of the charge Mr. Milburn sat as magistrate and Mr. McLean appeared as counsel for the prosecution on behalf of the Crown. Argued before MORRISON, J. at Vancouver on the 20th of February, 1924.

Statement

Sloan, for accused: A stipendiary magistrate is prohibited under section 399 of the Municipal Act from appearing in such a cause; further, the conviction was contrary to public policy; the Court was improperly and irregularly constituted; and this Court should infer that the prosecuting magistrate was biased in favour of his brother magistrate. The conviction is contrary to public policy as the action of the Crown must be free

Argument

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from taint. The prosecution is not free from taint as the Crown prosecutor is prohibited by law from prosecuting and was doing an unlawful act. That the Court was improperly constituted see *Rex* v. *Lancashire Justices* (1906), 75 L.J., K.B. 198. Lastly, the magistrate was in such a position that he might be suspected of being biased: see *Rex* v. *Woodroof* (1912), 20 Can. Cr. Cas. 17; 6 D.L.R. 300.

Argument

K. G. Macdonald, for the Crown: Section 399 imposes a penalty on the magistrate if acting improperly but it does not affect the validity of the proceedings: see *Rex* v. *Durocher* (1913), 21 Can. Cr. Cas. 61; *Rex* v. *Bank of Montreal* (1919), 49 D.L.R. 288. The prosecuting counsel although a stipendiary magistrate is a practising barrister and appears as such. The case of *Rex* v. *Lancashire Justices* (1906), 75 L.J., K.B. 198 does not apply as in that case the justices appealed from although not taking part, were sitting on the Bench when the appeal was heard. In this case there is substantially no ground upon which bias can be inferred: see *Ex parte Peck* (1908), 15 Can. Cr. Cas. 133. If the Court is found to have been improperly constituted by virtue of section 399 of the Municipal Act the motion must fail under the provisions of section 91(3) of the Government Liquor Act, as it renders said section 399 inoperative in respect of any offence arising under the Liquor Act. On the construction of this section see *Rex* v. *Bank of Montreal, supra,* and *Rex* v. *Hall* (1822), 1 B. & C. 123.

Sloan, in reply: Section 91(3) of the Government Liquor Act does not apply as we are not attempting to shew that the magistrate had no jurisdiction or that he exceeded his powers.

22nd February, 1924.

Judgment

MORRISON, J.: I think Mr. *Sloan's* submission is met by subsection (3) of section 91 of the Government Liquor Act.

The application is refused.

Appeal dismissed.

IN RE MUNICIPAL ELECTIONS ACT AND TOMSETT *ET AL.*

MORRISON, J. (At Chambers)

1924

Feb. 1.

IN RE MUNICIPAL ELECTIONS ACT AND TOMSETT

Elections—Municipal—Councillor for municipality — Tie vote — Returning officer drew lots to decide on casting vote—Validity—R.S.B.C. 1911, Cap. 71, Sec. 82.

On an election for a councillor of a municipality the votes cast shewed a tie between the two candidates. The returning officer then prepared a number of slips of paper putting the name of one candidate on one of them and the name of the other on another. The remainder of the slips he left blank. All the slips were then put in a hat and mixed up. The returning officer then asked a voter to draw a slip at a time from the hat stating he would give the casting vote to the candidate whose name first appeared. A candidate's name appeared on the third slip drawn and he received the casting vote. On petition of the unsuccessful candidate the election was declared void and a new election ordered.

PETITION on behalf of F. A. Tomsett, a candidate for councillor in Ward 5, Municipality of Richmond, for a declaration to avoid the election of J. W. Lockhart on the 19th of January, 1924, upon the ground that the returning officer improperly drew lots to determine who should be elected, and that the certified voters' list was changed after final revision by the use of a supplemental list which was compiled without lawful authority. At the election held on the 19th of January, 1924, the votes cast shewed a tie between the petitioner, Tomsett, and the respondent, Lockhart, each having received one hundred and fourteen votes. The returning officer, Samuel Shepherd, clerk for the Municipality of Richmond, declared the vote a tie as between Tomsett and Lockhart. Instead of forthwith casting a ballot in favour of one of the candidates he prepared several slips of paper, on two of which were the names of the two candidates, and placed them in a hat. He then asked one of the voters present to draw from the hat until a name was drawn, adding that the first name drawn he would declare elected. A voter who was present drew three slips, the first two being blanks and on the third was the name of the respondent Lockhart, whereupon the returning officer declared Lockhart elected.

Statement

MORRISON, J. (At Chambers)

1924

Feb. 1.

IN RE MUNICIPAL ELECTIONS ACT AND TOMSETT

Heard by MORRISON, J. at Chambers in Vancouver on the 1st of February, 1924.

Maitland, for petitioner.

Killam, for respondent.

MORRISON, J.: I do not think it necessary to reserve my decision. I would not say the election was conducted along the principle laid down in the Act. After all the public have an interest in the matter, and they must have the advantage of the deliberate voting of the individual electors, and when it is a tie, then it is incumbent upon the responsible official to declare himself. Apparently in this case it was not done, although the returning officer was confronted with a very trying situation, but that is one of the incidents of the office; and unless you have some very clear and unmistakeable authority, I do not see where there is room for any kind of doubt or hesitation about it. The public is interested in the matter, because these men are elected to look after the affairs of the particular municipality, for a year, and they have a right to expect that the election shall be carried on strictly in compliance with their own law, the law which their representatives have put on the statute. It is very simple. The election is declared void and a new election ordered.

Judgment

Petition granted.

THE ROYAL BANK OF CANADA v. GUSTAFSON *ET AL.*

MCDONALD, J.

1924

Jan. 21.

ROYAL BANK OF CANADA v. GUSTAFSON

Timber—Lawfully cut on lands—Lands become Crown lands before removal of timber—Right of removal—B.C. Stats. 1912, Cap. 17, Sec. 7. Contract—Assignment of moneys accruing due under—Assignor's breach of contract—Liability of assignee.

Timber was lawfully cut on lands which since the cutting, but before removal, became Crown lands. Section 7 of the Forest Act provides that it is unlawful for any person without a lease or licence "to cut, fell, or carry away any trees or timber upon or from any of the Crown lands of the Province."

Held, that said section prohibited the removal of the timber.

G. Co. entered into an agreement with the defendants to purchase from them at fixed prices, and from them only, a sufficient quantity of logs and shingle-bolts to keep its mill in continuous operation for a certain period and that its operation would be continuous. Under the same agreement G. Co. sold its logging plant and equipment to the defendants and further agreed to sell the defendants certain shingle-bolts at $2 per cord. Subsequently G. Co. assigned to the plaintiff all moneys accruing due to it in respect of the said sale of logging-plant and equipment and shingle-bolts.

Held, that the defendants could avail themselves of a right of set-off and counterclaim for damages for breach of warranty of title in respect of the shingle-bolts but they could not as against the plaintiff claim damages for failure of G. Co. to take delivery of the material which it had agreed to purchase from the defendants. There were two branches of the agreement and the claim for damages for failure to take delivery, being a claim which arose subsequent to the assignment and notice of assignment, and not being so interwoven with the plaintiff's claim as to be inseparable from it, could not avail against the plaintiff as assignee of G. Co.

ACTION to recover the balance due in respect of the purchase price of a certain plant and equipment and certain shingle-bolts purchased by the defendants from a company which had assigned to the plaintiff the moneys due to it in respect of the said sale; and claim by the defendants of a right of set-off and counterclaim for damages in respect of breaches of contract by the said assignor company. The facts are set out fully in the reasons for judgment. Tried by MCDONALD, J. at Vancouver on the 16th of January, 1924.

Statement

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Jan. 21.

Alfred Bull, for plaintiff.

Cowan, K.C., and *A. J. Cowan,* for defendants.

21st January, 1924.

ROYAL BANK OF CANADA *v.* GUSTAFSON

MCDONALD, J.: Prior to the 30th of August, 1922, the Gilroy Shingle Company, Limited, was operating a sawmill and shingle mill at or near Port Alberni, Province of British Columbia. It and its predecessors in title had a right to cut and had cut on certain lands in the vicinity of Grappler Creek 719 cords of shingle-bolts, of which 175 cords were situate upon the north-east quarter of section 21. The Company was also possessed of plant and equipment used in connection with the cutting of timber. On the 30th of August, 1922, the Company entered into an agreement with the defendants, which agreement falls under two separate and distinct heads. In the first place the Company agreed to purchase from the defendants, at fixed prices, a sufficient quantity of logs and shingle-bolts to keep this mill at Port Alberni in continuous operation day and night for a period terminating the 2nd of July, 1923, and thereafter unless terminated by one month's notice, and the Company agreed to purchase from the defendants only and to keep its mill in continuous operation as stated. In the second place, the Company sold its logging-plant and equipment to the defendants for $3,087.28 and agreed further for the sale to the defendants at $2 per cord of the 719 cords of shingle-bolts above mentioned.

Judgment

On the 12th of October, 1922, the Company assigned in writing to the plaintiff Bank all moneys accruing due to it in respect of the said sale of plant and equipment and shingle-bolts, and written notice of such assignment was, on the 13th of October, 1922, mailed to the defendants and received by them in the ordinary course of post. On the 8th of November, 1922, the Company closed down its mill and afterwards, in February, 1923, became bankrupt and one Cruickshanks was appointed its trustee in bankruptcy. The defendants took delivery of the said shingle-bolts save and except the 175 cords situate upon the north-east quarter of section 21, but were forbidden by an official of the Provincial forestry branch to carry away the shingle-bolts on this quarter section. These shingle-bolts had been cut prior to March, 1920.

In October, 1920, the said north-east quarter of section 21 was offered by the Provincial Government for sale for taxes, and the taxes not having been paid this quarter-section became the property of the Crown in October, 1921.

The plaintiff now sues to recover from the defendants the sum of $1,780.52 being the admitted balance due from the defendants in respect of the purchase price of the plant and equipment and shingle-bolts mentioned, and the defendants claim a right of set-off and counterclaim for damages to an amount sufficient to counterbalance the plaintiff's claim, with the exception of $700, which defendants have paid into Court.

Dealing first with the questions arising in respect of the 175 cords of shingle-bolts, it is clear that such bolts were never received by the defendants and, further, that the official above mentioned forbade the defendants from removing them. The plaintiff admits that if there is a right of set-off and counterclaim for damages in respect of these particular bolts such right of set-off and counterclaim is available against the plaintiff as assignee of the Gilroy Company, but says that even as against the Gilroy Company such set-off and counterclaim cannot prevail. The plaintiff contends that the sale of these shingle-bolts then lying cut upon the lands for a named price was a complete bargain and sale, and that the property in the shingle-bolts then passed to the purchasers as and where the shingle-bolts then lay. The defendants contend that, under section 7 of the Forest Act, B.C. Stats. 1912, Cap. 17, which reads as follows,

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"It shall be unlawful for any person, without a lease or a licence in that behalf, to be granted as hereinafter mentioned, to cut, fell, or carry away any trees or timber upon or from any of the Crown lands of the Province,"

there was a statutory prohibition against the removal of these 175 cords of shingle-bolts from the north-east quarter of section 21 by reason of the fact that, in October, 1921, these lands became Crown lands and that, therefore, the Gilroy Company is liable as for an implied breach of warranty of title. With considerable hesitation, I have come to the conclusion that the defendants' contention ought to prevail. The section in question is not ambiguous nor difficult to understand, and it does constitute a direct prohibition against the removal of these shingle-bolts from the lands in question. It may be that the

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intention of the section was merely to prevent the cutting, felling or carrying away of timber from Crown lands generally and not to prevent the carrying away of timber lawfully cut upon Crown lands and lying upon such lands when the same reverted to the Crown, but I do not see how such a limited construction can be placed upon the words used. Admittedly upon the date of the agreement the lands were Crown lands, and whatever the purpose of the section may have been, it has prohibited the carrying away of timber from Crown lands. The defendants are, therefore, entitled to set off in this regard the sum of $378, being the price of 175 cords at $2 per cord and $28 interest charged by the plaintiff in its claim. The defendants are further entitled to succeed on their counterclaim in this regard in the sum of $356 spent by them in building a road with a view to the removal of these shingle-bolts, and a further sum of $175 representing the additional price of $1 per cord which they were obliged to pay to obtain shingle-bolts to replace those which they did not receive. The total amount represented by this set-off and counterclaim is $909.

On the second branch of the case, the defendants counterclaim for damages for the failure of the Gilroy Company to take delivery of logs and shingle-bolts as provided for by the agreement. The defendants in this respect did not seek to prove their whole claim for damages but expressed themselves as being content with proving a sufficient amount of damages to counterbalance the remainder of the plaintiff's claim, *viz.*, $171.52. I am satisfied, on the evidence, that the defendants have proved at least such amount of damages on this head, but I am of opinion that this claim for damages is not available to the defendants as against the plaintiff in this action. Both parties rely upon the decision of the Judicial Committee in *Government of Newfoundland* v. *Newfoundland Railway Co.* (1888), 13 App. Cas. 199. In my opinion, the agreement, as stated above, falls into two separate and distinct branches and this claim for damages for failure to take delivery of logs and shingle-bolts, being a claim which arose subsequent to the assignment and notice of assignment and not being so interwoven with the plaintiff's claim as to be inseparable from it, cannot

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prevail against the plaintiff as assignee of the Gilroy Company. There will accordingly be judgment for the plaintiff for $171.52. The plaintiff will have the general costs of the action and defendants will have the right to set off the costs incurred in respect of the issue upon which they have succeeded.

Judgment for plaintiff.

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Maintenance and champerty — Action for damages — Agreement with solicitor that he retain one-half amount recovered—Action to set aside —Legal Professions Act, R.S.B.C. 1911, Cap. 136, Sec. 97—Ultra vires of Province.

The plaintiff, desiring to bring an action for damages for injuries sustained in a collision while a passenger on a street-car, consulted a solicitor and signed a document as follows: "In consideration of your prosecuting my claim against B.C. Electric Railway Co. without any expense to me, I authorize you to effect a settlement of which you may retain one half the amount recovered." On the evidence it was found that the plaintiff was not in a normal condition of health up to the trial and the interviews between plaintiff and defendant up to the signing of the agreement were of such a conflicting and unpleasant nature that it was the solicitor's duty to advise her to seek independent advice as to the course to be followed and she not having had such advice the agreement should be set aside.

Held, further, that section 97 of the Legal Professions Act, permitting a solicitor to contract with his client for a share of the proceeds of litigation as his fee, is an invasion of the field of criminal law occupied exclusively by the Federal Parliament and is *ultra vires* of the Legislature. The agreement is therefore void as being champertous.

Held, further, that even under the Legal Professions Act such an agreement must not only be fair as to the manner in which it was obtained and in the sense that it must be understood by the client, but also its terms must be reasonable having regard to the kind of work the solicitor has to do under it, and the work done in this case was not worth the sum claimed by the defendant under the agreement.

ACTION to set aside a written agreement whereby the plaintiff, in consideration of the defendant prosecuting her claim for

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damages against the B.C. Electric Railway Company without expense to her, authorized the defendant to effect a settlement of which he was to retain one-half of the amount recovered. The claim was made on two grounds, first, that she had signed the agreement without having first received independent advice, and secondly, that owing to the injuries she had received she was in an unbalanced mental condition when she signed the agreement. On preliminary negotiations the B.C. Electric Railway Company offered $150 in settlement of the plaintiff's claim. This was refused, and on action being brought the plaintiff recovered $3,200 and costs. The facts are set out fully in the reasons for judgment. Tried by MORRISON, J. at Vancouver on the 14th of November, 1923.

Statement

Geo. A. Grant, for plaintiff.
D. Donaghy, for defendant.

17th January, 1924.

MORRISON, J.: The plaintiff, in July, 1922, suffered injuries to her person whilst a passenger on one of the B.C. Electric Railway cars. Accompanying her was another young woman who, at the time, was in the service of the defendant's family in some domestic capacity, the plaintiff being also at the time in the service of a near neighbour of the defendant. They were both injured. Shortly after the plaintiff and the defendant's servant were interviewed by the defendant; in consequence of which negotiations were begun with the Company looking to securing compensation for their injuries. The Company offered $150 in full settlement of the claim, which was promptly refused by the defendant, on behalf of the plaintiff. The defendant then advised her that there was a good chance of securing considerable more, and, on the understanding that a trial would be obviated, she consented to the negotiations continuing and thereupon signed the document in question, which reads as follows:

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"July 5, 1922.

"To Messrs. Mackintosh & Crompton.

"In consideration of your prosecuting our claim against B.C. Electric Railway Co. without any expense to us, we authorize you to effect a settlement of which you may retain one-half the amount recovered.

"HELEN TAYLOR
"ALICE M. MAYOH."

The claim was not amicably adjusted, and the defendant began suit, which resulted in a verdict for both women for $3,200 each. The defendant claimed half of these amounts. I find that, at the time of signing the agreement, and up to the trial, the plaintiff was not in a normal condition of health. She was unable to retain her position and I accept the evidence of Mrs. Crosby, with whom she was employed, as to this. However, she continued her relation of client and solicitor with the defendant and even entered the service of the defendant's family up until nearly the trial. She now states that she did not understand the purport of the writing signed by her and that she was guided by the defendant's advice; that she had no independent advice regarding it nor had she received a copy of the agreement, and that in the course of several later interviews the relation between them had become rather unpleasant. I am satisfied that they had arrived at a juncture when at least ordinary prudence should have led the defendant either to have discontinued acting for her or to have advised her to seek independent advice as to the course to be followed by her in her dealings with the Company. That juncture arrived at the very earliest after the Company made their offer of $150 and it became necessary, in the defendant's opinion, for him to ask her to sign the agreement. The plaintiff and defendant were not then dealing on even footing. The course of their relationship brought the defendant within that rule of equity enunciated by Lord Esher, M.R. in the case of *Liles* v. *Terry* (1895), 2 Q.B. 679 at p. 683, whereby there is a legal presumption of undue influence by the solicitor; a rule depending not upon the circumstances but upon the relation of the parties. Compendiously put, "the policy of the law was against the payment to a solicitor of any other than his legal remuneration." The presumed influence of the solicitor upon the client is the basis of the rule. *Huguenin* v. *Baseley* (1807), 14 Ves. 273 at p. 296.

Judgment

"It is almost impossible in the course of the connection of . . . . attorney and client . . . . that a transaction shall stand purporting to be a bounty for the execution of antecedent duty":

Lord Eldon in *Hatch* v. *Hatch* (1804), 9 Ves. 292 at pp. 296-7.

"I take it to be a well-established principle of this Court, that persons

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standing in a confidential relation towards others cannot entitle themselves to hold benefits which those others may have conferred upon them, unless they can shew to the satisfaction of the Court that the persons by whom the benefits have been conferred had competent and independent advice in conferring them":

Turner, L.J. in *Rhodes* v. *Bate* (1866), 1 Chy. App. 252 at p. 257.

"The principle . . . . is this that whenever you have these fiduciary relations (and in the present case we have to deal with the fiduciary relation of solicitor and client), the moment the relation is established, there arises a presumption of influence, which presumption will continue as long as the relation, such as that of solicitor and client, continues, or at all events until it can be clearly inferred that the influence had come to an end":

Vaughan Williams, L.J. in *Wright* v. *Carter* (1903), 1 Ch. 27 at p. 50.

So much for that branch of the case. The plaintiff also submits that the agreement is void as being champertous.

"Champerty is maintenance in which the motive of the maintainor is an agreement that if the proceeding in which the maintenance takes place succeeds, the subject-matter of the suit shall be divided between the plaintiff and the maintainor":

Stephen's Digest of the Criminal Law, 6th Ed., Art. 156, pp. 112-3; Crankshaw's Criminal Code, 5th Ed., 190.

"Champerty is in short that species of maintenance which is called champerty: *viz.*, the unlawful maintenance of a suit in consideration of a bargain for part of the thing or some profit out of it":

Stevens v. *Bagwell* (1808), 15 Ves. 139 at p. 156; *Briggs* v. *Fleutot* (1904), 10 B.C. 309 at p. 321.

Judgment

Champerty is a criminal offence by the Common Law of England. It, therefore, became a criminal offence in British Columbia upon the introduction of the Common Law into this Province, so that a champertous agreement will not be enforced here by the Courts.

It is contended, on behalf of the defendant, that "this law is now obsolete." It may be true that prosecutions for this offence are now practically unknown, but, as Street, J. said in *Hopkins* v. *Smith* (1901), 1 O.L.R. 659 at p. 661:

"I see no reason for holding that it is no longer a punishable offence . . . . in this Province."

However, in 1901, the then Attorney-General introduced an amendment to the Legal Professions Act of British Columbia, which was later amended in 1911, Cap. 136, Sec. 97. The section now reads:

"97. Notwithstanding any law or usage to the contrary, any solicitor or barrister in the Province may contract, either under seal or otherwise, with any person as to the remuneration to be paid him for services rendered or to be rendered to such person in lieu of or in addition to the costs which are allowed to said solicitor or barrister, and the contract entered into may provide that such solicitor or barrister is to receive a portion of the proceeds of the subject-matter of the action or suit in which any solicitor or barrister is or is to be employed, or a portion of the moneys or property as to which such solicitor or barrister may be retained, whether any action or suit is brought for the same or a defence entered or not, and such remuneration may also be in the way of commission or percentage on the amount recovered or defended against, or on the value of the property about which any action, suit, or transaction is concerned."

That piece of legislation, which is in unambiguous, bold phraseology, to my mind, clearly attempts to delete the law as to champerty as it stood in British Columbia, and was, therefore, an open invasion by the Provincial Legislature of the field of criminal law occupied exclusively by the Federal Parliament. Enterprising excursions of that sort, be they never so alluring, are rendered futile because they are, in plain English, beyond the strength of the assailants or in the classical language of the lawyer *ultra vires* the Legislature. On either of these grounds the agreement cannot stand. Even if the matter were before me under the Legal Professions Act, I would undoubtedly hold: an agreement entered into under such circumstances as here must not only be fair, but must also be reasonable. The element of fairness refers to the mode of obtaining it. It well might be that the client may have fully understood and appreciated what she was doing to such an extent that the element of fairness exists. There must be also the element of reasonableness and as to whether it is reasonable or unreasonable is not to be alone determined by whether it is "fair" or not. When challenged the solicitor must satisfy the Court that the agreement not only was absolutely fair in the manner in which it was obtained, but also that its terms are reasonable, having regard to the kind of work the solicitor has to do under it. The solicitor, as an officer of the Court, has no right to an unreasonable amount of payment for the work he has done, and ought not to make an agreement for incommensurate remuneration. It is difficult to find that the work done in this matter was worth

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the sum claimed by the defendant under his agreement. *In re Stuart, Ex parte Cathcart* (1893), 2 Q.B. 201.

There will be judgment for the plaintiff as claimed.

Judgment for plaintiff.

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WASHINGTON AND GREAT NORTHERN TOWNSITE CO. v. HOLBROOK

THE WASHINGTON AND GREAT NORTHERN TOWNSITE COMPANY AND VANCOUVER, VICTORIA AND EASTERN RAILWAY AND NAVIGATION COMPANY v. HOLBROOK.

Real property—Prescriptive title—Nature of possession—Right as against holder of certificate of indefeasible title—B.C. Stats. 1921, Cap. 26.

In an action to recover possession of certain lands it was held on the evidence that the defendant had failed to discharge the onus which rested on him of shewing that he had been in actual, open, visible, exclusive, continuous and undisturbed possession of the lands for a period of twenty years.

Held, further, that in any case on a proper construction of the Land Registry Act the defendant in the circumstances of the case, could not acquire a title by possession as against a person holding a certificate of indefeasible title.

Statement

ACTION to recover possession of certain lands comprising a portion of the foreshore of Burrard Inlet the plaintiff the Vancouver, Victoria and Eastern Railway and Navigation Company holding a certificate of indefeasible title to a portion of the lands and the plaintiff The Washington and Great Northern Townsite Company holding a like certificate for the balance of the lands in question. The facts are sufficiently set out in the reasons for judgment. Tried by MCDONALD, J. at Vancouver on the 4th of January, 1924.

A. H. MacNeill, K.C., for plaintiffs.
Hume B. Robinson, for defendant.

16th January, 1924.

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McDONALD, J.: This action is brought to recover possession of certain lands comprising a portion of the foreshore of Burrard Inlet within Vancouver Harbour. The plaintiff, The Vancouver, Victoria and Eastern Railway and Navigation Company, obtained a certificate of indefeasible title to a portion of the lands in question on the 30th of November, 1914, and the plaintiff, The Washington and Great Northern Townsite Company, obtained a certificate of indefeasible title to the remainder of the lands in question on the 22nd of May, 1915.

As against this paper title of the plaintiffs, the defendant sets up a title by possession for a period of twenty years, claiming to have been in possession of at least a portion of the lands in question from April, 1903, to April, 1923. It is conceded that the onus is upon the defendant to establish his title by possession. There was some conflict in the evidence but I have no hesitation in finding that the defendant has not satisfied the onus which is upon him to shew that he has been in actual open, visible, exclusive, continuous and undisturbed possession of a defined portion of the lands in question for the period of 20 years. His claim is based upon the fact that for many years he has maintained a float and a small house, the former being anchored both near and off shore and rising and falling with the tide. I am convinced, on the evidence, that this float has not always remained in the same position, and admittedly the house was by the defendant himself, during the period in question, moved a considerable distance off shore, where it remained for some months.

Judgment

Even if I am wrong in the above finding of fact, I should still be prepared, if I may say so, with due respect, to agree with the construction placed by Perdue, J. in *Smith* v. *National Trust Co.* (1911), 17 W.L.R. 354, upon the Manitoba statute similar to our Land Registry Act, section 37, and to hold that as against the certificates of indefeasible title held by the plaintiffs the defendant could not, under the circumstances of this case, acquire a title by possession.

It is contended, however, by counsel for the defendant that, in as much as the land in question comprises a part of the foreshore of an estuary of the sea, the plaintiffs cannot, though their

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predecessors in title acquired this foreshore by grant from the Crown in right of the Dominion of Canada, bring an action against any other person for possession of that foreshore. Counsel relies upon *Gann* v. *Free Fishers of Whitstable* (1864), 11 H.L. Cas. 192 and other cases decided upon the principles therein enunciated. I am unable to see how those principles apply to the case at Bar. Plaintiffs seek to recover possession of a certain parcel of land and nothing more. They are not seeking to interfere with the rights of navigation which may belong to the public. If they do so interfere, further questions may arise for future disposal, but the only question that arises in the present action is the question of whether or not the plaintiffs are entitled as against this defendant to possession of the land. In my opinion, they are so entitled and there will be judgment for possession of the lands described in the statement of claim.

Judgment for plaintiffs.

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Criminal law — Commitment — Election for speedy trial — Alteration of charge—Right to elect on charges as altered—Criminal Code, Secs. 399, 827, and 834.

Where an accused has elected for speedy trial under Part XVIII. of the Criminal Code on a charge of receiving goods knowing them to have been stolen and before arraignment the charge was altered by counsel for the prosecution by striking out the words "did unlawfully receive and have" and inserting in their place "did unlawfully retain." Notwithstanding the statement of prisoner's counsel when the alteration was made that he was not objecting to any amendment of the original charge, the accused must be given the option of electing as to the altered charge and where this option has not been given to him, a conviction on the charge as altered will be set aside.

Statement

APPEAL from a conviction at Vancouver by CAYLEY, Co. J. on the 21st of February, 1924, the accused having been sentenced to three years' imprisonment on a charge of unlawfully

retaining in his possession stolen goods knowing them to have been stolen. At the trial counsel for the Crown stated he desired to make a slight amendment to the charge by putting in the words "did unlawfully retain in his possession" instead of the words "did unlawfully receive and have in his possession." Counsel for the accused then said he was not objecting to any amendment of the original charge. The accused appealed on a question of law submitting that "having been committed for trial and having elected to be tried on the charge that he did unlawfully receive and have certain goods theretofore stolen then well knowing said goods to have been stolen was without his consent as provided by the Criminal Code tried for the offence that he did unlawfully retain in his possession said goods theretofore stolen, he, the convicted prisoner, then well knowing said goods to have been stolen."

Statement

The appeal was argued at Vancouver on the 24th to the 26th of March, 1924, before MACDONALD, C.J.A., MARTIN, MCPHILLIPS and EBERTS, JJ.A.

Woodworth, for accused: When the charge is changed under section 834 of the Code the prisoner must again elect under section 827. Any statement by counsel does not affect the situation; the accused must be asked to elect. There was no consent of the judge as required by section 834: see *Rex* v. *Cohon* (1903), 6 Can. Cr. Cas. 386; *Rex* v. *Bobyck* (1919), 49 D.L.R. 678. That counsel's statement does not waive accused's right to elect see *Rex* v. *Walsh and Lamont* (1904), 8 Can. Cr. Cas. 101. The formalities must be carried out: see *Rex* v. *Lacelle* (1905), 10 Can. Cr. Cas. 229; *Rex* v. *Crossan* (1921), 62 D.L.R. 462. The case of *Miller* v. *Malepart* (1918), 32 Can. Cr. Cas. 208 is against me, but the circumstances are different. The procedure must be in accordance with *Rex* v. *Cohon, supra;* see also *Rex* v. *Sylvester* (1912), 19 Can. Cr. Cas. 302.

Argument

Wood, for the Crown: The point taken is highly technical and is dealt with in *Rex* v. *Stanyer* (1923), 33 B.C. 223, and the case of *Rex* v. *Simpson* (1923), 3 W.W.R. 1095 appears to be against me. As to knowledge of goods being stolen after their receipt see *Rex* v. *Richard Johnson* (1911), 27 T.L.R. 489; *Rex* v. *Scheer* (1921), 34 Can. Cr. Cas. 231. An amend-

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ment can be made such as does not make a substantial change of the charge: see *Rex* v. *Cohen* (1912), 19 Can. Cr. Cas. 428; *Reg.* v. *Weir (No. 3.)* (1899), 3 Can. Cr. Cas. 262 at p. 268; *Rex* v. *Wallace* (1915), 24 Can. Cr. Cas. 95 at p. 97; *Rex* v. *Douglas* (1906), 12 Can. Cr. Cas. 120. He has been proved guilty and no wrong has been done prisoner: see *Rex* v. *Lum Man Bow and Hong* (1910), 15 B.C. 22; *Rex* v. *Carmichael* (1915), 22 B.C. 375 at p. 379. Counsel's consent in prisoner's presence is sufficient: see *Miller* v. *Malepart* (1918), 32 Can. Cr. Cas. 208 at p. 214; *Rex* v. *Bobyck* (1919), 49 D.L.R. 678. The cases of *Rex* v. *Walsh and Lamont* (1904), 8 Can. Cr. Cas. 101; and *Rex* v. *Lacelle* (1905), 10 Can. Cr. Cas. 229, can be distinguished. Section 978 of the Code shews how far counsel can go on admissions.

Argument

Woodworth, in reply, referred to *Rex* v. *Breckenridge* (1903), 7 Can. Cr. Cas. 116; *Rex* v. *Jack* (1915), 24 Can. Cr. Cas. 385 at p. 388; *Farquharson* v. *Morgan* (1894), 70 L.T. 152.

Cur. adv. vult.

On the 25th of April, 1924, the judgment of the Court was delivered by

MACDONALD, C.J.A.: The prisoner was charged with receiving goods knowing them to have been stolen. He was committed for trial and afterwards elected to be speedily tried by a County Court judge. Before arraignment, the charge was altered by counsel for the prosecution by striking out the words "did unlawfully receive and have," and inserting in their place "did unlawfully retain." Accused's counsel, when the alteration was made, said, "I am not objecting to any amendment of the original charge." The altered charge having been read to the accused, he pleaded not guilty, and the trial proceeded.

Judgment

The procedure mentioned in section 827 of the Criminal Code was not followed in respect of this altered charge. If then the charge as altered was not a mere amendment of the original charge but was a substitution of a new charge for it, there was, we think, error in not requiring the accused to elect. Section 834 of the Criminal Code points out that when new

charges are added or preferred, the procedure mentioned in said section 827 should be followed, and we do not see that the acquiescence of counsel in what was done here affects the matter at all. An election by the accused was necessary to give the judge jurisdiction to try the offence.

The Criminal Code made a change in the law as enacted in the older criminal statutes of Canada (see R.S.C. 1886, Cap. 164, section 82 *et seq.*) by inserting in section 399 the words "or retains."

There appears to have been very little recognition of the effect of this change in the wording of the section.

In *Rex* v. *Carmichael* (1915), 22 B.C. 375 at p. 379, I ventured to express my opinion of what was aimed at in these terms:

"When the section was amended, as it was some years ago, so as to cover retaining as well as receiving, that was done . . . . . to meet cases of the receiver receiving the stolen property innocently, but afterwards retaining it guiltily. The section as amended now, makes the person guilty of receiving if he retains after guilty knowledge."

The Court of Criminal Appeal in *Rex* v. *Johnson* (1911), 75 J.P. 464, held that a person charged with receiving under the English statute, could not lawfully be convicted of that offence when he received innocently but retained after knowledge that the thing had been stolen. It is there stated that in order to constitute the crime of receiving the knowledge that the thing had been stolen must be present at the time of receiving, that proof of knowledge afterwards acquired would not make out the charge. The inference to be drawn from that decision, is that where retaining with knowledge of the theft is made a crime, as we think it is by section 399 of the Code, it is a new and distinct one, and therefore when the charge against the appellant was changed from one of receiving to one of retaining, the substituted charge could not be proceeded with until the accused had elected to be tried speedily upon it.

Judgment

The suggestion that the acquiescence of counsel for the appellant rendered it unnecessary to have an election cannot, we think, be given effect to. Section 827 requires the judge to state to the prisoner that he is charged with the offence, describing it, and that he has the option to be tried forthwith before a

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judge without the intervention of a jury, or to remain in custody or under bail as the Court decides, to be tried in the ordinary way by the Court having criminal jurisdiction. That is the imperative duty of the judge, and it is for the protection of the prisoner and we do not think that the acquiescence of counsel is sufficient to displace the duty.

The offence of receiving, or as it is often put in indictments, receiving and having, is one offence. An accused person could not be convicted of having in his possession goods knowing them to be stolen on an indictment of that kind; the receiving is an essential element of the offence. He who receives stolen goods and has them in his possession even for an instant, is guilty, and in order to constitute the offence it is necessary that he should have actual or constructive possession, that is to say, constructive in this sense, that the goods were in the possession of some person who could be regarded as the agent of the accused to receive possession of them. It is said in the notes in Crankshaw (5th Ed.) to section 399, that similar provisions are contained in the Imperial Larceny Act, 1916, Cap. 50, Sec. 33, but it is not pointed out that the Imperial Act does not contain the words "or retains" following the word "receives," nor anything to that effect. And again in the same notes we are referred for the meaning of the phrase "having in one's possession" to section 5(*b*) of the Code, which defines it in the same sense in which it was construed under the English law. The words "having in one's possession" is no part of section 399, but even when it occurred in indictments it was conjunctively coupled with receives, and whatever its purpose was it was no separate offence, whereas under section 399, the word "retains" is used disjunctively making it as we think, a separate offence. Had it been "receives and retains" in his possession, we think no real distinction could be made between it and "receive and have" in his possession, but where it is disjoined, if it is to have force at all, and we think effect must be given to it, it must be treated as creating a distinct offence.

Judgment

The conviction should be quashed and there should be a new trial, and as the appellant in his notice of appeal claims the right to be tried by jury, and there having been no election by

him to be tried summarily, he is entitled to the benefit of section 1014 of the Criminal Code, and we must direct that the new trial is to be had before a jury.

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New trial ordered.

Solicitor for appellant: *C. M. Woodworth.*
Solicitors for respondent: *Lane, Wood & Co.*

McRAE BROTHERS v. BROWNLOW, MORTON AND PLANTA.

COURT OF APPEAL
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McRAE BROTHERS v. BROWNLOW

Mechanic's lien—Mortgage—Registration—Priority—R.S.B.C. 1911, Cap. 154, Secs. 4, 9 and 19—B.C. Stats. 1921, Cap. 26, Secs. 34 and 42.

The defendant P. sold a property to B. and M. in 1920 and being paid a portion of the purchase price took a mortgage on the property for the balance, but did not register it until the 15th of February, 1923. The plaintiffs under contract with B. and M. constructed a building on the property commencing work on the 8th of February, 1923, and completing it on or about the 20th of the same month. He registered a mechanic's lien against the property in respect of said work on the 22nd of March, 1923. In an action on the lien it was held that the lien had priority over the mortgage.

Held, on appeal, reversing the decision of BARKER, Co. J., that priority of registration rules. As between owner and contractor or wage-earner the latter has a lien from the inception of the work, but where a third person is concerned (as the mortgagee in this case) the lien does not come into existence until registered. It comes within the operation of section 42 of the Land Registry Act which gives priority to the earlier registered instrument.

APPEAL by defendant Planta from the decision of BARKER, Co. J. of the 31st of October, 1923, in an action on a mechanic's lien for $658. Planta sold certain lots to the defendants Brownlow and Morton in 1920. A payment was made on account of the purchase price and Planta obtained a mortgage from the purchasers for the balance of the purchase price. Planta did not apply for registration of this mortgage until the

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15th of February, 1923. Later the defendants Brownlow and Morton contracted with the plaintiffs for the construction of a building for $658. The plaintiffs commenced work on the 8th of February, 1923, completed the building on the 20th of February following, and on the 22nd of March filed a lien and registered it against the property. The defendant appeals on the ground that although the mortgage was registered after the work was commenced by the lienholders, it having been registered before the registration of the lien, the mortgage takes priority to the mechanic's lien.

Statement

The appeal was argued at Victoria on the 8th of January, 1924, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

V. B. Harrison, for appellant: Planta had the mortgage since 1920. The work upon which the lien is claimed commenced on the 8th of February, 1923, and the lien was registered against the property on the 22nd of March. Application for registration of the mortgage was made on the 15th of February, 1923, and although it was seven days after the work was started, it was five weeks before the lien was registered against the property. Priority of registration governs as between a lienholder and third parties and is subject to section 42 of the Land Registry Act: see *Bank of Hamilton* v. *Hartery* (1919), 1 W.W.R. 868; *City of Calgary* v. *Dominion Radiator Co.* (1917), 40 D.L.R. 65 at p. 75. We do not need to register our mortgage. We are an unpaid vendor and entitled to protection: see *Cook* v. *Belshaw* (1893), 23 Ont. 545. Increased value of the property must be shewn and there is no evidence of this.

Argument

Cunliffe, for respondent: When the work was put upon the property Brownlow and Morton had an interest upon which a mechanic's lien would attach: see *Dorrell* v. *Campbell* (1916), 23 B.C. 500. The mortgage only dates from the day of registration. The work was commenced before that giving us, we contend, priority.

Harrison, in reply.

Cur. adv. vult.

4th March, 1924.

MACDONALD, C.J.A.: The defendant's mortgage was in existence long before the work for which a mechanic's lien is claimed was done, but was not registered until six days after the said work had been commenced. The lien was not registered until some time after the registration of the mortgage. The question therefore is, what are the rights, in respect of priority, of the lienholders and the mortgagee?

The Courts of Ontario have held that priority of registration rules, that though as between owner and contractor or wage-earner, the latter will have a lien from the inception of the work, yet that when a third person is concerned the lien does not come into existence until registered. *McVean* v. *Tiffin* (1885), 13 A.R. 1, and the cases therein referred to, and *Reinhart* v. *Shutt* (1888), 15 Ont. 325. These decisions are founded upon the Ontario legislation, which, while it differs in some respects from ours, is in the main similar to it so far as is relevant to this case.

Under the Ontario Mechanics' Lien Act, a lien may be registered before the work is commenced, and when registered the lienholder is declared to be from that time in the position of a purchaser *pro tanto,* indicating, as the Court of Appeal thought, an intention to bring mechanic's liens under the Land Registry Act. These provisions are absent from our Act, but there are others which, I think, shew a similar intention. For instance, "encumbrance," as defined, is to include lien, and a charge is defined to include an encumbrance. Again, a copy of the lien affidavit is to be registered in the Land Registry office. When, therefore, we have a conflict between the holder of a registered charge, which the lien becomes when registered in the Land Registry office, and another registered charge, namely, a mortgage, I do not see any escape from the operation of section 42 of the Land Registry Act, which gives priority to the earlier registered instrument.

MACDONALD, C.J.A.

But the rights of respective parties under the said section are, nevertheless, qualified by the provisions of the Mechanics' Lien Act. The cases in Ontario to which I have referred turned partly upon a question of procedure. In those cases

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the mortgagees had not originally been made parties to the action but were brought in in the master's office, which was held to be wrong. In the case at Bar, however, the mortgagee was originally made a party and therefore his rights as against the plaintiff must now be declared. By section 9 of the Mechanics' Lien Act, when the work has been done on mortgaged property the lienholder can claim only the increase of value brought about by his work, and I think he is entitled in this case to prove what that amounts to. Section 34 of the Land Registry Act was referred to by counsel, but I do not think that that section affects this case. Under that section the mortgage did not come into existence as against the lienholder until it was registered. That leaves the parties as each having, as against the owner, an interest in the land during the six days between the commencement of the work and the date of registration of the mortgage, the one an unregistered lien, the other an unregistered mortgage. Their priority was fixed subsequently by registration. The work, I think, is to be considered as having been done on mortgaged premises. The observations apply as well to the first six days as to the following period.

There should be a new trial for the purpose of ascertaining the increased value, and of giving effect to the rights and remedies of the parties on the basis of this judgment.

The appellant is entitled to the costs of the appeal, those of the trial should abide the order of the County Court on the new trial.

MARTIN, J.A.

MARTIN, J.A.: I agree that this appeal should be allowed for the reasons substantially given by the Chief Justice, and that there should be a new trial to the limited extent indicated by his judgment.

GALLIHER, J.A.

GALLIHER, J.A.: The lots in question herein were owned by one Planta, who sold them to Brownlow, and executed a deed in favour of Brownlow and took a mortgage back for the unpaid purchase money for $1,200. Both instruments were dated March 22nd, 1920, but were not registered until February 15th, 1923.

The plaintiffs entered into a contract with Brownlow to supply

material and construct a small building on these lots for the sum of $658. The property consisted of four lots of small area and all enclosed within one fence, and the evidence is not clear as to which two of these lots the building rests on. The learned judge below has treated the four lots as one parcel, and all as affected by the lien and, under the circumstances, I think he was justified in doing so.

The work for which the lien is claimed commenced about the 8th of February, 1923, and the material was ordered and supplied about the same date. The work was completed on the 20th of February, 1923. The lien was filed on March 22nd, 1923, and registered in the Land Registry office on March 23rd. It thus appears the work was commenced about a week before the registration of the mortgage and completed about 5 days after such registration.

The learned judge held that the lien was prior to the mortgage and from this decision the mortgagee appeals.

Under our Land Registry Act the mortgage takes effect as against third parties, from the date of its registration, and the real question here is, Does the lien take effect from the commencement of the work so as to give it priority over the mortgage? If it takes effect only from the date of its registration in the Land Registry office, then it is subsequent to the mortgage and the plaintiffs' remedy would be under section 9 of our Mechanics' Lien Act, R.S.B.C. 1911, Cap. 154, and be for the increase in value of the mortgaged premises by reason of the erection of the building.

GALLIHER, J.A.

As between the owner and the lienholder, the lien would, I think, attach as from the commencement of the work, but as between a lienholder and a third party, in this case the mortgagee, when the question is one of priority, does that hold good?

I have already stated that as against third parties the mortgage takes effect from date of registration. Section 42 of the Land Registry Act, B.C. Stats. 1921, Cap. 26, says that:

"When two or more charges appear upon the register affecting the same land, the charges shall, as between themselves . . . . have priority according to the date at which the applications for registration thereof respectively were received by the registrar, and not according to the dates of the execution of the instruments."

That is, in effect, what we have here.

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Under our Mechanics' Lien Act, the lien is given; that lien is kept alive by the party claiming it taking certain proceedings within a specified time, *e.g.,* filing an affidavit setting out certain particulars in the proper County Court registry and a duplicate or a copy certified as such by the County Court registrar in the proper Land Registry office "as a lien against the property, interest or estate against which the lien is claimed."

It seems to me the words I have just quoted would indicate that when it comes to settling priorities the date of the last-mentioned filing is the one that must be considered and not the date when the work commenced. This seems to be the view taken in the Courts in Ontario, though the cases may not be exactly on all fours. See *Reinhart* v. *Shutt* (1888), 15 Ont. 325 at p. 327; *McVean* v. *Tiffin* (1888), 13 A.R. 1 at p. 4; *Cook* v. *Belshaw* (1895), 23 Ont. 545 at p. 550.

GALLIHER, J.A.

Though no evidence was given as to the increase in value by reason of the erection of the building, once it is held that the mortgage is prior to the lien, the plaintiff can, I think, go to the judge below, if he so desires, to have the procedure provided in section 9 of the Mechanics' Lien Act carried out and, if necessary, I would so order.

The appeal, in my opinion, must be allowed with costs.

MCPHILLIPS, J.A.

EBERTS, J.A.

McPHILLIPS and EBERTS, JJ.A. agreed in the result.

Appeal allowed and new trial ordered.

Solicitor for appellant: *V. B. Harrison.*
Solicitor for respondents: *F. S. Cunliffe.*

BREADY v. McLENNAN.

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1924

Jan. 10.

BREADY v. McLENNAN

Practice—Application to strike out appeal for want of security for costs—Security deposited after notice but before hearing—Costs of motion.

Notice of appeal was given on the 22nd of December, 1923, in a County Court action. A demand for security for costs was made on the same day. No security being given in reply thereto notice of motion for an order for security was served on the 29th of December and an order was made on the 4th of January, 1924. On the 6th of January respondent's solicitor telephoned appellant's solicitor when the appellant's solicitor assured him security would be furnished. On the 7th of January respondent's solicitor served notice of motion to the Court of Appeal returnable on the 10th of January to dismiss the appeal on the ground that security had not been furnished. The necessary security was deposited with the registrar on the 9th of January.

Held (MARTIN and GALLIHER, JJ.A. dissenting as to costs), that although the motion must be dismissed as the security has been furnished the respondent was in the circumstances entitled to make the motion and should be given the costs in any event in the cause.

MOTION to the Court of Appeal for an order dismissing the appeal on the ground that the appellant had not deposited with the registrar of the County Court at Nanaimo $100 as security for costs of the appeal pursuant to an order of BARKER, Co. J. of the 4th of January, 1924. Notice of appeal was served on the respondent's solicitor on the 22nd of December, 1923. On the same day respondent's solicitor served a demand for security for costs. No security being given respondent's solicitor served notice of motion on appellant's solicitor on the 29th of December to be heard by the County judge at Nanaimo on the 4th of January, 1924, being the first day upon which a motion could be made for an order for security for costs. The order was made on that date fixing the security at $100. On the 6th of January the respondent's solicitor telephoned the appellant's solicitor asking if security would be furnished and appellant's solicitor assured him that it would. On the 7th of January the respondent's solicitor served on the appellant's solicitor a notice of intention to apply to the Court of Appeal to dismiss the appeal in default of giving security for costs. The notice recited that the application would be made "on Thursday, the

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10th day of January, A.D. 1924, or at the hearing of the appeal if the case is reached before that date." The sittings of the Court of Appeal commenced on the 8th of January but the case had not been reached prior to the hearing of this motion on the morning of the 10th of January at Victoria. The appellant deposited the necessary security with the registrar of the County Court at Nanaimo on the 9th of January.

Statement

The motion was heard at Victoria on the 10th of January, 1924, by MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

D. S. Tait, for the motion.
Mayers, contra.

MACDONALD, C.J.A.: I think, as a matter of practice, Mr. *Tait* was entitled to make the motion.

Then comes the second question, in the circumstances should the motion succeed? Now the only thing that can be said against it is that an assurance that the security would be furnished had been given to Mr. *Tait,* but there was no undertaking that it should be done.

MACDONALD, C.J.A.

The question then is, what disposition ought we to make of the costs in those circumstances? If Mr. *Tait* had given the notice returnable on the day or at the time when the appeal should be called for hearing he would have been in exactly the same position as he now occupies, and the Court would have to decide whether he should have the costs or not. I think in this case, we ought to give him the costs in any event in the cause. The order is that the motion be dismissed with costs to the applicant in any event.

MARTIN, J.A.: I propose to refrain from attempting to lay down any general rule in regard to the practice, because in a recent case, *Scott* v. *City of Nanaimo* [*ante,* p. 344], decided on the 8th inst., I thought the practice had been settled, but apparently it had not been settled in the way that I for many years thought it had been. So I propose to deal with this matter of practice in the particular circumstances of the case, declining to lay down any general rule at all. Assuming that it was proper to make this motion at this time, I point out that it was not proper

MARTIN, J.A.

to make it in the alternative way it was made, *i.e.*, by naming the day of first hearing as the 10th of January, and then adding to that "or at the hearing of the appeal"; the notice of motion at least ought to be definite, in order that the opposing counsel may know when he ought to be here to meet it. I have never seen an alternative notice given in this Court before, and it is not a proper practice.

Then, on the facts, having regard to the shortness of the time preceding this notice, the security only having been ordered on a Friday and this Court sitting on the next Tuesday, with a half-holiday and Sunday intervening; and with the assurance of the solicitor on the other side given on the Sunday that the security would be furnished, I think that steps should not have been taken to incur any costs until a reasonable time had elapsed to see whether that assurance was going to be carried out or not. I do not place this assurance on the ground of an unqualified undertaking, but under the circumstances it was sufficient to stay proceedings as aforesaid, and certainly a reasonable time could not have elapsed before the opening of this Court at least.

MARTIN, J.A.

So in the circumstances of this case I think that the notice was given too soon, and, even if the motion is allowed, that the costs of it should not be given as costs in the cause to the applicant in any event, as usual in such motions where successful, but should be in the cause only.

GALLIHER, J.A.: My view is the same as that of my brother MARTIN. I would refuse costs in the circumstances of this case.

GALLIHER, J.A.

MCPHILLIPS, J.A.: In my opinion the motion was properly made; and the proper order, under the circumstances, is to give the costs in regard to a motion properly launched. When an order is made for security for the costs of an appeal, I do not see how it could be looked upon in any other way than that the security should be put up on or before the first day of the sittings of the Court. What could an order mean but that? All the cases might be disposed of on the first day; that might be a possible happening; and there might be many reasons to sweep off a number of the cases on the list. As a matter of fact it is in the interest of litigants, and a saving of costs, that

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a motion of this kind should be made. I do not think there are any special features about this matter at all. I think this Court ought to be clear, that when security is ordered the security must be given, and if it is not given a motion may be made. And I certainly disagree with the idea that a solicitor can give some assurance that a thing will be done and that prevents a motion being made. We would have chaos in practice if that is the case. If the solicitor, on the other hand, is willing to undertake, that is another matter. But even then I do not see why the Court should necessarily take notice of that. There have been solicitor's undertakings given, and they have not been kept. I do not think this is a special case at all, but just an ordinary case to be ordinarily dealt with. And the costs should be the costs to the respondent in any event.

MCPHILLIPS, J.A.

EBERTS, J.A.: I am of opinion that the application was made in a proper way, and that the costs should follow in the usual way. I would give the costs in any event.

EBERTS, J.A.

Motion dismissed.

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1924

March 4.

MARSHALL v. WAWANESA MUTUAL INSURANCE CO.

MARSHALL v. THE WAWANESA MUTUAL INSURANCE COMPANY.

Insurance, fire—Property held under agreement for sale—Proposal form—Applicant described as "owner"—No misrepresentation—Variation of statutory condition in application—Not included in policy—Not effective—B.C. Stats. 1919, Cap. 37.

The plaintiff obtained certain property from the Land Settlement Board under agreement for sale. He had certain improvements made for the payment of which he was advanced further moneys by the Board and before making any payment on the purchase price he was consulted by an agent of the defendant Company as to insurance. He decided to take insurance on his barn and the contents, explaining fully his position to the agent and signed an application form in blank which was subsequently filled in by the agent who described the plaintiff as "owner."

Held, that the word "owner" in the circumstances was not a misrepre-

sentation of the plaintiff's title, not because he had explained his title to the agent but because he could fairly be described as such.

The application for insurance contained a "special condition" to the effect that only two-thirds of the value of the property at the time of the loss would be paid for. The "special condition" was not printed on the back of the policy as a variation of or addition to the statutory conditions.

Held, that notwithstanding the provisions in the fifth statutory condition in the schedule that the written application is in terms to be deemed part of the contract of insurance, as the special condition was not set out in the policy as required by statute it cannot be given effect to.

APPEAL by defendant from the decision of MCDONALD, J. of the 21st of June, 1923 (reported 32 B.C. 419), in an action on a fire-insurance policy in the defendant Company. In September, 1921, the defendant Company insured the plaintiff against loss by fire as follows: $500 on a two-storey frame building used as a barn in the Comox district; $500 on household furniture and other goods in a one and one-half storey dwelling; and $500 on the produce in the said barn. The two-storey frame building and the produce therein were destroyed by fire on the 6th of July, 1922. Judgment was given for the plaintiff for $923.50. The plaintiff obtained the property in question under agreement for sale from the Land Settlement Board. He was to pay $2,700 in 21 yearly instalments. He also owed the Board $722.60 for material supplied for the construction of the barn and other improvements. At the time the insurance was taken out he had not made any payments. The defence was that the plaintiff in answering questions in his application had in answer to a question as to his title said he was "owner" of the property insured which was untrue and sufficient to render the policy null and void. That in any event the Company was only liable for two-thirds of the actual loss although this provision was not written in the policy. The plaintiff claimed that he gave all the necessary facts truthfully to the agent who filled in the application for insurance.

Statement

The appeal was argued at Victoria on the 28th and 29th of January, 1924, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Harold B. Robertson, K.C., for appellant: Respondent stated in the application that he was "owner" of the property. He

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merely held an agreement for sale upon which he had paid nothing. This is a material misrepresentation that vitiates the contract: see *Condogianis* v. *Guardian Assurance Company Limited* (1919), V.L.R. 1 at p. 5; (1921), 2 A.C. 125; *Rural Municipality of Fertile Valley* v. *Union Casualty Co.* (1921), 3 W.W.R. 26. The learned judge below referred to *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, and on appeal 70 D.L.R. 360, but these cases were decided on particular facts applicable in each case; they do not apply here. In this case respondent could say "I am owner in equity" or "beneficial owner" but he cannot say "owner" as he is not the owner: see *Wall* v. *Bright* (1820), 1 J. & W. 494 at pp. 500 and 503; *The Canadian Bank of Commerce* v. *The Royal Bank of Canada* (1921), 29 B.C. 407 at pp. 411-2; *Rose* v. *Watson* (1864), 10 H.L. Cas. 672; *Shaw* v. *Foster* (1872), L.R. 5 H.L. 321; *Howard* v. *Miller* (1915), A.C. 318 at p. 326. On the question of agency see *Ridout* v. *Fowler* (1904), 1 Ch. 658 and on appeal (1904), 2 Ch. 93. Sewell who was the agent had no right to delegate his authority to Lowell: see *Summers* v. *The Commercial Union Ins. Co.* (1881), 6 S.C.R. 19; *The Canadian Fire Ins. Company* v. *Robinson* (1901), 31 S.C.R. 488 at p. 494; *Walkerville Match Co.* v. *Scottish Union* (1903), 6 O.L.R. 674; *James* v. *Ocean Accident & Guarantee Corporation* (1921), 1 W.W.R. 551, and on appeal 30 B.C. 207. On the position of a solicitor for insurance see *Sowden* v. *Standard Fire Ins. Co.* (1880), 5 A.R. 290 at p. 301; *Mahomed* v. *Anchor Fire and Marine Insurance Co.* (1912), 17 B.C. 517; (1913), 48 S.C.R. 546 at p. 553; *The Ottawa Agricultural Ins. Co.* v. *Sheridan* (1880), 5 S.C.R. 157 at p. 174; *Laforest* v. *Factories Insurance Co.* (1916), 53 S.C.R. 296. One contemplating insurance must make reasonable inquiry as to agent's authority: see MacGillivray on Insurance, 188-9. The man who did the work here was merely a soliciting agent and nothing more. Whether he was an agent or not the plaintiff is bound by the representation made in his

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application: see *Bawden* v. *London, Edinburgh, and Glasgow Assurance Company* (1892), 2 Q.B. 534; *Wells* v. *Smith* (1914), 3 K.B. 722 at p. 725; *Biggar* v. *Rock Life Assurance Company* (1902), 1 K.B. 516; *New York Life Insurance Co.* v. *Fletcher* (1886), 117 U.S. 519. The application was signed in blank and filled in by Lowell who forwarded it to Sewell the agent: see *The Provident Savings Life Assurance Society of New York* v. *Mowat* (1902), 32 S.C.R. 147 at p. 172; *M'Millan* v. *Accident Insurance Co., Limited* (1907), S.C. 484; *Phœnix Assurance Co., Ltd.* v. *Berechree* (1906), 3 C.L.R. 946; *Condogianis* v. *Guardian Assurance Company Limited* (1921), 2 A.C. 125 at p. 129; *Dawsons, Ld.* v. *Bonnin* (1922), 2 A.C. 413. On proof of loss see *Anderson* v. *Fitzgerald* (1853), 4 H.L. Cas. 484 at p. 506. The statutory conditions are endorsed on the policy and only two-thirds of the value of the property is recoverable: see *Davidson* v. *Waterloo Mutual Fire Ins. Co.* (1905), 9 O.L.R. 394.

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Clearihue (*W. T. Straith,* with him), for respondent: The plaintiff did not wilfully make any false statement: see *Mason* v. *Agricultural Mutual Assurance Association* (1868), 18 U.C.C.P. 19 at p. 22. On the question of two-thirds' loss, this is a variation of the statutory conditions and must be properly inserted in the policy: see *Citizens Insurance Company of Canada* v. *Parsons* (1881), 7 App. Cas. 96; *Wanless* v. *Lancashire Insurance Co.* (1896), 23 A.R. 224; *Eckardt* v. *Lancashire Insurance Co.* (1900), 27 A.R. 373 at p. 381; *Eacrett* v. *Gore District Mutual Ins. Co.* (1903), 40 C.L.J. 30. The onus is on the Insurance Company and it must shew any misstatement is material to the contract: see *Patterson* v. *Oxford F.M. Fire Ins. Co.* (1912), 23 O.W.R. 122; *Konowsky* v. *Pacific Marine Insurance Co.* (1923), 2 W.W.R. 71.

Robertson, in reply.

Cur. adv. vult.

4th March, 1924.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The plaintiff is one of the soldier settlers who acquired land at Merville, B.C. A serious forest fire destroyed the buildings and produce of a large number of these settlers, including those of the plaintiff. In this case, therefore, there is no suggestion of incendiarism. The insur-

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ance was solicited by an agent who had no authority beyond that of an ordinary agent, to bind the Insurance Company. The plaintiff disclosed to the agent verbally everything which he was bound to disclose to the Company, and signed the application in blank, leaving it to the agent to fill it up when he returned to town.

On the hearing of the appeal the question came up as to whether the representation in the application that the plaintiff was the "owner" of the land was a misrepresentation in view of the fact that he was a purchaser merely under agreement with the Soldier Settlement Board. We held that the word "owner" in the circumstances was not a misrepresentation of his title, not because he had explained his title to the agent, but because he could fairly be described as such. But a second question was raised which we reserved for further consideration, and I will now dispose of it.

The argument of appellant's counsel was confined to one submission, *viz.*, that the plaintiff was entitled only to two-thirds of his loss. The facts briefly are: that defendant accepted the plaintiff's application for insurance, in which it was plainly stated that the produce insured was in the barn and was worth $750; on this basis they insured the property for $500, two-thirds of its value. The written application is in terms to be deemed part of the contract of insurance. The application contains what is named therein a "special condition" to the effect that only two-thirds of the value of the property at the time of the loss would be paid for. That special condition is not printed on the back of the policy as a variation of or addition to the statutory conditions. The question then is: Is defendant entitled to rely upon it?

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Evidence was given that the goods were not, at the time of the contract, actually in the barn, and that only part of them were afterwards put in. This evidence was not relevant to the question now under consideration. The question now to be decided is one of construction of the contract merely. I will assume, for the sake of argument, that the said special condition is part of the contract, it is not set out in the policy as required by statute and cannot be given effect to.

Again, it was contended that the words in the policy "insurance on produce in barn or stable covers same while in buildings" have some bearing on the case. It is true that they affect it to this extent, that recovery cannot be made for loss of goods situate elsewhere than in the barn when destroyed. I think that is the only relevancy of those words to the case.

I would dismiss the appeal.

MARTIN, J.A.: We reserved judgment upon the meaning of the following clause in the application, *viz.*:

"It is also a special condition of the insurance hereunder effected, that upon any property herein insured, that not more than two-thirds cash value thereof at time of loss will be recoverable from the said Company."

It is objected that the defendant is not entitled to rely upon this "special condition" in the application even though it is agreed that said application "shall form a part of and be a condition of the insurance contract," because it is a variation or addition to the "statutory conditions" prescribed by the Fire-insurance Policy Act, B.C. Stats. 1919, Cap. 37, and hence, in accordance with sections 4, 5 and 6 of that Act, it ought to have been "printed in conspicuous type and red ink" upon the policy, which admittedly was not done. The learned judge below took the view that this objection was well founded, and, in my opinion, that is the proper view to take of the statute and its conditions read as a whole, and this view is not altered by the fact that the fifth statutory condition in the schedule is as follows:

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"After application for insurance, if the same is in writing signed by the assured, it shall be deemed that any policy sent or delivered to the assured is intended to be in accordance with the terms of the application, unless the company points out, in writing, the particulars wherein the policy differs from the application."

That provision, placing a construction upon the intention of the parties as to the incorporation of the application, does not, in my opinion, exempt the Company from the overriding obligations of section 5 as to the only way in which it can acquire special protection if it intends to rely upon special conditions.

It follows that the appeal should be dismissed.

GALLIHER, J.A.: I agree with the Chief Justice that the two-thirds clause is a variation of the statutory conditions and

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is of no effect unless endorsed on the policy in the manner prescribed by the statute.

McPHILLIPS, J.A. would dismiss the appeal.

Appeal dismissed.

Solicitors for appellant: *Robertson, Heisterman & Tait.*
Solicitors for respondent: *Clearihue & Straith.*

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RYAN v. X.L. LOGGING CO.

RYAN *ET AL.* v. X.L. LOGGING COMPANY LIMITED AND WILSON LOGGING AND TIMBER COMPANY LIMITED.

Mechanic's lien—Reopening case on terms—Timber licences—Interest in land—Vendor in position of mortgagee—"Request in writing"—Interpretation—R.S.B.C. 1911, Cap. 154, Sec. 9.

On the enforcement of a mechanic's lien the action may be reopened to allow the plaintiff to make all necessary formal proofs on terms of paying defendant's costs to date, where the Court concludes the plaintiff's counsel made a slip arising from his being allowed to make an amendment reducing the amount claimed in the lien as filed.

The defendant Wilson Company sold a timber licence under agreement for sale to the defendant X. L. Logging Company upon which only a small cash payment was made. The agreement which was duly signed by the parties contained a clause that the purchaser covenanted to construct a pole road from the sea to the northerly end of the limit. The X. L. Company while in possession contracted with the plaintiffs for the construction of the road. The plaintiffs completed the road the longer portion of which went through the limit in question but in the meantime the X. L. Company became bankrupt and was in default both as to the agreement for sale and on the road contract. The plaintiffs then filed a lien and brought action for the enforcement thereof against both companies. Under section 9(*a*) of the Mechanics' Lien Act the seller of land is a mortgagee and the main section provides that liens are only prior to the mortgage as against the increase in value "unless the same is done at the request of the mortgagee in writing."

Held, that an interest in a timber licence is an interest in land, that the Wilson Company having sold the timber licence is a mortgagee within

section 9(*a*) of the Mechanics' Lien Act and as the clause in the agreement for sale for the construction of a log road implies in its terms a "request in writing" the road was constructed at the request in writing of the Wilson Company and the plaintiffs are entitled to judgment.

ACTION to enforce a mechanic's lien. The facts are set out in the reasons for judgment. Tried by CAYLEY, Co. J. at Vancouver on the 14th of February, 1924.

Beeston, for plaintiffs.
Tobin, for defendants.

18th March, 1924.

CAYLEY, Co. J.: The plaintiffs are road contractors and claim judgment against the defendants, the X.L. Logging Company (now in bankruptcy) for $1,385.92, being balance due for building a road for said defendant, who did not defend, and to enforce a mechanic's lien against the defendant, the Wilson Logging and Timber Company, who is the owner of timber licence M-9960, survey lot No. 1299, Loughborough Inlet.

The plaintiffs did not at the trial prove the filing of the lien in the County Court or that the action was begun within the time limited after such filing, but, as I regarded this as either a slip or an error arising from their being allowed to amend the amount mentioned in the affidavit from $1,809.62 to $1,385.92 (owing to a small portion of the road not having been constructed on the timber limit itself) I allowed the plaintiff to reopen the case to make all the formal proofs necessary on the terms that the Wilson Company should have the costs of the action up to the date of such amendment. Counsel for the Wilson Company then admitted all the necessary allegations and the matter now to be disposed of is whether the lien filed applies to a timber licence and, if so, whether it applies to the Wilson Company's timber licence and to what extent. The facts, as to the timber licence, are as follows: The Wilson Logging Company, which was the holder of the licence in question, by agreement for sale, dated the 20th of January, 1923, between themselves as vendor and the defendant, the X.L. Logging Company as purchasers, sold all its right, title and interest in the said licence to the X.L. Logging Company aforesaid. A small cash payment was

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made by the purchaser but default made in all the other payments and the licence, as I understand it, has reverted to the vendor, the Wilson Company. While the defendant, the X.L. Logging Company, was in possession, however, under the agreement referred to, it contracted with the plaintiffs and one Olsen to build the logging road referred to. Olsen dropped out at an early stage and the plaintiffs did the work and built the road agreed to be built, and this road was built on the Wilson Company's limit (with the exception of a small portion as to which a lien is not claimed).

In the agreement for sale referred to occurs the following paragraph:

"4. The purchaser further covenants and agrees to immediately start the construction of a fore and aft pole road, or a truck road, from the beach at Loughborough Inlet to the northerly end of the claim included in the said timber licence, and to the east side of the large creek, the said road to be completed before any logs shall be hauled off the said licence as hereinafter provided, and in any event to complete said road at a date not later than the 1st of June, 1923."

The first question to be decided is whether the Mechanics' Lien Act applies to land held under a timber licence. The argument that it is runs somewhat as follows:

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A mechanic's lien lies upon lands (Mechanics' Lien Act, Sec. 6, Subsec. (2) (*c.*); "Land" includes tenements (Interpretation Act, Sec. 26, Subsec. (25); "Tenements" signifies everything that may be holden, that is, which can be the subject of tenure, and includes not only land but rent, commons and some other rights and interests issuing out of or concerning land" (Stephen's Commentaries on the Laws of England, 17th Ed., Vol. 2, p. 6); a *profit a prendre* is an interest in land (Halsbury's Laws of England, Vol. 11, pars. 656 and 667; and *Vaughan-Rys* v. *Clary et al.* (1910), 15 B.C. 9 at p. 10; a timber licence is a *profit a prendre* (*Vaughan-Rys* v. *Clary, supra*), therefore a timber licence is an interest in land.

It is true that there may be interests in land not subject to mechanics' liens. A widow's right of dower is an interest in land (Brown's Statute of Frauds, 276) and American decisions are that a wife's inchoate right of dower is not subject to mechanics' liens (Wallace on Mechanics' Liens, 3rd Ed., 54). There was no guiding decision cited to me except *Rafuse* v.

Hunter (1906), 12 B.C. 126, which declares that a mechanic's lien is not an interest in land, but *Rafuse* v. *Hunter* is not consistent with *Vaughan-Rys* v. *Clary et al.* and must be looked upon as overruled. I think I must conclude that the word "land" as used in the Mechanics' Lien Act includes an interest in land and therefore includes a timber licence.

The next question is as to the position of the defendant, the Wilson Company, whether the lien filed applies to the interest of the Wilson Company in the licence and, if so, to what extent? Under section 9 (*a*) of the Mechanics' Lien Act a seller of land is a mortgagee and in the main section liens are only prior to the mortgage as against the increase in value "unless the same is done at the request of the mortgagee in writing." The Wilson Company is in the position of mortgagee and the defence claims that there was no request in writing. The work referred to in the paragraph quoted of the agreement for sale was done as agreed upon and the agreement was signed by both companies.

I think I must hold that this clause implies in its terms a "request in writing" and, as the Wilson Company was a signatory to this request and the road was constructed with their knowledge, it is as constructed at the request in writing of the Wilson Company.

Judgment for the plaintiffs for $1,385.92 and costs subsequent to the amendment mentioned and enforcement of the lien. Leave to apply.

Judgment for plaintiffs.

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CHARLTON v. BRITISH COLUMBIA SUGAR REFINING CO.

CHARLTON v. THE BRITISH COLUMBIA SUGAR REFINING COMPANY LIMITED.

Master and servant—Injury to servant—Agreement of company to give life employment—New company taking over—Liability to retain servant—Right of dismissal for misconduct—R.S.B.C. 1911, Cap. 153, Sec. 2.

An employee of a company having been injured in its service refrained from suing for damages on being promised suitable employment by the Company for the rest of his life. Later a new company was formed to take over and did take over as a going concern the business of the old company. The employee continued in the service of the new company. There was knowledge of the agreement in the new company as its president was at the time of the agreement an official of the old company and later its liquidator, and was at all times aware of the agreement.

Held, that an employment was created with the new company subject to the said agreement as to its terms and duration.

Section 2 of the Master and Servant Act providing that "no voluntary contract of service or indentures entered into by any parties shall be binding on them or either of them for a longer time than a term of nine years" is not applicable to such an agreement as this as it is in a sense a unilateral agreement and not "a contract of service or indentures" entered into and binding on both parties for any period of time.

The employee may be dismissed for misconduct, and what is misconduct that justifies dismissal depends on the facts of the particular case. The misconduct need not be directly connected with the employment. Using for his own purposes part of the funds subscribed by the Company and its employees for the purposes of an annual employees' picnic and entrusted to him for control, disbursement and accounting, his conduct in connection therewith causing much dissatisfaction among the employees, may be sufficient ground for dismissal.

Statement

ACTION for damages for alleged wrongful dismissal. The facts are set out fully in the reasons for judgment. Tried by MACDONALD, J. at Vancouver on the 10th of September, and the 20th and 27th of December, 1923.

J. E. Bird, and *Kent*, for plaintiff.
Stockton, for defendant.

11th January, 1924.

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MACDONALD, J.: In 1912, plaintiff, whilst in the employ of a company bearing the same name as the defendant, was seri-

ously injured. He alleges that, in consideration of his refraining from taking proceedings to enforce a claim in respect of such injuries, the said company agreed "to employ him in such work" as he was capable of performing for the rest of his life, at a reasonable salary. Then, that in breach of such agreement of employment the present defendant, in February, 1923, unlawfully, wrongfully and without just cause or reason summarily dismissed him from its employ. This was the cause of action, shortly outlined, as it stood, until the defence had been partially heard at the trial. Plaintiff then sought to extend his cause of action by alleging that the plaintiff was what was termed a "pensioner" of the defendant, that is, entitled to remuneration whether he worked or not. This position was such a departure and so inconsistent with the statement of claim that I declined to consider it, unless allowed by amendment duly obtained. I granted amendment of the statement of claim, though opposed by the defendant. Upon this privilege being exercised, the amendment does not appear in the same terms as those I understood were desired by counsel, when it was obtained. It does not differ materially from the cause of action as originally stated, except that, along the lines of pensioning or granting an annuity, it alleges that defendant (presumably the old company) had agreed to pay the plaintiff $85 per month for his natural life, whether he was capable of rendering any service to the defendant or not. There was also the further statement in the amendment that, as soon as the plaintiff recovered from his injuries, the defendant would employ him in such light service as it should require of him and he was capable of performing, for a further remuneration (beyond the $85 per month) commensurate with such services. There was no writing between the parties shewing how the claim, if any, arising out of the injuries sustained by the plaintiff was arranged. The lack of certainty, as to the terms of any such agreement or arrangement is explained by the plaintiff, through his accepting the word of B. T. Rogers, late president and managing director of the old company, and so not having it reduced to writing. I have then the difficult task, so many years afterwards, of determining the nature of the agree-

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ment or arrangement arrived at, when the plaintiff, through Mrs. Charlton, his wife, discussed the accident with said Rogers, in the presence of J. Fordham Johnson, secretary of the then company. It is contended by the plaintiff that a settlement of his claim for injuries, was then proposed by Mr. Rogers, and, after consultation with her solicitor, was accepted by Mrs. Charlton on behalf of the plaintiff. Defendant contends that the old company, through its president, simply entered into a voluntary agreement and that, in other words, it was not bound, except as a matter of good will on its part, to employ the plaintiff when he was recovered and able to undertake any light work in which his services could be utilized. It is not contended that the president of the old company could not have bound his company but that, as a matter of fact, he did not do so, except in the manner indicated. Plaintiff was, at the time, still confined in the hospital and Mrs. Charlton waited upon Mr. Rogers at the request of her husband. There were only three persons present at the time when the matter was discussed, and of these Mr. Rogers died in 1918, so the account of what transpired is dependent upon the memory of Mrs. Charlton and Mr. Johnson. They differ, in some details, in their recollection of the conversation, but agree on some important points. This difference is not a source of wonder when you consider the fact that, according to Mrs. Charlton, Mr. Rogers refused to put anything in writing, as to his intentions or what his company would do by way of assisting the plaintiff, and that from 1912, up to the dismissal of the plaintiff in 1923, the parties interested did not upon any occasion discuss such conversation. There should be no doubt that Mrs. Charlton, at the time, communicated to her husband the effect of the conversation and if, as is now stated, it disclosed anything, beyond an agreement to employ the plaintiff, it is peculiar, to say the least, that the plaintiff did not advance such a contention to his employers. I do not think he is of a timid or retiring disposition. He was seeking from time to time an increase of salary. One would have thought, as a ground for such increase, if he were more than an ordinary employee, he would have so contended. What then was the agreement or arrangement

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arrived at between the parties? Mrs. Charlton, in the first account of the interview with Mr. Rogers, said that he was prepared to pay $1,500, which would be obtained from the insurance company "and take care of him (the plaintiff) for the rest of his life and also pay the doctor's bill." She then repeated this statement and added that they, meaning his employers, would provide "something suitable" for the plaintiff. Mr. Johnson, in giving his account of what took place at the conversation, says that Mrs. Charlton informed Mr. Rogers, at the outset, that her husband did not wish to bring suit against the company and asked what he could do under the circumstances, and he replied that "Mr. Charlton would be paid $1,500, by the insurance company, that the company would pay all the hospital expenses, doctor bills and so on and that he would give him a position at $85 a month, that being the pay he was then receiving, as long as he behaved himself and subject to absolute loyalty to the company." This account of the interview and further questions, arising on examination for discovery of Mr. Johnson, were put in by the plaintiff, as part of his case. It is quite evident from this statement, if you accept Mr. Johnson's recollection as being correct, that it was intended, in consideration of the plaintiff not taking any proceedings with respect to his injuries, that he would be continued in service by his employers in some capacity. This conclusion is borne out by the further questions then submitted and answered by Mr. Johnson, as follows: Judgment

"Then assuming that he had behaved himself and had been loyal to the Company, by implication that was intended to mean he would be looked after for the rest of his life?

"Mr. *Stockton*: Well, that is an improper question the way you put it.

"Mr. *Kent*: Well, was that the intention; that subject to his being of good behaviour? Well, it might be taken as such perhaps.

"Was it not really the intention at the time that should be so? Yes, subject to good behaviour and loyalty to the Company."

I think the clear intention was, that the relationship of master and servant should continue, and that Mr. Rogers impressed Mrs. Charlton with his sincerity and desire to assist her husband by way of employment, as soon as he was able to resume his duties. Further, that such employment was to continue for the balance of his life. I do not think this would be an

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unusual nor unreasonable promise for a company to make, under the circumstances, towards an employee, injured in its service. The surrounding circumstances and the after-conduct of the parties support the conclusion that the relationship of master and servant was to be established on these terms. The employers carried out their portion of such arrangement at the time and even paid the plaintiff his salary, at the previous rate, until he was able to return to work. Then he was given light duties to perform in the office and with an increase of salary, from time to time, held a clerical position until his dismissal. I think it unnecessary to discuss at length, other evidence which, to my mind, amply supports a conclusion, that the relation of the parties was one, in which the plaintiff was a servant and subject to all the express and implied conditions attaching to such a position. Then, if plaintiff was an employee of the defendant, was the arrangement or agreement entered into, in 1912, consequent upon the accident with resulting injuries, binding upon the defendant? Plaintiff alleges, in his statement of claim, that the defendant entered into the agreement for employment with the plaintiff but the defendant, in its defence, asserts that it was not in existence, as a corporation, at the time of any such agreement. It appears, as I have intimated, that a company under the same name as the defendant was carrying on its business under the laws of British Columbia. It was desired, probably for business reasons, to become incorporated under the Dominion laws. The old company was, therefore, dissolved and a new company incorporated, under Dominion Letters Patent, to take over the assets and assume the liabilities of the old company. It is contended by the defendant, as such new company, that while the plaintiff was in its employ, it was only upon a monthly basis, and it was not bound by any agreement for employment that might have been entered into by the old company, through its authorized officials. This contention might prevail or have greater weight if it was simply a question of applying the principle of novation. However, when the new company acquired, as a going concern, the business of the old company and the plaintiff still remained in its employ, was not an

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employment created, which was subject to the agreement entered into between the plaintiff and the old company as to its terms and duration? As I have mentioned, Mr. Johnson was well aware of the terms of the plaintiff's employment and, both as liquidator of the old company and president of the new company, such knowledge was brought home to the defendant. I think, in view of the circumstances, his employment continued upon the same terms as had pertained from 1912.

Before, however, considering the terms and conditions attaching to the employment of the plaintiff, I should determine, as to the effect of section 2 of the Master and Servant Act, R.S.B.C. 1911, Cap. 153, reading as follows:

"No voluntary contract of service or indenture entered into by any parties shall be binding on them or either of them for a longer time than a term of nine years from the date of the day of such contract."

Counsel were not enabled to throw any light upon the construction to be placed upon this legislation, except that it appears to have been adopted from the Province of Ontario. There were no cases, apparently available, which could be cited by way of assistance. If the section be, as is contended, applicable to the present case, there is no doubt that more than nine years have elapsed since the arrangement was entered into, through the employment of the plaintiff by the old company, so termed. Still, I do not think that the section is applicable to such arrangement or agreement. It was not a "voluntary contract of service." If I am right in my construction, as to the arrangement that was entered into, it amounted to a binding agreement on the part of the then company to employ the plaintiff for his life, but plaintiff, on his part, was at liberty to forego any benefits that might be derived from the agreement and dissolve it at any time, upon proper notice. It was, in that sense, a unilateral agreement and was not "a contract of service or indenture" entered into and binding on both parties for any period of time.

The important question then remains to be determined, whether the defendant was justified in dismissing the plaintiff. The ground, alleged at the time for dismissal, and still maintained, is that plaintiff was dishonest and that the defendant had a right, for that reason, to dispense with his services. It

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is submitted that the transaction, in which the alleged dishonesty took place, was one outside of plaintiff's duties and did not in any way pertain to their performance. Where misconduct is asserted, as a ground for dismissal, the result which should follow, must necessarily depend upon the facts of each particular case and their application to settled principles, governing the relationship of master and servant. The position of plaintiff, in this respect, does not differ from any other ordinary employee.

"There is no fixed rule of law defining the degree of misconduct which will justify dismissal. Of course there may be misconduct in a servant which will not justify the determination of the contract of service by one of the parties to it against the will of the other. On the other hand, misconduct inconsistent with the fulfilment of the express or implied conditions of service will justify dismissal":

Clouston & Co. Limited v. *Corry* (1906), A.C. 122 at p. 129.

This lack of authority, as affording assistance, in determining what causes would justify discharge of a servant from his contract in all cases, and that the decisions only give partial aid in that direction, is referred to by Bramwell, B. in *Horton* v. *McMurtry* (1860), 5 H. & N. 667 at p. 676; 29 L.J., Ex. 260, as follows:

"Cases may be cited in which the Courts have laid down certain criteria as to when a master is justified in discharging his servant but if these decisions are examined it will be evident that they do not afford an exhaustive set of cases, but only a certain number; and it seems to me correctly stated in Smith's Law of Master and Servant, p. 69, that 'It is difficult to lay down any general rule as to what causes will justify the discharge of a servant, which shall comprise and be applicable to all cases; since whether or not a servant in any particular case was rightfully discharged must, of course, depend upon the nature of the services which he was engaged to perform, and the terms of his engagement.' That is a good observation to bear in mind, and it seems to me that in this case there was ground on which the defendant might have discharged the plaintiff; at all events it might have been properly left to the jury to say whether the defendant was justified in discharging the plaintiff. That it is not necessary that the misconduct should include moral turpitude manifestly appears from the case of *Smith* v. *Thompson* [(1849)], 8 C.B. 44 (E.C.L.R. Vol. 65), where all that the servant did was to appropriate, in payment of his own salary 30*l.* out of some money sent him by his master for business purposes. In the present case, it may be assumed that the plaintiff supposed he acted rightly, at least there is no evidence that he committed any fraud; but in truth he did one thing and said another."

Judgment

The situation thus requires consideration of the facts pertaining to the alleged misconduct. Defendant, in carrying on

its extensive business, had in its employ 300 men. They were accustomed to have an annual picnic at Bowen Island, and the expenses necessary for that purpose were obtained by subscription from the Company, its officials and employees. For some years, plaintiff had been the secretary-treasurer in connection with such annual picnic and, acting under a committee, had complete control of the receipts and expenditures, subject to a due accounting within a short time after the picnic was held. In 1922, the picnic was held in August, and the plaintiff, with the funds in hand or available for that purpose, should, as he usually did, have paid the expenses of the picnic within a few weeks after it was held. He failed to do so, though he posted a statement shewing moneys received and expenses of the picnic incurred. As a matter of fact, he had, in the meantime, used, for his own purposes, a portion of the moneys which had been collected for the expenses of the picnic. It soon became discovered that all the accounts had not been paid and the committee of the employees pressed for payment. He was requested, as secretary, to call meetings for the consideration and settlement of accounts, but failed to do so. Meetings were called by the committee and, instead of the plaintiff attending and frankly admitting his failure to carry out the trust imposed on him, and asking for indulgence, he ignored such meetings. Eventually, after sundry efforts to settle all the accounts outstanding, some of them were paid by the plaintiff, but a small number still remained unpaid. It was not, however, until the month of January, 1923, that all accounts were settled, the last one being satisfied by the defendant deducting for that purpose, with the consent of the plaintiff, sufficient to pay the rent of the picnic grounds. It is quite evident that this conduct on the part of the plaintiff was discussed generally, and especially at meetings of employees, and created considerable dissatisfaction. This feeling was emphasized in minutes of the meeting of the picnic committee held on January 16th, 1923. I find that the plaintiff was, at that time, asserting that there were no liabilities outstanding in connection with the expenses of the picnic and that this statement was not in accordance with the facts. In

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February, 1923, upon Mr. Johnson's return from the East, he was informed of the conduct of the plaintiff, which has been shortly outlined, and decided that, under the circumstances, he should instruct the secretary of the Company to dismiss the plaintiff. He was tendered, without admitting liability, three months' wages, but refused the offer and, on the 9th of February, through his solicitor, threatened suit unless some satisfactory settlement was made. Correspondence ensued, but the defendant adhered to its position that the dismissal was justified on account of the dishonesty of the plaintiff. The employment of the plaintiff was not an ordinary one. He was not required to do any hard work. He had a right to expect and did receive some privileges. Whatever he may have expected, perchance on sympathetic grounds, had he a right from a legal position, to require the defendant to overlook his shortcomings with respect to trust moneys? He had become aware, in July, 1922, that the defendant expected its employees to pay their debts and apparently had sought to create a high standard of business honesty as far as its employees were concerned. None of the authorities cited are directly in point, and thus their consideration can only be of slight assistance.

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In *Priestman* v. *Bradstreet* (1888), 15 Ont. 558 the plaintiff, while general manager of the defendant's business at Toronto and Montreal, was engaged in speculating on margins through bucket shops and refused to abstain from such transactions. He was not found to have been dishonest in any way but following *Pearce* v. *Foster* (1886), 17 Q.B.D. 536, it was held that his conduct was incompatible with the proper discharge of his duties to his employer. The judgment refers to his position of trust and having control of the funds of the company, also that its success depended upon his upright and faithful discharge of duty. His conduct, except as to the stock transaction, appeared in a favourable light, and his evidence impressed the Court strongly with his candour and truthfulness. While some principles are deducible from this judgment, the ground of dismissal appears to be really one that the transactions pursued by the plaintiff were inconsistent with the proper discharge of its duty. As far as the

service to be rendered by the plaintiff, in this case, is concerned, they appeared to be such, as not to be directly affected by his misconduct in relation to the funds for the picnic.

In *Pearce* v. *Foster, supra,* the judgment proceeds along the same lines. Lord Esher, M.R. at p. 539 says:

"What circumstances will put a servant into the position of not being able to perform, in a due manner, his duties, or of not being able to perform his duty in a faithful manner, it is impossible to enumerate. Innumerable circumstances have actually occurred which fall within that proposition, and innumerable other circumstances which never have yet occurred, will occur, which also will fall within the proposition."

Lindley, L.J., at p. 542, says, in referring to the alleged misconduct of the servant:

"It is not necessary for them [the employers] to prove that they have in fact suffered by reason of his conduct. . . . . But the defendants would suffer or might suffer very seriously indeed, if they kept the plaintiff in their employ knowing that he was a gambler."

This case was cited by the defendant in support of its position, but only assists to a limited extent. Its major effect is to emphasize the proposition that an act on the part of a servant, which is incompatible with the faithful and proper performance of his duties, is a good ground for dismissal.

Parsons v. *London County Council* (1893), 9 T.L.R. 619 is a pertinent case, as indicating the standard of honesty required of a person employed by a County Council, even though the misconduct complained of, was not directly connected with his employment. In that case, the plaintiff had been dismissed by the council, following his conviction for having unlawfully travelled on a railway, without having paid his fare, with intent to defraud. His action, though differently framed, really amounted to one for wrongful dismissal. Sir Richard Webster, in opening the case on his behalf, said that it was desired that the council should state whether it intended to justify the dismissal merely upon the ground that the plaintiff had been convicted or upon the ground that it had been rightly convicted:

Judgment

"In other words, upon the ground that he was guilty of the offence with which he had been charged."

He then added, as shewing the view of the law taken by such a learned counsel, that,—

"It was very important for the plaintiff to know this, because if the Council had adopted the former course the plaintiff could not have dis-

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puted the right of the Council to dismiss him, while if they adopted the latter course it would be open to the plaintiff to clear his character by shewing, if he could, that he had not travelled, without a ticket, with the intention to defraud, and consequently that he had not been rightfully convicted."

Defendant, with the knowledge of such admission, took the latter and more difficult course, with the approval of the trial judge. In the outcome it was held the plaintiff was not guilty of the offence for which he had been convicted. The trend of the trial, coupled with the admission of counsel for the plaintiff, indicates that the council would have been justified in the dismissal of plaintiff either on the ground that the plaintiff was convicted (whether innocent or guilty) or upon the ground that he was properly convicted.

Here the plaintiff had used for his own purposes a portion of the funds to which the defendant and its employees had subscribed. The knowledge of such misappropriation had become public property amongst the employees. It was decided by Mr. Johnson, who was authorized to act for the defendant, that such conduct on the part of the plaintiff could not well be overlooked and, in his evidence, he expressed at length his reasons for coming to the conclusion.

Judgment

"It is a question of fact whether the plaintiff was so conducting himself that it would have been injurious to the interests of the theatre [Company] to have kept him":

see Vaughan, J. in *Lacy* v. *Osbaldiston* (1837), 8 Car. & P. 80 at p. 86.

I think the position taken by the Company was legally tenable, and that it was justified under the circumstances in dismissing the plaintiff.

The action is dismissed with costs.

Action dismissed.

HOUSTON v. VICTORIA MACHINERY DEPOT COMPANY LIMITED AND SPRATT.

MURPHY, J.

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Feb. 13.

HOUSTON v. VICTORIA MACHINERY DEPOT

Company law—Suit by shareholder on behalf of himself and other shareholders—A director or majority shareholder—Voted salary and travelling expenses.

A shareholder suing on behalf of himself and all other shareholders can maintain an action alleging illegal use of the company's moneys, when it clearly appears that an application to the company to authorize such an action would be futile.

When the plaintiff complains of the directors voting a salary and travelling expenses to the managing director he must shew that their action was either *ultra vires* or of a fraudulent character and although it is beyond the powers of the directors to vote the salary and travelling expenses this defect could be remedied at a shareholders' meeting as the managing director is herself a majority shareholder; further, as it appears she has control of the situation and the supervision of the entire management and the onus is on the plaintiffs, the action of the company in voting her a salary of $6,000 per annum and travelling expenses has not been shewn to be of a "fraudulent character."

ACTION by plaintiff on behalf of herself and the other shareholders of the defendant Company for a declaration that it is beyond the powers of the defendant Company to carry on the business of lumber dealers and that the defendant Marguerite E. Spratt as managing director acted *ultra vires* of the Company in applying its funds in the operation of the Glenora Saw Mills in which her husband was interested and in which the defendant Company lost $3,702.67, for an injunction restraining the defendants from carrying on said business, for a declaration that $6,000 salary and $1,720.65 travelling expenses, paid the defendant M. E. Spratt is a fraud on the plaintiff a minority shareholder and said sums should be refunded, for an injunction restraining the defendants from making further payments of salary or travelling expenses, and for a declaration that $95,178 at the credit of the reserve fund is undivided profits and the failure to distribute is an oppression on the minority shareholders. The plaintiff's deceased husband had formerly managed the Company's affairs when dividends were paid. The plaintiff claims that since his death no dividends have been paid and the

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affairs of the Company have been managed entirely for the benefit of the majority shareholders resulting in oppression of the minority shareholders. Tried by MURPHY, J. at Victoria on the 1st of February, 1924.

Maclean, K.C., and *Sinnott*, for plaintiff.
W. J. Taylor, K.C., and *Alexis Martin*, for defendants.

13th February, 1924.

MURPHY, J.: In my opinion plaintiff suing on behalf of herself and all other shareholders, can maintain this action, since it clearly appears that an application to the Company to authorize such suit would be futile: *Russell* v. *Wakefield Waterworks Company* (1875), L.R. 20 Eq. 474; *Burland* v. *Earle* (1902), A.C. 83. The cases of *Rose* v. *B.C. Refining Co.* (1911), 16 B.C. 215, and *Johnston* v. *Carlin* (1914), 20 B.C. 520, as I read them, confirm rather than impeach this statement of the law.

The plaintiff to succeed must shew that the action of the directors in voting a salary to Mrs. Spratt was either *ultra vires* or of a fraudulent character: *Burland* v. *Earle, supra.*

It is true that the act was *ultra vires* of the directors, but it was not of the shareholders, and since this defect could and clearly would be remedied by the majority shareholders at a shareholders' meeting, since the defendant Mrs. Spratt is the majority shareholder, the minority cannot maintain this action on the *ultra vires* ground: *Burland* v. *Earle, supra,* at pp. 93 and 94. It was expressly decided in the same case that the question of salaries is a matter of internal management: see pp. 99 to 100.

Judgment

The other question remains, *viz.*, can the voting of a salary of $6,000 to Mrs. Spratt be said to be "an act of a fraudulent character?" Or as put in *Dominion Cotton Mills Company, Limited* v. *Amyot* (1912), A.C. 546, Has the majority shareholder abused her powers and deprived the minority of their rights? If "fraudulent" is to receive the ordinary legal interpretation that the act so characterized necessarily involves moral turpitude, I think the question in the form first put must be answered in the negative.

Mrs. Spratt swears in her discovery, put in as part of plaintiff's case, that she has the supervision of the entire management of the Company, and is in control of the situation, and that she is always present when any question of business policy is under consideration and takes part when the final decision in any such matter is made. This means, I take it, that it is she who decides these vital questions. It is true that Mr. Bechtel says that Mrs. Spratt merely signed cheques. In my opinion the onus is on the plaintiffs and the sketchy evidence before me does not comply with that requirement, particularly inasmuch as something of a "fraudulent character" has to be shewn.

As to the other form in which the question is put, it is evident that a Court of first instance, at any rate, must walk warily when it is asked to declare an act admittedly within the powers of a company to be an abuse of such powers, and one depriving the minority of their rights. Viewed from one point of view, what was done herein might be said to result in hardship to the minority shareholders. But "hardship" and "abuse of powers resulting in a minority being deprived of their rights" are obviously not one and the same thing. And even with regard to "hardship," it is to be remembered no one is compelled to become a minority shareholder, and if one does, he or she is presumed to know the law as to company control.

Judgment

Now, if Mrs. Spratt is, as she says, the Court of last resort in the management of this Company's affairs, can it be said that to vote her a salary of $6,000 a year is an oppressive act resulting in depriving the minority of their rights? Again the onus is on the plaintiffs to prove that it is.

The evidence shews that from 1917 to at least 1921, the Company made or, at any rate, distributed amongst its shareholders, very considerable amounts of money. To say that a company with this record is acting oppressively and depriving the minority of their rights, when it pays the person who determines its policy $6,000 a year, is, I consider, something that should not be done by a Court of first instance. The fact that moneys paid by the Company as salaries were, by an arrangement between shareholders, afterwards divided up according to their

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respective shareholdings, has, I think, no bearing on the question to be decided herein, except possibly on the issue of fraud, and upon which I have already passed. Costs to defendants. Action dismissed.

Action dismissed.

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VETERANS' SIGHTSEEING AND TRANSPORTATION CO. v. THE PHŒNIX INSURANCE CO.

THE VETERANS' SIGHTSEEING AND TRANSPORTATION COMPANY LIMITED v. THE PHŒNIX INSURANCE COMPANY OF HARTFORD, CONNECTICUT, AND DORA B. TANNER.

Insurance—Automobile—Misstatement as to year of model—Effect on insurance—Inspection by insurance agent—B.C. Stats. 1919, Cap. 37, Sec. 4.

In an action to recover on an insurance policy the value of an automobile destroyed by fire the defendant claimed that false and fraudulent statements were made when the insurance was effected in that the car was a "model year 1915" when in fact it was a 1912 model. The defendant's agent inspected the car before placing the insurance and considered it a good risk for the amount for which it was insured.

Held, that as it appears from the evidence that the year model is immaterial and what is relied on is inspection by the insurance agent particularly where the car is a re-built one in the process of which it is entirely changed, the insurance agent issued the policy not on the faith of anything that was said to him but as a result of his own inspection and the plaintiff is entitled to recover the loss sustained.

Held, further, that the plaintiff is bound by the finding of the appraisers appointed pursuant to a term in the policy.

Statement

ACTION to recover $2,800 on an insurance policy. The plaintiff insured its Winton Six 20-passenger sightseeing car for $2,800 in the defendant Company on the 12th of May, 1922, for one year upon which it paid the premium. On the 9th of October, 1922, the car was mortgaged to one D. B. Tanner to secure an advance of $1,500. On the 1st of November, 1922, the car was totally destroyed by fire. The defendant

Company claimed that false statements were made by the plaintiff in that the car was "model year 1915" when the insurance was effected when in fact it was a 1912 model. Tried by MURPHY, J. at Victoria on the 14th of February, 1924.

Foot, for plaintiff.
T. M. Miller, for defendant.

22nd February, 1924.

MURPHY, J.: It is objected that plaintiff cannot maintain this action because by Exhibit 19 it has assigned all interest in the policy to Dicks. But said Exhibit 19 allows Dicks to sue in name of plaintiff. I therefore overrule the objection.

It is clear, I think, that keeping in mind the date of the loss, the policy in question here is a contract for fire insurance within section 4 of Cap. 37, B.C. Stats. 1919. If authority is needed the case of *Rockmaker* v. *Motor Union Insurance Co.* (1922), 70 D.L.R. 360 may be cited, for although this is a decision on the Ontario Act, the language construed is very similar to that used in said section 4. When there is any variation, such variation emphasizes, I think, the correctness of my view. If that be so, then since the policy herein does not comply with the requirements of said chapter 37, it becomes subject to the statutory conditions, and these are binding on both the insurer and the insured: *Citizens Insurance Company of Canada* v. *Parsons* (1881), 7 App. Cas. 96. Hence the Insurance Company could, under section 17 of the schedule to Cap. 37, B.C. Stats. 1919, have elected to repair the car. They say they did by virtue of Exhibit 5. But Exhibit 5 is not such an election. It is merely an intimation to plaintiff by a garage company that they have been instructed by defendant Company "entirely without prejudice" to repair the car. The statement of defence contains no offer to repair the car.

Judgment

Then it is said that false and fraudulent statements were made when the insurance was effected. Defendant's agent inspected the car before placing the insurance and he swears he considered it a good risk for $2,800, and I hold he issued the policy not on the faith of anything said to him on behalf of plaintiff, but as a result of his own inspection. He drew up

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the policy and an error crept in, in stating the car was "model year 1915." Dicks, the real plaintiff herein, who negotiated for the policy, thought the car was model year 1914. In fact it was originally manufactured as a touring car in 1912. But the evidence is clear that so far as fire insurance is concerned, the year model is immaterial. What is relied upon is inspection by the insurance agent, and this is particularly true where the car is, as here, a rebuilt car and one that has, in the process of rebuilding, been entirely changed.

The actions of plaintiff Company in effecting this insurance were, I hold, honest throughout, and that, coupled with what is said above about inspection, answers all defences founded on what occurred when the policy was taken out.

As to the objection that the proof of loss describes the car as a 1915 year model, whereas Dicks who made the statutory declaration verifying the proof, believed at the time it was a 1914 year model, I hold that in so doing he was merely identifying the car as the one insured and to do so followed the description thereof which defendant's agent had put in the policy. There was no fraud or intention to deceive on the part of Dicks in making this declaration. I hold, however, that plaintiff is bound by the finding of the appraisers appointed pursuant to a term in the policy.

Judgment

There is no merit in the objection that the plaintiff's name is not correctly given in the policy, the word "limited" being omitted. Defendant's agent intended to insure and did insure the owner of the car whom Dicks represented. Said owner was the plaintiff Company. The cheque for premium was given by plaintiff Company and signed with its correct name. The error was made by the defendant's agent who drew up the policy.

There will be judgment for plaintiff for the sum of $2,123.95, and costs.

Judgment for plaintiff.

BUSCOMBE v. HOLDEN.

MCDONALD, J.

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BUSCOMBE v. HOLDEN

Will—Proof of—Opposed by husband—Contract between husband and wife before marriage—Evidenced by transfer of property and execution of former will—Proof of contract.

A deceased by her last will, left to her mother a property that had been transferred to her by her husband immediately after their marriage. In an action to prove the will, the husband alleged that by verbal agreement made with deceased prior to their marriage it was agreed that while the title to the property was to be placed in deceased's name by conveyance she was to hold the property as trustee for him and in the event of her death the property was again to become his, and pursuant to this agreement she executed a will in his favour shortly after their marriage for which he asks probate. The evidence disclosed that the conveyance of the property to the wife was not completed for registration purposes until the first will had been executed.

Held, that notwithstanding the documentary evidence in support of the husband's evidence when taking into consideration the various statements made by him as to his agreement with his wife as well as the results of his cross-examination at the trial and the position taken by his solicitor under his instruction, he has failed to establish the agreement upon which he relies.

ACTION to prove the will of Lillian Eltham Holden, deceased, dated the 14th of January, 1920. The defendant, William Holden, was married to Lillian Eltham Buscombe in 1911. He claimed that at the time of their marriage it was agreed that he should convey to her what is known as the "Pender Hotel property" in Vancouver, that he should have the rents and profits therefrom during his lifetime and that she should will the property to him. The property was duly conveyed to her and registered in her name and on the 2nd of December, 1911, she made a will in favour of her husband. Subsequently the husband received the rents and profits from the hotel and in 1915 the husband purchased a residential property in Point Grey and conveyed it to his wife. On the 14th of January, 1920, Mrs. Holden executed a will leaving the Pender Hotel to her mother, the residence in Point Grey to her husband and appointed her stepfather, Henry A. Buscombe, her executor. The defendant alleged the second will was not

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executed in the presence of two witnesses and that the deceased was not at the time of making the will of sound memory and understanding but on the contrary had been for weeks drinking to excess and was intoxicated and under the influence of liquor furnished by her stepfather, that the execution of the will was obtained by fraud, coercion and the undue influence of the plaintiff and by way of counterclaim the defendant alleged that by verbal arrangement made with the deceased previous to his marriage with her it was agreed and understood that while the title to the property was to be placed in deceased's name by conveyance in reality she was a trustee for him and in the event of her death the property was to become his, and pursuant to this agreement the deceased executed a will in his favour on the 2nd of December, 1911, and he asked to have probate of same. Tried by McDONALD, J. at Vancouver on the 5th to the 13th of February, 1924.

Statement

J. W. deB. Farris, K.C., and *Wismer,* for plaintiff.
Stockton, and *W. C. Thomson,* for defendant.

22nd February, 1924.

McDONALD, J.: In the year 1911 the defendant William Holden became affianced to Lillian Eltham Buscombe, daughter of the defendant by counterclaim, Marie Eltham Buscombe, and stepdaughter of the defendant by counterclaim, Henry Arthur Buscombe. He states that a day or two before his marriage, which took place on the 2nd of August, 1911, he learned that his proposed wife had a great admiration for one McMillan and that he thereupon broke off the engagement; but one day later, *viz.,* the day preceding his wedding, he saw his proposed wife and, succumbing to her entreaties, he agreed to carry out the proposed marriage and that as a term of that agreement he contracted to convey to her the property known throughout this action as the Pender Hotel property, worth now some $35,000, upon condition that he should have the rents and profits of this property during his lifetime and that his proposed wife should devise this property to him by her will, the conveyance not to be completed until the will should be executed. This phase of the matter will be dealt with later in this judgment.

Judgment

On the evening of the wedding the plaintiff handed to his wife a conveyance in duplicate of the Pender Hotel property, but the acknowledgment necessary for registration purposes was not completed. On or about the 30th of November, 1911, Mrs. Holden instructed Sir Charles Hibbert Tupper, K.C., at an interview between Sir Charles and the Holdens, to prepare her will devising all her estate to her husband and making him sole executor. At that interview she stated to Sir Charles that, in as much as she had received all her property from her husband, it was only right that she should devise it to him in case of her death. At the same time, Holden acknowledged the execution of the conveyance of the Pender Hotel property, and this conveyance was handed to Sir Charles in order that he should place his certificate thereon. Sir Charles took the conveyance with him, prepared the will pursuant to the instructions, completed the certificate upon the conveyance and forwarded the documents on December 1st, 1911, to Mr. Holden. As intimated at the trial, I am quite satisfied that this will was duly executed by Mrs. Holden, and there is no question as to her testamentary capacity at that date. Mrs. Holden executed the will in her husband's office and then took it home with her and, according to Mr. Holden, on that evening he handed her the certificate of title and conveyance, and the will remained in her possession.

Judgment

On the 13th of May, 1912, application was made to register the conveyance and certificate of indefeasible title 80555-B was issued to Lillian Eltham Holden. On the 16th of June, 1913, Mr. Holden, having become somewhat hampered for money, arranged that Mrs. Holden should execute a mortgage upon the Pender Hotel property to one Jones to secure a loan for $30,000. The money was duly advanced to Holden and, to secure Mrs. Holden, her husband executed a promissory note in her favour for $30,000 and a mortgage upon the Holden Block, which he owned, for $57,919.04.

In the year 1915 Holden purchased a residential property on 54th Avenue, in the Municipality of Point Grey, and the conveyance of the same was made to his wife. He states that, at that time, his wife asked him if the will already executed would

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In the year 1918 Mr. Holden and his wife and Mr. and Mrs. Buscombe all took up their residence in the house on 54th Avenue for a time. Later in that year Holden and his wife went to Wichita Falls, Texas, where Holden became interested in oil. They remained there during 1919, except for a short visit in Vancouver in the summer. They came back to Vancouver to spend the Christmas holidays in 1919 and lived with the Buscombes during this time. On the 3rd of January, 1920, Holden having paid off the mortgage on the Pender Hotel property and procured a discharge of same, took from Mrs. Holden a release of the mortgage on the Holden Block and took delivery up of his promissory note for $30,000. No explanation has been offered as to why the mortgage upon the Holden Block was for $57,919.04 instead of for $30,000. It is suggested that this was a scheme on Holden's part to defeat or delay his creditors or that the $27,919.04 represents the rents and profits which Holden had received from the Pender Hotel property. Holden absolutely denies both of these suggestions, but offers no explanation as to how the amount was made up. In any event, Holden has throughout received the rents and profits of the Pender Hotel property and made the necessary disbursements in connection with the maintenance and improvement of the building thereon.

Judgment

As stated above, on the 3rd of January, 1920, Mrs. Holden executed a release of the mortgage on the Holden Block. This was executed in the office of Mr. Potter, a solicitor of this Court, who had an office in the Holden Block. Mr. Potter states that, at this time, Mrs. Holden was particular to be assured that, before releasing her mortgage on the Holden Block, the mortgage which she had executed upon the Pender Hotel property, should be discharged.

On the 14th of January, 1920, the Holdens having arranged to leave on that evening for Wichita Falls, Mrs. Holden, some time about mid-day, went alone to the office of Mr. Potter, whom she had met in connection with the discharge of mortgage, and instructed him to draw her will, whereby she devised

the Pender Hotel property to her mother, Marie Eltham Buscombe, and the residential property on 54th Avenue to her husband and she appointed her stepfather, Henry Arthur Buscombe, to be her executor. Mr. Potter states that, at this time, Mrs. Holden was apparently an intelligent, normal woman. He gives in considerable detail the discussion that took place when he was receiving his instructions, which shew, if Mr. Potter is to be believed, that Mrs. Holden was, at that time, possessed of full testamentary capacity, that she knew what property she owned, who were the persons having a claim upon her bounty and the disposition which she wished to make of her property. The will was drawn with pen and ink upon a printed will form, and as it was about completed one Vincent, a client of Mr. Potter's, came to the door of the office (which, by the way, consisted of but one rather small room) and was asked by Mr. Potter to wait for a moment at the door. Vincent was then brought in and told that Mrs. Holden wished him to witness her will. I am satisfied upon the evidence that Mrs. Holden, Mr. Potter and Vincent signed the will at the same time and in each other's presence. I accept without reservation Mr. Potter's evidence. Vincent states that he did not know he was witnessing a will but was told that it was a power of attorney. I do not accept his evidence. His conduct throughout the whole matter lacked candour and his demeanour and the explanations offered in the witness box convinced me that he was not telling the truth.

Judgment

Much evidence was offered on Mr. Holden's behalf to shew that on the 14th of January, 1920, Mrs. Holden was incapable of making a will for the reason that she had, at that time, become a chronic alcoholic, and Mr. Holden blames this condition entirely upon her mother and stepfather. When moving for a commission to issue to take evidence in Wichita Falls, in regard to his wife's condition, when she was there in January, February and March, 1920, he swore an affidavit in which he stated that for three weeks prior to the 14th of January, 1920, his wife was in a continuous state of intoxication, and yet we find him on the 3rd of January, 1920, eight days prior to the 14th of January, 1920, accepting from his wife a release of a

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mortgage for $57,919.04. I can see no good purpose to be attained by analyzing at length the evidence of the various persons who gave testimony as to Mrs. Holden's mental condition in January, 1920. There is, of course, a great conflict in the evidence. Though I formed a very strong opinion at the trial, I have, in deference to the able and strenuous argument of Mr. *Stockton,* reserved judgment and again considered the evidence as carefully as I can, and I feel quite convinced upon the whole of the evidence that Mrs. Holden knew exactly what she was doing on the 14th of January, 1920, and that the document duly executed by her on that date is truly her last will and testament.

I have not overlooked the evidence of Mr. Holden when he states, and is corroborated by one Mrs. Harris, of Wichita Falls, that as late as July, 1922, when they were preparing to take a motor trip to Vancouver, his wife had in her trunk the will of 1911. No great good can be attained by speculating as to what her motive was in making known to her husband at that time (if she did so) that the will of 1911 was still in existence. If she did what I think she did, *viz.,* devise the Pender Hotel property to her mother, having formerly devised it to her husband, it is not at all unnatural that she should wish to conceal that fact from her husband.

As regards the evidence offered by Mrs. Beevors, as intimated at the trial, I discard this entirely. It is, I think, too fantastic to commend itself to reason.

Judgment

The medical evidence offered by Dr. Powers, of Wichita Falls, is entirely too vague upon which to base a finding of mental incapacity in January, 1920, particularly in the face of the evidence of Dr. McLaughlin, who, on three or four occasions between the 5th and 14th of January, 1920, saw Mrs. Holden in her mother's house when he was treating her mother for a serious illness, and never at any time noticed any signs that she was intoxicated or had even been drinking.

It was strenuously argued that inasmuch as certain evidence given by Mr. and Mrs. Buscombe in their examination for discovery and the evidence of their witness Mrs. Turner was not to be believed, it ought, therefore, to be assumed that the will of the 14th of January, 1920, was made at a time when Mrs.

Holden did not understand what she was doing and was under the influence of her mother and stepfather. It does, of course, seem almost incredible that if Mrs. Turner was told by Mrs. Holden of the execution of this will this information should have been withheld, as stated, from the mother, to whom the devise had been made; but it seems to me that whether this evidence is accepted or not it has nothing to do with the real question, *viz.*, whether Mrs. Holden was possessed of testamentary capacity on the 14th of January, 1920. As above stated, I have no doubt whatever that she was so possessed.

There remains to be considered the question of whether or not the will of the 14th of January, 1920, was executed in breach of a contract made by Mrs. Holden with her husband and, if it be found that such a contract did exist, whether or not such contract is binding in law. It is contended that, even if the verbal contract be proven, as set up by Mr. Holden, yet that it cannot prevail by reason of the provisions of the Statute of Frauds and by reason of the requirements of the British Columbia Evidence Act as to the necessity of the evidence of such a contract being corroborated. As I have reached a conclusion upon the facts in this connection I find it unnecessary to deal with the legal questions raised. Mr. Holden's statements, as to what this contract was, are set out in the following words:

In his examination for discovery, the following evidence is given:

"Now this is after you had decided to break off the engagement, that you had this discussion? In the office and at the house, yes,—at their house.

"Yes? I told her under no circumstances would I put any property in her name, for she might change her mind if she thought so much of this particular person, Harry McMillan.

"Yes, now—— And we talked it over and decided that we would make out this thing. She didn't want—she didn't want her brother-in-law—or not her brother-in-law, but Charles Buscombe and his wife to know anything about the reason for breaking off the engagement, and the reason why I didn't put the property in her name."

"You were still adhering to the idea then that you were not going to let her have the property absolutely? Most decidedly.

"Yes. Now, why were you adhering to that position? Because it was perfectly safe—it was perfectly safe of having it in her name because we had an understanding it was mine as long as I lived, in case she died first she didn't get the property.

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"That wasn't your original intention, was it, Mr. Holden? My intention was for her protection.

"No, but your original intention before you were married was to give her this property with no strings on it?

"Mr. *Stockton*: You mean before the engagement was broken?

"Mr. *Farris*: Yes.

"Yes, I think that was my intention."

Then followed some further questions and some discussion between counsel, and then—

"What was the arrangement which you made with Mrs. Holden? The arrangement that I made with Mrs. Holden was that we were to get the deeds completed, on the completion of the deeds she was to furnish me with a will conveying—willing all the property that I gave her—or put in her name, rather, back to me. She was perfectly satisfied.

"Now, when did you make that arrangement? We discussed it—oh, I don't remember the different times; eventually we——

"Before or after marriage? I think it was mentioned at the time she was in the office.

"Before marriage. Well, then, do I understand that you settled the thing then? No, I remember we discussed it several times before we completed the deal, and it was at Glencoe Lodge, I remember, one night, we decided to get Tupper—Sir Charles Tupper—to fix it up.

"Yes, and when you were living there—that was, of course, after you got back from your wedding trip? That was four months after.

"Now, I don't know when it was—whether it was before marriage or after, and I would like to get that information as to which it was, that you came to an understanding? I believe—we discussed it—I remember we discussed it in the office the day that she wanted me to reconsider it, and suggested doing what I did.

"Well, you said it was a bargain, was it—if you didn't, all right, I want that. I can't say definitely."

Judgment

At the trial Mr. Holden gives the following evidence:

"Just tell us what took place between the two of you in regard to a will? The will was discussed in the office the same time as the deeds of the Pender Block.

"Mr. *Farris*: I did not get when this was.

"Mr. *Stockton*: A day or two before the wedding? A day or two before the wedding.

"Just tell us what the discussion was, and just what was done? Well, previous to that I had practically decided to give her the Pender Block outright, and a day or two before the wedding, probably two days before the wedding I had reasons to change my mind, and I broke off the engagement, got the ring back and I gave her back the one she had given me as a present. The next day she came to the office and that was when the will was discussed and the deed to the Pender Hotel. I refused to carry out my previous intention owing to some dissatisfaction.

"On this occasion when she was in the office again, you patched up your engagement? We did.

"Now what took place about the will and the Pender Hotel property? We came to an agreement there.

"What was that agreement? The agreement was that I was to make out this deed the way I had intended with the exception of the notarying of them, and that they were to be handed to her the next night, after the wedding, up at her house.

"You are not telling us what the agreement was? You are telling us the way the agreement was to be carried out. The agreement we had at that time was that she was to make the will, that was after the engagement was made up.

"Renewed? Renewed, yes. She was to make a will leaving her personal property and my building that I was putting in her name, to me; that I was to have all the revenue from the property, and the property was to remain mine as long as she lived. I was to have the full benefit of it."

The matter is discussed in other parts of Mr. Holden's evidence, and I would gather from his other evidence that "she" in the last answer should read "I."

On the 28th of June, 1923, Mr. Holden's solicitor wrote to the Buscombes' solicitor to the following effect:

"We are instructed by Mr. Holden to advise Mr. and Mrs. Buscombe that apart altogether from the dispute as to the alleged will, Mrs. Holden had no beneficial interest in this property and same cannot be considered or dealt with as part of her estate. Although Mrs. Holden was registered as the owner she was merely holding same in trust for Mr. Holden who was and is the sole beneficial owner."

Judgment

Mr. *Stockton* contends, and with considerable force, that, inasmuch as the conveyance of the Pender Hotel property was not completed for registration purposes until the will of 1911 was executed, Mr. Holden's evidence is borne out by the documents, still, taking into consideration the various statements made by Mr. Holden as to his agreement with his wife, as well as the results of his cross-examination at the trial and the position taken by his solicitor upon his instructions, I am satisfied that he has failed to establish the agreement upon which he relies.

There will be judgment accordingly for the plaintiff in the action and the counterclaim is dismissed.

Judgment for plaintiff.

HOWAY, CO. J.

1924

March 14.

LANCASTER v. VAUGHAN

LANCASTER v. VAUGHAN. (No. 2).

Maintenance—Illegitimate child—Children of Unmarried Parents Act—Affidavit as to paternity—"Really"—Omitted—Adopted statute—Settled interpretation in another Province—B.C. Stats. 1922, Cap. 9, Secs. 24 and 26.

In an action brought for necessaries supplied to an infant child under section 24 of the Children of Unmarried Parents Act it appeared that the affidavit filed by the mother stated that the defendant was the father of said child, not "really the father" as required by section 26 of said Act.

Held, that the omission of the word "really" from the affidavit was fatal and the action should be dismissed.

Section 26 of the Children of Unmarried Parents Act subject to necessary alterations, is an exact copy of sections 3 and 4 of chapter 131, R.S.O. 1877, which were reproduced in subsequent revisions of the Ontario statutes with slight alterations.

Held, that where a statutory provision is adopted from another jurisdiction after having been in force there for a long period, the judicial decisions of that jurisdiction should be followed unless there are strong reasons for a contrary view.

Statement

ACTION against Dennis Vaughan under section 24 of the Children of Unmarried Parents Act as the reputed father of an infant child for necessaries supplied said infant. One Elizabeth Fox gave birth to a male child on the 6th of August, 1923, and she alleged that Dennis Vaughan was the father of the child. The plaintiff Charles Lancaster had supplied certain necessaries to the child and mother for which the action was brought. The further necessary facts are set out in the reasons for judgment. Tried by HOWAY, Co. J. at New Westminster on the 7th of March, 1924.

Kent, for plaintiff.
Sullivan, for defendant.

14th March, 1924.

Judgment

HOWAY, Co. J.: This is an action against the defendant as reputed father for necessaries supplied to an infant child under section 24 of the Children of Unmarried Parents Act.

The action comes before me under an issue raising a point of

law consented to by counsel for both parties for the purpose of saving the expenses of a regular trial. The point of law raised is in the following words:

"The plaintiff asserts and the defendant denies that the provisions of section 26 of the Children of Unmarried Parents Act, B.C. Stats. 1922, Cap. 9, under which statute this action is brought, have been complied with and that this action can be sustained."

Section 26 provides that:

"No action shall be sustained under the last two preceding sections unless it is shewn upon the trial thereof that while the mother of the child was pregnant, or within six months after the birth of her child, she did voluntarily make an affidavit in writing before some one of His Majesty's justices of the peace declaring that the person afterwards charged in the action is really the father of the child, nor unless she deposited the affidavit, within the time aforesaid, in the office of the registrar of the County Court nearest the place in which she then resides; but the affidavit shall not be evidence of the fact of the defendant being the father of the child."

This section is, with the necessary verbal alterations, an exact copy of R.S.O. 1877, Cap. 131, Secs. 3 and 4, reproduced in R.S.O. 1887, Cap. 138, and with slight changes again enacted in R.S.O. 1914, Cap. 154.

Two objections are taken to the affidavit which has been filed, (a) that it was not deposited by the mother herself but by her solicitor; (b) that the affidavit does not comply with the section. Inasmuch as I am of opinion that the second objection is fatal, I am dealing with it entirely. The affidavit so far as concerns this objection is as follows:

"2. On the 6th day of August, 1923, I gave birth to a male child and I say that Dennis Vaughan of Fern Ridge in the Province of British Columbia is the father of such child [which] was born at Fern Ridge in the Province of British Columbia."

Judgment

It will be observed that the word "really" which is in the section is omitted from the affidavit. The contention is that such omission is fatal. This very question (of the effect of the omission of the word "really") came before the Court of Queen's Bench in Ontario in 1867 in *Jackson* v. *Kassel,* 26 U.C.Q.B. 341, and it was then held that such an affidavit was not a compliance with the conditions precedent laid down by the statute. Draper, C.J., who delivered the judgment of the Court, while admitting that it is perhaps difficult to point out what difference in substance there is between swearing that A is the father of a certain child, and swearing that A is really the father, goes on to say:

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> "However, whatever be the reason, the language of the Act is plain and also peremptory, and we are not prepared to hold that the oath she has taken is the oath which the statute requires."

That decision was cited with approval in *Northcote* v. *Brunker* (1887), 14 A.R. 364 at p. 378, and was followed in 1918 by the Appellate Division of the Supreme Court of Ontario in *Broderick* v. *McKay* (1917), 39 D.L.R. 795. In that case again the word "really" was omitted from the affidavit, and the omission was held to be fatal. It will be seen that this is the consistent construction of the statute in Ontario for fifty-five years before it was copied into our statutes. It is urged by the defendant that that construction should be adopted here, and I am reluctantly forced to that conclusion.

In analogy to the rule laid down in *Trimble* v. *Hill* (1879), 5 App. Cas. 342 it has been declared in *B. & R. Co.* v. *McLeod*. (1914), 18 D.L.R. 245 that,—

Judgment

> "where a statutory provision is adopted from another jurisdiction after having been in force there for a long period, the judicial decisions of that jurisdiction upon its interpretation should be followed unless there are very strong reasons for a contrary view."

See also on this point *Ward* v. *Serrell* (1910), 3 Alta. L.R. 138; *Witsoe* v. *Arnold and Anderson Ltd.* (1914), 15 D.L.R. 915, and *Bennefield* v. *Knox* (1914), 17 D.L.R. 398.

I am therefore prepared, as already stated, to hold that the provisions of section 26 have not been complied with. It follows, under the terms of the submission, that this point being determined in the defendant's favour, the action must be dismissed and with costs.

Action dismissed.

IN RE GOVERNMENT LIQUOR ACT AND THE RAINIER BOTTLING WORKS LIMITED.

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Jan. 31.

IN RE GOVERNMENT LIQUOR ACT AND RAINIER BOTTLING WORKS

Government Liquor Act—Sale of beer for exportation—Stored in vessel near uninhabited island—Seizure—Application by vendor to recover under section 68 of Act—"Owner"—Passing of property from vendor to purchaser—R.S.B.C. 1911, Cap. 203, Secs. 6, 25 and 27—B.C. Stats. 1921, Cap. 30, Sec. 68.

The Rainier Bottling Works Limited having a licence for the manufacture of beer obtained orders for a quantity of beer for export to the United States from C. and H. who would arrange for the shipping. The beer was taken from the Company's brewery and delivered at Vancouver in boats owned by E. who was employed by C. and H. as carrier from Vancouver to Chatham Island. The only connection alleged between E. and the Company was that E. was not to deliver the beer to C. and H. until he had been convinced the beer was paid for. E. stored the beer on a vessel of his own at Chatham Island where it remained in his charge and while awaiting the arrival of C. and H. the cargo was seized by officers. An application by the Company under section 68 of the Government Liquor Act for the return of the beer as owner thereof was dismissed by the stipendiary magistrate at Victoria on the ground that the Company was not the "owner" as the property had passed to C. and H. and on appeal by way of case stated the decision of the magistrate was affirmed.

Held, on appeal, affirming the decision of MURPHY, J., that when the goods were delivered to the purchasers' agent without reservation not only the property in the goods but the possession of the goods passed and the vendor has no further interest in them upon which an application under section 68 can be founded.

Per MARTIN, J.A.: When people engage in this kind of business they must realize that their operations cannot be viewed as transactions in the ordinary course of business from which Courts of Justice can draw the ordinary inferences as between reputable merchants, and if they persist in so engaging they are likely to have those inferences drawn against them which their conduct invites.

APPEAL by the Rainier Bottling Works Limited from the decision of MURPHY, J. of the 15th of November, 1923, dismissing an appeal by way of case stated from the judgment of the stipendiary magistrate at Victoria on the 12th of July, 1923, dismissing an application by the Rainier Bottling Works Limited under section 68 of the Government Liquor Act, claiming

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ownership of a quantity of beer seized by constables on a vessel known as the "Emma H" at Chatham Island. The Rainier Bottling Works Limited, licensed to manufacture and export beer, received an order in Vancouver from one Thomas Clark on the 3rd of May, 1923, for 51 barrels of beer for export to the United States and on the 15th of May a further order from one Herb Halliwell for 15 barrels. Both orders included a statement that applicants would arrange for shipping the beer to the United States. The beer was taken from the Company's brewery and delivered on board a boat or boats, the property of one Emery who was the carrier employed by Clark and Halliwell to transport beer from Vancouver to the Chatham Islands. Emery was agent for Clark and Halliwell, the only connection alleged between Emery and the Rainier Company being that Emery was not to deliver the beer to Clark and Halliwell until he was convinced that Clark and Halliwell had paid for it. There was no reference as to when the beer was to be paid for. Emery transported the beer as to both orders on the 3rd and 16th of May respectively to Chatham Island and stored the beer on the vessel "Emma H" that he had towed over from Vancouver, and the beer remained on the "Emma H" until the 2nd of June when seized by the constables. The magistrate held that the Rainier Company was no longer the owner of the beer as the property had passed to Clark and Halliwell and their application was dismissed. It was held by MURPHY, J. on a case stated by the magistrate that he was right in so holding. The Rainier Bottling Works Limited appealed on the ground that on the evidence they should have been held to be the owner of the goods and entitled to possession thereof.

Statement

The appeal was argued at Victoria on the 30th and 31st of January, 1924, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Higgins, K.C., for appellant: The goods never passed. Emery still had them when seized and he was not to deliver to Clark and Halliwell until paid for and to that extent Emery was our agent. The facts bring us within section 6 of the Sale of Goods Act; see also sections 25 and 27. Assuming the goods did pass we had a sufficient interest to justify this

Argument

application as the goods were not paid for: see *Dodsley* v. *Varley* (1840), 12 A. & E. 632.

Maclean, K.C., for respondent, was not called on.

MACDONALD, C.J.A.: The appeal should be dismissed. I found my judgment upon this, that the learned magistrate has found that the property passed to the purchaser. Now it might be said that while the property could pass, the possession had not passed; but when we look at the case we find that the purchasers themselves have said this:

"That I will arrange shipping of said 51 barrels of beer to the United States and I declare further that none of the said 51 barrels of beer shall be delivered or consumed within the Province of British Columbia. That I am solely responsible for any action of any carrier employed by me for export of said 51 barrels of beer."

That is the purchaser's own declaration, he is responsible for Emery; Emery is his agent and he is responsible for the conduct of Emery. What does the learned magistrate find, if anything, as to possession? I submit on that point that he does not find anything, but simply recites this:

"The only connection alleged between Emery and the Brewing Company was that Emery was not to deliver over the beer to Clark and Halliwell at the Chatham Islands, until he had been convinced that Clark and Halliwell had paid for the same."

He recites that as an allegation, he has made no finding at all. Now then, that leaves the case in this way: We have the contract of purchase, which sets out that the beer is to be delivered to Emery, the carrier of the purchaser. When goods are delivered to the purchaser, or to the purchaser's agent, and there is no reservation made, not only the property in the goods but the possession of the goods passes, and the vendor has no further interest in the goods as such, and has no lien. And that is what happened here, on the facts as stated in the case.

MACDONALD, C.J.A.

Now the only thing that is in dispute, the only thing that we can deal with in this case, is the contest before the magistrate, which was provided for in section 68. The seizure was made by the constables; the claimants, the Brewing Company, made a claim to the goods; the only issue involved there was, are you the owner or are you not? Clearly, whoever may be the owner, they were not the owners. They were neither entitled to the property nor to the possession of the goods. Some person

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else may have been, but that person was the only one who could appear before the magistrate and make out a case.

On that I think the appeal should be dismissed, and the answer to the questions should be in the affirmative.

IN RE GOVERNMENT LIQUOR ACT AND RAINIER BOTTLING WORKS

MARTIN, J.A.

MARTIN, J.A.: In my opinion, even supposing that the magistrate had found that Emery was not to allow delivery to take place until he had been convinced that the purchasers had paid for the goods—even if that is to be considered as having been found by the magistrate as a direction to or condition imposed upon Emery—yet under all the surrounding circumstances I have no doubt whatever that the magistrate would be entitled to find, as he has found, that notwithstanding such direction or condition the property had in fact passed to them, and therefore the vendors could have no claim or right to this consignment whatever. I shall not detail the circumstances which convince me in that view, because I have recited them during the argument. I will only repeat, to make this clear once more, that when people engage in such very exceptional and suspicious circumstances in a business of this description, they must realize that their operations cannot be viewed as transactions in the ordinary course of business from which Courts of Justice can draw the ordinary inferences and view them in the ordinary light as between reputable merchants, and, therefore, they must realize if they do persist in engaging in such operations they are likely to have those inferences drawn against them which their conduct invites. I would dismiss the appeal.

GALLIHER, J.A.

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

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: In my opinion the appeal cannot succeed. This case has to be viewed, of course, in the category of there being no conviction. If there had been a conviction, other considerations would arise and forfeiture would, perhaps, not be a difficult matter at all, but would in due course follow. There was not a conviction here, therefore section 68 and subsections have to be considered.

With respect to the articles having been seized, there being

jurisdiction to seize, there is no advantage in going into the question as to whether or not the inspector proceeded rightly. If called upon to say anything upon this point, I could not say the inspector proceeded wrongly. It seems to me, whether he proceeded rightly or wrongly, under section 68 and the subsection, it is only one person that can come in and claim the liquor, and that is the owner. At one point during the argument I thought that possession in itself might give the right to the goods, but that apparently is untenable. Subsection (3) of section 68 reads:

"If within thirty days from the date of its seizure no person by notice in writing filed with the Board claims to be the owner of the liquor, the liquor and all packages containing the same shall *ipso facto* be forfeited to His Majesty, and shall forthwith be delivered to the Board."

No right of property less than ownership would seem to be recognized by the statute. The owner is the person who must come in and make the claim, not one who is otherwise entitled to possession of the goods. Subsection (4) reads:

"If within the said time any claimant appears, it shall be incumbent upon him within that time, and after three days' notice in writing filed with the Board stating the time and place fixed for the hearing, to prove his claim," etc.

MCPHILLIPS, J.A.

The claimant must be the owner. Therefore we arrive at this stage in the inquiry: Who is shewn to be the owner upon the facts here? It is contended that there was an agreement between the vendors and vendee in the present case, that the property in the goods was not to pass until payment (and I take Mr. *Higgins's* statement that it was proved below and that such an arrangement is valid under the Sale of Goods Act, it might then well be that title did not pass) yet we have no finding of fact to that effect. I would have been disposed to have sent the case back for restatement, but in view of the very firm opinions formed by my learned brothers to the contrary, I do not wish to formally dissent, nor do I formally dissent.

MARTIN, J.A.: I may add that the reason which induced me not to yield to the suggestion that the case should be sent back for restatement upon the point as to Emery's authority is that I have assumed that point in favour of Mr. *Higgins's* client, therefore it would be unnecessary to do so.

MARTIN, J.A.

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Mr. *Higgins*: As to the costs of this appeal?

MACDONALD, C.J.A.: We give you no costs. The Crown Costs Act applies.

Appeal dismissed.

Solicitor for appellant: *Frank Higgins.*
Solicitors for respondent: *Elliott, Maclean & Shandley.*

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1923

Nov. 2.

REX v. LOO LEN

REX v. LOO LEN. (No. 1).

Criminal law—Conviction under The Opium and Narcotic Drug Act—Alien—Held for deportation—Habeas corpus—Can. Stats. 1910, Cap. 27, Sec. 43; 1911, Cap. 17, Sec. 10B; 1922, Cap. 36, Sec. 5—B.C. Stats. 1920, Cap. 31, Sec. 2.

The accused, an alien, having been convicted and sentenced to imprisonment for having opium in his possession was on the termination of his sentence held for deportation under section 10B of The Opium and Narcotic Drug Act, his release having been refused in *habeas corpus* proceedings.

Held, on appeal, *per* MACDONALD, C.J.A. and EBERTS, J.A.: That the proceedings are criminal and there is no jurisdiction to hear the appeal.

Per MARTIN, GALLIHER and MCPHILLIPS, JJ.A.: That the proceedings being civil and not criminal, there is the right of appeal under section 2 of the Court of Appeal Act but the appeal should be dismissed on the merits.

Statement

APPEAL by defendant from the order of MORRISON, J. of the 12th of October, 1923, dismissing his application for a writ of *habeas corpus* with *certiorari* in aid. The appellant was convicted under The Opium and Narcotic Drug Act, as amended by Cap. 36, Can. Stats. 1922, and upon the termination of his imprisonment he was detained under said Act (section 10B) for deportation.

The appeal was argued at Vancouver on the 29th of October, 1923, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Mellish, for appellant: The magistrate had no power to impose hard labour. We have an appeal even in a criminal case, but if a man is in gaol improperly and an application is made to free him that is a civil proceeding, not criminal, and there is the right of appeal: see *Rex* v. *Morris* (1920), 53 N.S.R. 525; *Rex* v. *Page* (1923), 53 O.L.R. 70. The result is now that he is held under a void commitment; the conviction and sentence cannot be separated. An inmate of a prison must be properly an inmate: see *Rex* v. *Cuhule* (1923), 2 W.W.R. 336; *Rex* v. *Clark (No. 2)* (1906), 12 Can. Cr. Cas. 17; *Rex* v. *McIver* (1903), 7 Can. Cr. Cas. 183; *Re Gevry* (1906), 12 Can. Cr. Cas. 344; *Poulin* v. *City of Quebec* (1907), 13 Can. Cr. Cas. 391; *Ex parte Carmichael* (1903), 8 Can. Cr. Cas. 19.

E. Meredith, for the Crown: The case of *In re Immigration Act and Mah Shin Shong* (1923), 32 B.C. 176 is the same as this, where it was held the proceedings were criminal and there was no appeal. There was no jurisdiction to order *habeas corpus* as there was no affidavit of the applicant in support: see English & Empire Digest, Vol. 16, p. 258; *Rex* v. *Home Secretary—Ex parte O'Brien* (1923), 39 T.L.R. 487; *The Canadian Prisoners' Case* (1839), 3 St. Tri. (N.S.) 963 at p. 1031; *Case of the Sheriff of Middlesex* (1840), 11 A. & E. 273. If the Crown makes a good return that sets up a *prima facie* case that must be met and his material is not sufficient: see Halsbury's Laws of England, Vol. 10, p. 68, par. 145; *Reg.* v. *Batcheldor* (1839), 1 P. & D. 516; English & Empire Digest, Vol. 16, p. 256, No. 585 (3), (4); *Reg.* v. *Blaby* (1894), 2 Q.B. 170 at p. 172. Argument

Mellish, in reply.

Cur. adv. vult.

2nd November, 1923.

MACDONALD, C.J.A. (oral): I adhere to the opinion which I expressed in *In re Immigration Act and Mah Shin Shong* (1923), 32 B.C. 176, which means that the appeal should be quashed. MACDONALD, C.J.A.

MARTIN, J.A. (oral): In my opinion this Court has jurisdiction to entertain this appeal on the ground that it is a civil MARTIN, J.A.

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proceeding, and I remain of the same opinion as expressed in *In re Immigration Act and Mah Shin Shong* (1923), [32 B.C. 176]; 1 W.W.R. 1365, in which I agreed with the judgment of my brother GALLIHER. If it is possible, I shall give my reasons in writing, as the matter is of considerable consequence. I shall take the first opportunity before long to put my views more exactly in writing.

GALLIHER, J.A.

GALLIHER, J.A. (oral): I agree in dismissing the appeal. I adhere to the opinion expressed by me in *In re Immigration Act and Mah Shin Shong* (1923), 32 B.C. 176 as to the jurisdiction of this Court to entertain the appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A. (oral): The question, in my opinion, is one which is determined by the statute itself. Of course, there has to be the agency of the minister of justice, and the minister of immigration, but finally the forum which determines upon the deportation is the board of inquiry; and following the view as expressed by Mr. Justice Anglin in a recent case the test as to whether the matter is criminal or civil is this: Could the board of inquiry have found this person guilty of a crime? The answer must be in the negative. Now apply this test to the board of inquiry which is making the final deportation order. It could not find this man guilty of any crime and therefore the matter could not be criminal. The board of inquiry's jurisdiction was to determine (1) whether or not he was an alien; (2) whether or not he had ever been an inmate of a prison. Those two things being found, then there is a statutory mandate, but that statutory mandate is subject to discretionary powers and to be implemented by the minister of justice, and all the machinery provided by Parliament was put into operation and given effect to, and the board of inquiry made the requisite inquiry. They found him to be an alien; they found that within three years of his arrival in Canada he was an inmate of a prison, and finding that, they in effect say to him, "we told you when you came to Canada that if within three years you were found to have been an inmate of a prison you would be liable to deportation." What answer has this alien who comes into Canada with that

statement made to him at the border line? No answer, in justice, no answer at all. He has done that which he was told at the outset if he did do deportation might follow, and therefore it is not a case of linking up the deportation with criminality, it cannot be that because the man is no longer a criminal. He has served his term of imprisonment; he has expiated his crime. Under the law we well know it would be a slanderous statement to call him a criminal. He has exculpated his offence, but having been an inmate of a prison, although not now a criminal, he may be deported. Therefore the order is right and proper, and it is not a case for *habeas corpus* entitling him to his liberty. There is the right to an appeal but the appeal is without merit, the deportation order is valid and regular and the appeal should stand dismissed.

MCPHILLIPS, J.A.

EBERTS, J.A. (oral): I adhere to the opinion I gave in the case of *In re Immigration Act and Mah Shin Shong* (1923), 32 B.C. 176, in which I was of opinion the Court had no jurisdiction to entertain the appeal. I am of the same opinion in this case, because I feel it is almost on all fours with the *Mah Shin Shong* case.

EBERTS, J.A.

Appeal dismissed.

COURT OF APPEAL

1924

March 4.

CHANNELL v. ROMBOUGH

CHANNELL LIMITED AND CHANNELL CHEMICAL COMPANY v. ROMBOUGH *ET AL.*

Trade-marks—A polish called "O-Cedar"—Small portion of oil of cedar an ingredient for perfume purposes—Description of goods—Registration —Name calculated to deceive public—Evidence of—R.S.C. 1906, Cap. 71, Sec. 11.

The plaintiffs, living in Chicago, U.S.A., commenced the manufacture and sale of "O-Cedar Polish" and "O-Cedar Polish Mops" used to polish hardwood floors and furniture. In 1908 and 1913 they extended their business by manufacturing the goods in Canada and registered the specific trade-mark "O-Cedar" as applied to the sale of furniture polish, polish-mops and dusters under the Trade Mark and Design Act. They spent large sums in advertising and their sales extended throughout the different Provinces. In 1914 the defendant's predecessors commenced the manufacture and sale of polish and mops in British Columbia under the name of "Cedarbrite." An action for an infringement of the plaintiffs' trade-mark, for an injunction and damages was dismissed.

Held, on appeal, affirming the decision of MACDONALD, J., that the word "O-Cedar" as applied to a polish containing oil of cedar, one of the qualities of which as distinguished from other polishes is the scent of cedar, cannot be the subject of a trade-mark.

Held, further, that the word "Cedarbrite" is so dissimilar to that of "O-Cedar" that it is not calculated to deceive the public on the sale of polish or mops nor was there any intention on the part of the defendants to do so.

APPEAL by plaintiffs from the decision of MACDONALD, J. of the 29th of October, 1923 (reported 33 B.C. 65), in an action for damages for wrongfully using or imitating the plaintiffs' trade-mark and for an injunction. Charles A. Channell who went from Quebec to Chicago in 1906 started the manufacture of a polish called "Orient Spray." In 1907 he changed the name to "O-Cedar Polish" and in the following year he manufactured "O-Cedar Polish Mops." He founded the Channell Chemical Company in Chicago in 1908. This Company sold these goods in the United States from that time and developed an exclusive business. In 1912 the Company registered the trade-mark "O-Cedar" in the United States. One of the Channell Brothers went to Toronto in 1913 and incorporated

Statement

"Channell Limited" in Canada and registered the specific trade-mark "O-Cedar" as applied to the sale of furniture polish and polish-mops and dusters in accordance with the Trade Mark and Design Act and the Canadian Company spent large sums in advertising and sold the polish, mops and dusters in Canada, developing a large trade. With relation to the defendants, one Alexander Traill commenced the manufacture of a polish called "Jay Polish" and polish-mops in Vancouver, B.C., and in 1914, after experimenting for improvements, perfected the formula now used by the defendants in the manufacture of "Cedarbrite Polish." He also called the mops "Cedar Mops" and later on "New Improved Cedar Mops." Traill formed the Dust Control Company to take over the business and carried it on until 1920 when he died and his wife, in August, 1921, as executrix of his estate sold the business of the Dust Control Company to one A. D. Sturrock who immediately assigned to the Middle West Manufacturing Company Limited. Mrs. Traill (later Mrs. Rombough) took the Company back in June, 1922, as the purchasers failed to pay for the business, and has since carried it on as the Dust Control Company. The appearance of the goods as produced is almost the same as that of the plaintiff Company. The plaintiffs had their own goods for sale in British Columbia since 1914 but prior to that had sent them to retailers in British Columbia for sale in their own stores. On the trial the action was dismissed. The plaintiffs appealed claiming: (1) They were entitled to register "O-Cedar"; and (2) the defendants in the sale of their goods were imitating the plaintiffs' goods and were deceiving the public into thinking they were getting the plaintiffs' goods.

Statement

The appeal was argued at Victoria on the 8th, 9th and 10th of January, 1924, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

A. H. MacNeill, K.C., for appellants: The word "O-Cedar" was first used in 1907 and continued in use until 1912 when it was registered. On registration under the Trade Mark and Design Act see Smart on Trade-Marks and Designs 36; Sebastian's Law of Trade Marks, 5th Ed., 367; *New York Herald Co.* v. *Ottawa Citizen Co.* (1909), 41 S.C.R. 229. On the

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question of similarity and deception of general public see *Crawford* v. *Shuttock* (1867), 13 Gr. 149; *Davis* v. *Kennedy, ib.* 523; *Partlo* v. *Todd* (1888), 17 S.C.R. 196; *Standard Ideal Company* v. *Standard Sanitary Manufacturing Company* (1911), A.C. 78; *Fruitatives, Ltd.* v. *La Compagnie Pharmaceutique* (1912), 8 D.L.R. 917 at p. 919; *In re Trade-Mark No. 58,405, "Bovril"* (1896), 2 Ch. 600 at p. 608. The word must be taken as a whole: *Provident Chemical Works* v. *Canada Chemical Co.* (1902), 4 O.L.R. 545; *Groff* v. *The Snow Drift Baking Powder Co. of Brantford, Ontario* (1889), 2 Ex. C.R. 568. Snow flake as applied to baking-powder is a good trade-mark and registerable: see also *Radam* v. *Shaw* (1897), 28 Ont. 612; *Smith* v. *Fair* (1887), 14 Ont. 729 at pp. 732-3; *Reinhardt* v. *Spalding* (1879), 49 L.J., Ch. 57. As to the essential qualities of a trade-mark see *M'Andrew* v. *Bassett* (1864), 33 L.J., Ch. 561 at pp. 567-8; *Raggett* v. *Findlater* (1873), L.R. 17 Eq. 29 at p. 42; *Boston Rubber Shoe Co.* v. *Boston Rubber Co. of Montreal* (1902), 32 S.C.R. 315 at p. 332; *Reddaway* v. *Banham* (1896), A.C. 199 at p. 209.

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R. M. Macdonald, for respondents: If "O-Cedar" is descriptive it is not registerable and it is a question of fact whether it is descriptive or not. The defendants' business has been going on to the knowledge of the plaintiffs for many years and there has been a number of changes in ownership; it is too late to bring this action: see Halsbury's Laws of England, Vol. 13, p. 171, par. 206. The plaintiffs did no business in British Columbia up to 1914 so as to create a demand for these goods so there was no foundation laid for the public to be deceived by the defendants' sales. As to the letter "O" before "Cedar" taking the word "Cedar" out of the category of description see *Kirstein Sons & Co.* v. *Cohen Bros.* (1907), 39 S.C.R. 286. The meaning of "Cedar" is not dislodged by the letter "O" being put in front of it: see *In re Farbenfabriken Application* (1894), 1 Ch. 645 at pp. 652-4; *Eastman Photographic Materials Company* v. *Comptroller-General of Patents, Designs, and Trade-marks* (1898), A.C. 571. Cedar is a very important characteristic of both the plaintiffs' and defendants' commod-

ities. It is admitted cedar applies to the perfume. On the question of deception the polishes and mops are sold together: Halsbury's Laws of England, Vol. 27, p. 771; *Reddaway* v. *Banham* (1896), A.C. 199. As to what is an inventive word see *In re "Uneeda" Trade-mark* (1901), 1 Ch. 550; *American Druggist* v. *Boyer* (1923), Ex. C.R. 65; *In re Leonard & Ellis's Trade-mark* (1884), 26 Ch. D. 288.

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MacNeill, in reply: If "O-Cedar" is capable of registration then anyone who takes a portion of that word interferes: see *Barsalou* v. *Darling* (1882), 9 S.C.R. 677.

Cur. adv. vult.

4th March, 1924.

MACDONALD, C.J.A.: This is an action for damages for wrongfully imitating a trade-mark.

The plaintiffs manufacture a polish and mop which they distinguish by a combination of a letter and word, "O-Cedar," for which they have a trade-mark. The defendants manufacture and sell similar articles under the name "Cedarbrite," and the plaintiffs claim that this is an infringement of their said trade-mark.

It is well established that a person cannot obtain the exclusive right to use a common word. It is claimed that this polish, containing one per cent. of oil of cedar, gives a delightful cedar perfume to the articles upon which it is used, hence one of the attributes of cedar is one of the principal virtues claimed for the polish, namely, its scent. It is, of course, not contended by the plaintiffs that no one else might manufacture a polish containing oil of cedar for the purpose of giving a like scent to it. It is the name alone which the plaintiffs claim the exclusive use of. I am not sure that an exclusive use of the word or combination "O-Cedar" could not be obtained to denote articles of a particular manufacture, where the articles had no property of cedar. It is, of course, unnecessary to decide this, because I am clearly of opinion that the word "O-Cedar" as applied to the polish containing oil of cedar, the principal virtue of which as distinguished from other polishes is the scent of cedar, cannot be the subject of a trade-mark.

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This, of course, would dispose of the appeal, but I wish to rest my decision upon another ground as well. It is clearly established that one person cannot, with the intent of defrauding the public, use a name denoting the manufacture of someone else, when the name used is calculated so to deceive the public. Now, in this case, it is clear to me that the word "Cedarbrite" is not calculated to deceive the public, nor was it so intended. I do not refer to the evidence of the use of oil of cedar in the manufacture of polish, even before its use by the plaintiffs. I am content to rest my opinion upon the dissimilarity of the two names. I do not think that any reasonable person would be deceived by the word "Cedarbrite," denoting a polish or mop, into believing that he or she was buying "O-Cedar" polish or mop. There is no sufficient evidence in this case that any such deception either did or was likely to occur. On this ground also, I think the plaintiffs' case fails.

MACDONALD, C.J.A.

Many authorities have been cited to us on both sides, which I will not particularly allude to, since each case must be decided on its own facts. I do not find the cases cited to be useful, except for the general principles they lay down applicable to cases of this sort. In this case there is no dispute as to the principles applicable to the decision of it.

MARTIN, J.A.: I am of opinion that the learned judge below has reached the right conclusion, but without adopting his reasoning in its entirety. I should, indeed, be prepared to go further than he has gone, were it necessary to do so, with respect to the importance that the defendant might well attach to the general use of the common word "cedar" as descriptive of various well-known properties that it includes in the public mind. But I shall content myself by repeating what I pointed out during the argument, and which is something of much importance, though it was strangely overlooked, *viz.*: that "this trade-mark (specific) (is) to be applied to the sale of furniture polish, polish mops and dusters," which on the face of it would, in any event, have no application to its use in other respects, such as for a floor polish, though the evidence shews it is in wide and general use for that purpose.

MARTIN, J.A.

GALLIHER, J.A.

GALLIHER, J.A.: After a careful reading of the authorities

and consideration of the able argument of Mr. *MacNeill,* I am unable to disagree with the carefully reasoned judgment of the learned judge below.

I would dismiss the appeal.

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McPHILLIPS, J.A.: This appeal raises a question of law of some complexity. The appellants are the owners of a registered trade-mark "O-Cedar" in the United States of America and Canada, being a specific trade-mark, and also the owners of Canadian Patent No. 150322 and Canadian Patent No. 153141, being useful improvements in mops and mop heads, both of which improvements are embodied in the "O-Cedar" mop, and the appellants are manufacturing and selling mops and polish.

The action was one for an injunction restraining the defendants from the further use of the word "Cedar" as applied to the manufacture and sale of mops, polishes and oils, and from printing, impressing, or applying the same to any wrapper, package, carton or bottle containing mops, polishes or oils manufactured, sold or put up by them, and for damages or, in the alternative, an account of profits made by the defendants from the fraudulent imitation and passing off of goods in fraud of the appellants and to their injury. The evidence adduced at the trial is most voluminous, but a careful study of it would not indicate any intention to fraudulently appropriate the specific trade-marks or patents of the appellants or intention of passing off or intention to deceive the public, and it would not appear that any deception did take place, and the offers made by the defendants to otherwise describe their goods as "Cedarbrite" and to change the form and colour of the package and cartons would seem to me to have been a fair offer and exhibited good faith upon the part of the defendants and willingness to do all that was reasonable in the circumstances of the case. That offer, in my opinion, should have been accepted by the appellants. It would seem to me that, upon the facts of the present case, *Standard Ideal Company* v. *Standard Sanitary Manufacturing Company* (1910), 80 L.J., P.C. 87; (1911), A.C. 78 is determinative of the questions in issue. The head-note reads as follows:

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"Distinctiveness is of the essence of a trade-mark, and the word 'Standard,' though registered, is not a valid trade-mark within the Canadian Trade Mark and Design Act, 1879.

"Where an extra-provincial corporation which has obtained a licence carries on its business only by means of travellers who send the goods direct to the purchasers, and the name of the goods has not acquired a secondary meaning, in the absence of evidence of deception no action for passing off will lie, and an injunction will not be granted to restrain such sale."

I would refer to what Lord Macnaghten said at pp. 84, 85 [(1911), A.C.]:

"The Act does not define or explain the essentials of a trade-mark, nor does it provide for taking off the register an alleged trade-mark which does not contain the requisite essentials. In applying the Act the Courts in Canada appear to consider themselves bound or guided mainly by the English law of trade-marks and the decisions of the Courts of the United Kingdom.

"Now the word 'Standard' is a common English word. It seems to be used not infrequently by manufacturers and merchants in connection with the goods they put upon the market. So used it has no very precise or definite meaning. But obviously it is intended to convey the notion that the goods in connection with which it is used are of high class or superior quality or acknowledged merit. Without attempting to define 'the essentials necessary to constitute a trade-mark properly speaking' it seems to their Lordships perfectly clear that a common English word having reference to the character and quality of the goods in connection with which it is used and having no reference to anything else cannot be an apt or appropriate instrument for distinguishing the goods of one trader from those of another. Distinctiveness is the very essence of a trade-mark. The plaintiff company were therefore not entitled to register the word 'Standard' as a trade-mark. The result is, in accordance with the decision of the Supreme Court in *Partlo* v. *Todd* [(1888)], 17 S.C.R. 196, that the word though registered is not a valid trade-mark. The action so far as it is based on alleged infringement of trade-mark must fail."

MCPHILLIPS, J.A.

The word "cedar" is a descriptive word and although I am not prepared to say that "O-Cedar" is not a fancy name, as I believe it might well be deemed such, and not necessarily mean anything relative to the well-known wood cedar, yet the taking of a trade-mark for "O-Cedar" cannot give any monopoly of the well-known descriptive word "cedar." The trade-mark, as I view the matter, will not be in any way displaced by the dismissal of this action, which was the judgment of the Court below, but the appellants cannot prevent others from using the word cedar, used, as the evidence shews, as descriptive of an ingredient in the respondents' manufactured articles and products placed upon the market. Any attempt to adopt or use

the trade-mark "O-Cedar" would always be capable of being prevented by the issuance of an injunction so preventing, but no injunction is permissible to prevent the use of the word cedar in any lawful way as descriptive of the respondents' goods, *i.e.*, that cedar or a product of cedar is an ingredient of the polishes and oils placed upon the market by the respondents. Lord Buckmaster, L.C. in *Boord and Son (Incorporated)* v. *Bagots, Hutton and Company, Limited* (1916), 2 A.C. 382 at p. 388, said:

"The case has not suffered from lack of evidence on behalf of the appellants, and their witnesses have not failed in courage, but no one has ventured to say that one mark could reasonably be mistaken for the other."

In my opinion this language could equally well be used in the present case, although there was here an attempt, although faint, "to say that one mark could reasonably be mistaken for the other." As to that contention, I have no hesitation in saying that I cannot agree that there is any colourable or other imitation of the appellants' specific trade-mark (see *Singer Manufacturing Company* v. *Loog* (1882), 8 App. Cas. 15 at pp. 29-42; *Payton & Co.* v. *Snelling, Lampard & Co.* (1901), A.C. 308, Lord Macnaghten at p. 310, and *Hennessy* v. *Keating* (1908), 1 I.R. 43, 73, 466; 42 I.L.T. 169). The judgment of the Court of Appeal for Ireland was affirmed by the House of Lords. The judgment of the Court of Appeal is a most exhaustive one and the leading and controlling cases are referred to and commented upon. In *Payton & Co.* v. *Snelling, Lampard & Co., supra,* at p. 311, Lord Macnaghten said:

MCPHILLIPS, J.A.

"A great deal of the evidence is absolutely irrelevant, and I do not myself altogether approve of the way in which the questions were put to the witnesses. They were put in the form of leading questions, and the witnesses were asked whether a person going into a shop as a customer would be likely to be deceived, and they said they thought he would. But that is not a matter for the witness; it is for the judge. The judge, looking at the exhibits before him and also paying due attention to the evidence adduced, must not surrender his own independent judgment to any witness."

To some extent the above language of Lord Macnaghten might well be applied to the present case. I am satisfied that the learned trial judge was rightly entitled to dismiss the action, and entirely agree with that disposition of the case. I would, therefore, dismiss the appeal.

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EBERTS, J.A. would dismiss the appeal.

Appeal dismissed.

Solicitor for appellants: *A. H. MacNeill.*

Solicitors for respondents: *Bird, Macdonald, Bird & Collins.*

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BREADY v. McLENNAN

BREADY v. McLENNAN. (No. 2.)

Easement—Road adjoining leased premises—Right of way—Not expressed in lease—Road used by prior lessee—Used by lessee for ten months without objection—Implied right of user—R.S.B.C. 1911, Cap. 135, Sec. 4.

A rectangular parcel of land containing seven acres was leased for six years by the defendant to the plaintiff in 1921 and described in the lease as bounded on the east by a public road and on the south by a private road on the defendant's adjoining lands that connected with the public road. The lease contained no reference as to user of the private road. The dwelling-house, barn and garage occupied by the plaintiff adjoined the private road on the south side of the leased premises and was about 250 yards from the public road. In 1912 C. bought two acres immediately west of the seven acres and the private road in question was built to give him access to the public road. C. used the road until 1918 when he allowed his two acres to revert to the defendant. Prior to 1919, one A. leased the buildings afterwards occupied by the plaintiff with a portion of the seven acres and enjoyed the use of the private road without objection until 1921 when he gave up his lease. The plaintiff used the private road without objection for ten months when the parties disagreed as to improvements that the plaintiff was to carry out on the fences when he was informed by the defendant that he had no right to use the road. He continued to use the road until June, 1923, when the defendant put a ditch across the road, and a fence at its junction with the public road. An action for an injunction and damages was dismissed.

Held, on appeal, affirming the decision of BARKER, Co. J. (MCPHILLIPS, J.A. dissenting), that notwithstanding the use of the road by prior lessees and by the lessee himself without objection for a period and that one of the named boundaries of the leased premises is the road itself, the lease contains no reference to the right of user of this private road and the circumstances are not such as to base a finding that an implied right of way over the private road was granted under the lease to the lessee.

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APPEAL by plaintiff from the decision of BARKER, Co. J. of the 12th and 31st of October, 1923, dismissing the action and from his decision in the counterclaim of the 30th of October allowing to defendant $70 damages. The defendant leased seven acres of land in the Mountain District near Nanaimo to the plaintiff for six years from the 18th of March, 1921. The land contained a dwelling-house, outhouse and garage adjoining its southern boundary. A main highway runs north and south along the east boundary of the seven acres and a private road built by the defendant on his lands runs from the main road along the south boundary of the seven acres westerly for a distance of about 250 yards to the plaintiff's house and garage. From 1912 until 1918 one Coulson had two acres just west of the plaintiff's property and the private road in question was built to give him access to the main road, and prior to 1919 one Arnet leased the dwelling-house and outhouses with a portion of the land surrounding that was later taken by Bready and he used the private road in order to reach the public road without objection until 1921 when he forfeited his lease. The defendant lived on his lands across the private road from the plaintiff's house. Upon obtaining his lease the plaintiff used the private road in going from his house to the main road on the east for ten months. Trouble arose over certain improvements that the plaintiff was to make on the leased lands and the defendant prevented the plaintiff from using the private road by constructing a ditch and fence across it at the entrance to the main road. The plaintiff brought action for an injunction restraining the defendant from interfering with the plaintiff's use of the road from his house to the main road and for damages.

Statement

The appeal was argued at Victoria on the 15th and 16th of January, 1924, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Mayers (*Cunliffe*, with him), for appellant: We cannot get from our house to the public road without the use of this private road, and we used it for the first two years of our term. The land is described in our lease as adjoining the road in question

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and the respondent is estopped from denying the right of user: see *Espley* v. *Wilkes* (1872), L.R. 7 Ex. 298 at p. 303; *Roberts* v. *Karr* (1809), 1 Taunt. 495 at p. 496; *Mellor* v. *Walmesley* (1905), 2 Ch. 164. We are entitled to the use of this road under section 4 of the Leaseholds Act: see *Knock* v. *Knock* (1897), 27 S.C.R. 664 at p. 680; *Hansford* v. *Jago* (1921), 1 Ch. 322 at p. 328. The word "appurtenances" includes the right of way: see also *Rudd* v. *Bowles* (1912), 2 Ch. 60; *Bayley* v. *Great Western Railway Co.* (1884), 26 Ch. D. 434 at p. 457; *Thomas* v. *Owen* (1887), 20 Q.B.D. 225; *Brown* v. *Alabaster* (1887), 37 Ch. D. 490 at pp. 501 to 506; *Hart* v. *McMullen* (1900), 30 S.C.R. 245 at p. 254. This is an apparent easement and is included whether expressed or not. On the question of damage by rabbits, they belonged to the plaintiff's son. Their numbers decreased in a short time to one. There is no evidence of appreciable damage by them.

D. S. Tait, for respondent: The seven acres abut on the main road, and there is no easement of necessity here. Plaintiff could only have the user of this road where there is no other means of getting to the main road: see Gale on Easements, 9th Ed., 134; *Barlow* v. *Rhodes* (1833), 1 C. & M. 438 at p. 447; Halsbury's Laws of England, Vol. 11, p. 243. An easement can be created only by express grant or by prescription: see Gale on Easements, 9th Ed., 452. The easement does not pass under the general words: see *Kay* v. *Oxley* (1875), L.R. 10 Q.B. 360 at pp. 368-9; *Maitland* v. *Mackinnon* (1862), 32 L.J., Ex. 49; *Worthington* v. *Gimson* (1860), 2 El. & El. 618; *Barkshire* v. *Grubb* (1881), 18 Ch. D. 616; *Hansford* v. *Jago* (1921), 1 Ch. 322.

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A. Leighton, on the same side: As to damage done by the rabbits they were on the plaintiff's land with his knowledge and he is responsible. The evidence shews 42 rabbits came over on to the defendant's premises at one time: see *Brady* v. *Warren* (1900), 2 I.R. 632; Pollock on Torts, 12th Ed., 492; *M'Kone* v. *Wood* (1831), 5 Car. & P. 1; Halsbury's Laws of England, Vol. 1, p. 374, par. 817; *White* v. *Jameson* (1874), L.R. 18 Eq. 303 at p. 305; *West* v. *Bristol Tramways Company* (1908), 2 K.B. 14 at p. 21.

Mayers, in reply, referred to *Furness Railway Co.* v. *Cumberland Co-operative Building Society* (1884), 52 L.T. 144 at p. 145; *International Tea Stores Company* v. *Hobbs* (1903), 2 Ch. 165; *Brown* v. *Alabaster* (1887), 37 Ch. D. 490 at p. 504. On the severance of two estates one having previously had a right of way see *James* v. *Plant* (1836), 4 A. & E. 749; *Knock* v. *Knock* (1897), 27 S.C.R. 664 at p. 680. The cases cited by respondent are overruled. As to necessary words being required see *Bayley* v. *Great Western Railway Co.* (1884), 26 Ch. D. 434 at p. 457; Williams on Vendor and Purchaser, 3rd Ed., 599; *Kooystra* v. *Lucas* (1822), 5 B. & Ald. 830.

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Cur. adv. vult.

4th March, 1924.

MACDONALD, C.J.A.: The property is described in the lease by metes and bounds, and as so described does not embrace the private roadway in question in this action, but the plaintiff claims that he is entitled to use the roadway, relying upon the fact that both he himself and the prior occupiers of the house on the leased land, had the use of it, and also upon the ground that by the description in the lease the lessor impliedly gave him a right of way over the roadway. He based this latter contention on the fact that one of the named boundaries of the leased land is this roadway.

I have considered the authorities cited upon this question of the implication to be made from the description, and I have no hesitation in saying that, in my opinion, they have no application to the facts of this case.

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The roadway in question is merely one of defendant's approaches from the highway to his own house. It is true that he allowed tenants in prior years to use the roadway without objection, and that he also gave the plaintiff directions as to the character of gates which he should maintain, but the lease provides that certain fencing might be done by the plaintiff and paid for by the defendant, if satisfactory. This would explain his interest in the character of the gates. But apart from that, the defendant was interested in the character of the gates for the protection of his own land from trespass by plaintiff's animals.

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The defendant set up a counterclaim, among the items of which is one for damage caused by plaintiff's rabbits. I think the judgment appealed from is wrong in this particular. There is not sufficient evidence to shew that the damage complained of was actually committed by plaintiff's rabbits, or by rabbits for whose mischief he is responsible. The other items of the counterclaim have not been attacked. The amount of the counterclaim should therefore be reduced by $50, the sum allowed for damage by rabbits.

MACDONALD, C.J.A.

The defendant having succeeded on the appeal, is entitled to the costs thereof so far as they were incurred in connection with the issue on the counterclaim relating to the rabbits. As to the issue involved in the action, and the other issues in the counterclaim, the respondent should have the costs; the one to be set off against the other *pro tanto*.

MARTIN, J.A.: This appeal should, I have no doubt, be allowed as to that part of the judgment which awards damages for injury done by rabbits, and to that extent said judgment should be set aside.

But as to the other part of it, deciding against the plaintiff's claim for a right of way, while I am somewhat in doubt as to its propriety, yet not to an extent which would justify me in coming to the conclusion that it ought to be set aside, particularly in the face of the strong view of the majority of the Court to the contrary, so I think it safer to leave the reversal of the judgment in this respect to a higher Court, should it feel disposed so to do.

MARTIN, J.A.

As to the costs, since the appellant has had to come to this Court to be relieved to a substantial extent from said judgment, he is entitled to the costs of this appeal in general, less those of the distinct issue upon which the respondent succeeds as aforesaid.

GALLIHER, J.A.

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

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: The appellant is a lessee from the defendant of certain land and also has an option of purchase of the same land, which has not as yet been exercised. The claim

of the appellant now is that he is entitled to a right of way to the land by way of a road existent at the time of the lease and maintained by the defendant, his lessor, and the defendant is the owner of the adjoining lands. The description of the land is contained in the lease and option. The roadway in question is referred to in the description of the land and was then being maintained and in use by the lessor, and was for a considerable time used by the lessee to the knowledge of the lessor, and was the only constructed roadway by which the lessee could gain access to the leased land. It was only after certain differences had occurred between the lessor and lessee that the lessor closed up the roadway and the lessee was disturbed in the use and enjoyment of the roadway, *i.e.*, the right in the lessee to have ingress and egress from the public highway, and this denial of right means the construction of a roadway over the leased land at great expense, and in the precipitation of a situation not contemplated at the time of the creation of the demise, and is in contradiction to the accepted conditions then existing and in denial of a right of user accorded to the lessee for some considerable time. Upon all the surrounding facts it may be said, as a question of fact, that the intention of the parties was at the time of the lease that the lessee should have the right of user of the roadway, otherwise it is reasonable to suppose the lease and option of purchase would never have been entered into as unquestionably, if the lessee is to be called upon to construct an independent roadway, it will be exceedingly onerous and expensive, and it stands to reason the rental agreed upon would never have been agreed to. The appellant (the lessee) claims a right of way and asks a mandatory injunction calling upon the lessor to restore the roadway and his right to the user thereof and damages for the disturbance of such right. *Espley* v. *Wilkes* (1872), L.R. 7 Ex. 298 would seem to support the contention of the learned counsel for the appellant where, upon almost similar facts, it was held that under the defendant's lease a right of way was granted. I would refer to what Kelly, C.B. in the above case said at pp. 303-4:

MCPHILLIPS, J.A.

"But here the lessor, by the grant, has expressly described the land demised as abutting upon strips of land of his own to the north and the east, which he himself in the lease describes as newly-made streets, and

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which are distinctly delineated upon the plan, and therein called 'new streets.' The lessor, therefore, is estopped from denying that there are streets which are in fact ways, and which ways run along the north and the east fronts of the houses to be built on the demised lands, including the defendant's house, and of which streets or ways the way claimed in the plea to this action is a part.

"We should have thought this point clear upon the obvious and necessary construction of the lease and plan; but the case of *Roberts* v. *Karr* ([(1809)], 1 Taunt. 495) is a direct authority to that effect. There one Pratt granted a piece of ground to Compigne (under whom the defendant claimed), described as abutting east on a new road. It appeared that between a public road and the abutment in question there was a strip of land, the property of the grantor, but upon which no road existed at the time of the grant. The defendant pleaded a public right of way over this strip of land, and it was held that the grantor and those claiming under him were concluded or estopped from denying that there was a road or way over this piece of land; Mansfield, C.J., observing in the judgment delivered, 'If you (the lessor) have told me in your lease this piece of land abuts on the road, you cannot be allowed to say that the land on which it abuts is not a road.' And Lawrence, J., observes, 'If a man buys a piece of ground described as abutting upon a road, does he not contemplate the right of coming out into the road through any part of the premises?' Here the land is described as abutting upon 'newly-made streets,' and the case is an authority to shew that the grantor is estopped from denying that the strips of land, his property, are what he describes them to be, that is to say, 'streets,' which they cannot be unless there be a way through and along them. *Harding* v. *Wilson* [(1823)], 2 B. & C. 96, cited in argument for the plaintiff, is in effect also an authority for the defendant. There a piece of land was granted 'abutting upon an intended way 30 ft. wide;' and the land was underlet, the abutment being described as 'upon an intended way,' but not mentioning the width of 30 ft. It was held that the under-lessee was entitled to a convenient way, though not of the width of 30 ft."

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Rudd v. *Bowles* (1912), 2 Ch. 60 is a case which strongly supports the case of the appellant in the present case. It was there held, as in my opinion it should be held here, that the circumstances existing at the time of the lease may be looked at in construing the lease and that an implied right of way must be held to have been granted by the lease to the lessee. The lease in the present case was made under the provisions of the Leaseholds Act (Cap. 135, R.S.B.C. 1911), and in the statute the lessee is demised the lands with the appurtenances. Section 4 of the Act reads as follows:

"4. Every such deed, unless any exception be specially made therein, shall be held and construed to include all outhouses, buildings, barns, stables, yards, gardens, cellars, ancient and other lights, paths, passages, ways, waters, watercourses, liberties, privileges, easements, profits, com-

modities, emoluments, hereditaments, and appurtenances whatsoever to the lands and tenements therein comprised, belonging, or in anywise appertaining."

The very elaborate and learned judgment of Mr. Justice Russell in *Hansford* v. *Jago* (1921), 1 Ch. 322, with which I entirely agree, in my opinion, concludes the question here raised in favour of the appellant. There it was

"*Held*, (1.) that the right of way being *de facto* enjoyed by the tenants up to the date of the conveyances passed by way of express grant under the word 'appurtenances.'

"*Bolton* v. *Bolton* (1879), 11 Ch. D. 968 explained.

"*Thomas* v. *Owen* (1887), 20 Q.B.D. 225 followed.

"(2.) That the right of way passed in any case under the words to be read into the conveyances under s. 6, sub-s. 2, of the Conveyancing Act, 1881, as the use of one of these words, 'appurtenances,' did not suffice to exclude the others by shewing a contrary intention within s. 6, sub-s. 4.

"(3.) That even if there were no express grant of the right of way, such grant ought to be and could on the authority of *Brown* v. *Alabaster* (1887), 37 Ch. D. 490; *Swansborough* v. *Coventry* (1832), 9 Bing. 305; and *Allen* v. *Taylor* (1880), 16 Ch. D. 355, be implied. It was immaterial that there was no formed road in existence at the date of the conveyances, as there were other *indicia* which made it apparent that the right was then being openly enjoyed.

"The judgment of Barton, J. in *Donnelly* v. *Adams* (1905), 1 I.R. 154 discussed and explained.

"*Rudd* v. *Bowles* (1912), 2 Ch. 60 applied."

(And see *Cory* v. *Davies* (1923), 67 Sol. Jo. 517, where *Hansford* v. *Jago, supra,* was applied).

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I do not find it necessary to further pursue in detail a reference to the many authorities cited. In my opinion, the case is a very clear one. The learned counsel upon both sides delivered able arguments. In view particularly of the very exhaustive judgment of Mr. Justice Russell (*Hansford* v. *Jago, supra*) it is quite unnecessary to further enlarge upon the governing law applicable to the present case. It follows, in my opinion, in the words of Mr. Justice Russell that "the right of way was either expressly or impliedly granted" and the appellant is entitled to the declaration and mandatory injunction he asked for in the Court below.

I, therefore, would allow the main appeal but dismiss the appeal in respect of the counterclaim.

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EBERTS, J.A. would dismiss the appeal.

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitor for appellant: *F. S. Cunliffe.*

Solicitor for respondent: *Leighton & Meakin.*

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THE KING v. THE VANCOUVER LUMBER CO.

THE KING v. THE VANCOUVER LUMBER COMPANY *ET AL.*

Landlord and tenant—Rent—Non-payment—Action for possession—Necessity of formal demand for payment—Lease in pursuance of Act—Incorrect description—Effect of—Relief against forfeiture refused—R.S.B.C. 1897, Cap. 117.

Crown—Fisheries—Right of use of vacant lands—Demand to vacate—Service of writ claiming possession sufficient—Can. Stats. 1914, Cap. 8, Sec. 62.

A lease, as expressed therein, was made "in pursuance of the Act respecting short forms of leases" but there is no Act so entitled in British Columbia.

Held, that from the pleadings and the obvious intention of the parties as appears from the lease itself the lease was made pursuant to the Leaseholds Act, 1897, and that Act applied, and the rent having remained unpaid for fifteen days after it was due no formal demand for payment was necessary before suing for possession.

Held, further, that relief against forfeiture for non-payment of rent should not be granted where the lessee has been in default for many years, is still in default, and has never expressed any willingness, or disclosed any ability to pay the rent in arrear.

Section 62 of The Fisheries Act, 1914, provides that "every subject of His Majesty may use vacant pubic property, such as by law is common and accessory to public rights of fishery and navigation, for the purpose of landing, salting, curing and drying fish."

Held, that as against a person relying on this section the serving of a writ claiming possession is a sufficient demand to vacate, without making a demand to vacate before action is brought.

Statement

ACTION by the Crown to recover possession of Deadman's Island on the ground that the lessee had forfeited its lease by reason of non-payment of rent. Certain fishermen were also made defendants, they having occupied the foreshore and adjacent lands without lease or licence. The facts are set out fully

in the reasons for judgment. Tried by McDONALD, J. at Vancouver on the 21st of January, and 14th, 15th and 25th of February, 1924.

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M. A. Macdonald, K.C. (*Prenter,* with him), for plaintiff.
Lennie (*J. A. Clark,* with him), for defendant Company.
Beeston, for defendant Marsulia.

29th February, 1924.

McDONALD, J.: On the 14th of February, 1899, a lease of Deadman's Island was granted The Vancouver Lumber Company by the minister of militia and defence in pursuance of authority given to him by an order in council passed the 16th of February, 1899, on a memorandum from the minister, dated 10th February, 1899. This lease was expressed to be made "in pursuance of the Act respecting short forms of leases" and "for and during the term of 25 years renewable, to be computed from the 1st day of March, 1899." On the 4th of April, 1900, a further indenture was entered into and executed by the minister whereby, among other things, it was provided that the said lease at the expiration of the said first term of 25 years and from time to time at the end of each renewal term of 25 years, should be renewed for a further term or terms of 25 years at a rental to be from time to time determined by way of arbitration. Receipt of the first payment of rent made under the lease was declined for the reason that on the 16th of May, 1899, an action had been brought on behalf of the Province of British Columbia against The Vancouver Lumber Company, in which the Attorney-General of the Dominion was added as a defendant, whereby a declaration was sought that the title to Deadman's Island was in the Crown in the right of the Province. That action was finally disposed of against the Province by the Judicial Committee of the Privy Council on 2nd August, 1906. Thereupon, the lessee commenced to pay rent and paid rent regularly until the 1st of March, 1914. No further rent has been paid, though demands have frequently been made for payment, and it appears that Theodore Ludgate, now deceased, who was in fact The Vancouver Lumber Company, died without any assets, and his executor is, and has been, without funds with which to pay the rent.

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In or about the year 1909, the City of Vancouver laid claim to Deadman's Island as being included in a lease to the city from the Crown in right of the Dominion, and city officials forcibly ejected Ludgate from the Island. On the 7th of June, 1909, The Vancouver Lumber Company brought an action against the City of Vancouver for possession of the Island and for damages for trespass and, on 4th July, 1911, the Judicial Committee of the Privy Council decided that action against the city.

In 1912, the Crown in right of the Dominion brought an action against The Vancouver Lumber Company to have it declared that the endorsement above referred to, dated 4th April, 1900, was executed by the minister of militia and defence without the authority of an order in council, and the Judicial Committee of the Privy Council, on October 23rd, 1919, declared that the Company had wholly failed to prove that an order in council, authorizing such endorsement, had ever existed; and the endorsement was, therefore, without effect.

The present action was brought on 15th November, 1919, for possession of the Island upon the ground that the lessee has forfeited its lease by reason of non-payment of rent. No issue was seriously raised as to the rent which accrued due prior to 1906, nor indeed could it be successfully contended that any forfeiture could arise in this connection, the plaintiff having waived any breach prior to 1906 by the acceptance of rent from 1906 to 1914. The matter may be dealt with, therefore, with relation only to the rent which accrued due since 1914 and which admittedly has not been paid.

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It should be noted here that the other defendants are fishermen, who have occupied various parts of the foreshore of the Island and lands adjacent thereto without any express licence or lease from any source. All of these defendants, except Peter Marsulia, have abandoned their defence, and Marsulia's defence will be considered later in this judgment.

The first contention of The Vancouver Lumber Company is that this action is not maintainable by reason of the fact that the plaintiff failed to prove a demand for rent made with all the formalities required by the common law, and it becomes necessary therefore to consider whether or not the lease in

question was made pursuant to the British Columbia statute relating to short forms of leases.

It will be noted that the lease is expressed to be made "in pursuance of the Act respecting short forms of leases." There has never been in British Columbia an Act bearing that name. There was, when the lease was executed, an Act in force, being Cap. 117 of R.S.B.C. 1897, the caption of which was "An Act to facilitate the granting of certain Leases," and the first section of that Act provided: "This Act may be cited as the Leaseholds Act." In the statement of claim in this action it was stated that the lease was "expressed to be made pursuant to the Act respecting short forms of leases, being Cap. 117 of R.S.B.C. 1897."

Prior to the trial, the plaintiff obtained an order permitting an amendment whereby the words last quoted were eliminated and an allegation was permitted to be made that the lease was made pursuant to section 3 of 57 & 58 Vict., Cap. 26. The first paragraph of the statement of defence sets up that the statement of claim discloses no ground or cause of action against the defendants, and by par. 6 of the statement of defence an affirmative allegation is made in the following words:

"By indenture dated 14th February, 1899, and expressed to be made pursuant to the Act respecting short forms of leases, being Cap. 117, R.S.B.C. 1897, the plaintiff," etc.

After argument, the plaintiff's counsel applied for leave to amend, again setting up the allegation originally contained in his statement of claim that the lease was expressed to be made pursuant to Cap. 117. This application I refused, and I am dealing with the matter as the pleadings now stand. The allegation contained in par. 6 of the statement of defence is, in my view, one of fact, and, while the name of the statute is not correctly given, the number of the chapter is correctly given. On the other hand, there is ample evidence contained within the document itself that it was intended to be made pursuant to the Leaseholds Act; and, on the authority of *Lee* v. *Lorsch* (1875), 37 U.C.Q.B. 266, I think it should be held that the lease was actually intended to be made pursuant to the Leaseholds Act. Both, therefore, upon the pleadings and to carry out the obvious intention of the parties, I hold that the Leaseholds Act does apply to this lease. It follows from this that

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inasmuch as a part of the rent reserved under this lease remained unpaid for 15 days after it ought to have been paid, no formal demand for payment was necessary, and this action for possession ought to succeed unless the defendant is entitled to relief against forfeiture.

It is contended by the defendant that, in view of all the circumstances surrounding this lease and of the great expense and trouble to which the lessee has been put in maintaining and defending its title, and, in view of the defendant's claim of interference with its quiet enjoyment, relief from forfeiture ought to be granted.

As the original lease is now about to expire by effluxion of time, the only value to the lessee in obtaining such relief is that advantage may be taken of the alleged right to a renewal.

The plaintiff contends that such relief being claimed in the defendant's counterclaim cannot in any event be granted in this action, but could only be granted upon petition of right. With the plaintiff's contention, I am inclined to agree, but even acceding to the defendant's argument that this is not a substantive claim but is an equitable defence to plaintiff's claim for possession, I am still of opinion that no ground for relief has been made out. While the granting or withholding of relief is said to be a matter of discretion, still such discretion must, of course, be granted or withheld upon proper principles, and these principles have been considered many times and are now fairly well established. No case has been cited, nor have I been able to find one in which the facts are at all identical with the facts in the present case, where the defendant was in default for some four years prior to the issue of the writ, and is still in default, and has never at any time expressed any willingness or disclosed any ability to pay the rent reserved. The defendant relies strongly upon *Newbolt* v. *Bingham* (1895), 72 L.T. 852. There relief was granted to the mortgagee of a leasehold upon terms that he should within six months pay all rent in arrear and costs, and should carry out certain covenants as to repairs. In that case, however, the default of the lessee was unknown to his mortgagee, and so soon as the default became known tender of the rent was immediately made. In *Huntting* v. *MacAdam* (1908), 13 B.C. 426, in addition to all the other

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facts favourable to the tenant, it is to be noted that the rent was tendered almost immediately after default. And so in *Edwards* v. *Fairview Lodge* (1920), 28 B.C. 557, where relief was granted by MURPHY, J. in respect of the default in payment of rent, although the report does not so state, I find, on looking at the record, that rent money was tendered and was actually paid into Court. As stated by CLEMENT, J. in *Hunting* v. *MacAdam, supra,* at p. 441,

"this much is clear, that forfeiture for mere non-payment of rent on its due date has always been looked upon as a thing against which a Court of Equity should afford relief."

But this is far from saying that forfeiture for non-payment of rent for nearly ten years, particularly where there is no tender or offer to pay, is a thing against which the Court will grant relief.

There is nothing in the lessee's contention that there has ever been any interference with the lessee's quiet enjoyment by the lessor or by any person claiming by, through, or under the lessor.

In view of the above finding, it is not necessary that I should deal with Mr. *Lennie's* elaborate and forcible argument as to the meaning of the word "renewable" contained in the lease; for as the lease falls, any possible right of renewal falls with it.

Before leaving this branch of the case, I ought to say that, after perusing the judgment of Lord Haldane in *The King* v. *Vancouver Lumber Co.* (1919), 50 D.L.R. 6, I am satisfied that I was wrong in admitting the evidence offered by the defendants as to the alleged order in council which had been in question in that case.

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As to the defendant Marsulia, he has erected upon a portion of the foreshore of Deadman's Island a cottage in which he resides and portions of two small sheds in which he dries and cures fish, the other portions of such sheds being above high-water mark; and no claim is made by him to the land covered by such last-mentioned portions. He rests his claim upon section 62 of The Fisheries Act, 1914, which provides:

"Every subject of His Majesty may use vacant public property, such as by law is common and accessory to public rights of fishery and navigation, for the purpose of landing, salting, curing and drying fish."

Clearly this section does not apply to the cottage in which this defendant resides nor to the land covered thereby, as the same

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is not used for landing, salting, curing or drying fish. As to the lands covered by the portions of the sheds in question, the defendant's contention is that he was what might be termed a "statutory licensee" and that, inasmuch as it was not proven that any demand had been made upon him to vacate before action brought, the action would not lie. I think that the serving of the writ was in itself a sufficient demand that he vacate and that this defence cannot prevail.

Judgment

There will be judgment accordingly for the plaintiff against all the defendants.

Judgment for plaintiff.

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SCOTT v. CITY OF NANAIMO

SCOTT v. THE CORPORATION OF THE CITY OF NANAIMO.

Negligence—Municipal corporation—Sidewalk in disrepair—Duty to repair —Nonfeasance—R.S.B.C. 1911, Cap. 1, Sec. 17; Cap. 170, Sec. 57— B.C. Stats. 1913, Cap. 49, Secs. 45 and 55.

About 9 o'clock in the evening in June the plaintiff stubbed her toe against a block of cement pavement which had been forced above the adjoining block a few feet from the junction of two streets where there was an arc light, and falling she sustained severe injuries. The defect in the sidewalk was due to the growth of the root of a tree which forced the block of cement over it about one and one-half inches above the next block. The tree was growing at the time the sidewalk was constructed and was about one foot from the edge of the sidewalk. An action for damages for negligent construction or in the alternative for failure to keep the sidewalk in repair was dismissed.

Held, on appeal, affirming the decision of MURPHY, J. (MARTIN, J.A. dissenting), that the obligation upon a municipality is to build its sidewalks according to good engineering practice and is not required to build them so as to avoid every possible source of disturbance; that the cause of the disturbance here could not fairly be anticipated or foreseen at the time of construction and the action was properly dismissed.

Held, further, that although the sidewalk was constructed in 1911 section 57 of the Municipal Act (R.S.B.C. 1911) having been repealed by section 55 of the Local Improvement Act, B.C. Stats. 1913, it has no application to this case and section 45 of the latter Act does not impose any liability on a municipality for nonfeasance.

Statement

APPEAL by plaintiff from the decision of MURPHY, J. of the 25th of October, 1923, in an action for damages by reason

of defendant's failure to keep in repair a portion of sidewalk on Milton Street in the City of Nanaimo or in the alternative for the negligent construction thereof. A cement sidewalk was put on Milton Street (west side) in 1911-2. On the 7th of June, 1923, the plaintiff, Margaret Ann Scott, while walking along the sidewalk on Milton Street towards Wentworth Street tripped over a raised portion of the sidewalk which had got into disrepair. She fell to the ground and suffered serious injuries. It appeared that the condition of the sidewalk was due to the growth of a root under it which forced one of the flags about one and one-half inches above the adjoining one. The plaintiff claimed $296 special damages and general damages. The action was dismissed. Mrs. Scott died on the 15th of November and the appeal was taken by Mr. Scott for himself and as administrator of his wife's estate.

Statement

The appeal was argued at Victoria on the 10th and 11th of January, 1924, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Mayers (*Cunliffe,* with him), for appellant: There is a point of law under the Municipal Act. Section 57 of said Act was in force when the sidewalk in question was constructed and if this section stood alone there is no question that the Municipality would be liable but this section was repealed by section 55 of the Local Improvement Act, B.C. Stats. 1913, and it was held below that the repeal entirely destroys the effect of section 57 of the old Act. The first point is that the Interpretation Act says no right or obligation imposed shall be affected by the repeal of the Act, so section 57 of the original Act continues in this case by virtue of section 17 of the Interpretation Act: see *Arbuthnot* v. *Victoria* (1910), 15 B.C. 209; and *McPhalen* v. *Vancouver, ib.* 367. As to cases where the force of a repealed section continues see *Heston and Isleworth Urban Council* v. *Grout* (1897), 2 Ch. 306; *Wigram* v. *Fryer* (1887), 36 Ch. D. 87 at p. 92. Apart from the Interpretation Act the Court should imply a continuance of the obligation under section 57. Next we say it is misfeasance due to original careless construction, a tree having been left too close to the walk. The roots grew forcing the sidewalk into a condition dangerous to pedes-

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trians: see *Cooksley* v. *Corporation of New Westminster* (1909), 14 B.C. 330; *Smith* v. *South Vancouver and Corporation of Richmond* (1923), 31 B.C. 481.

F. A. McDiarmid, for respondent: This case is governed by *Clarke* v. *Corporation of Chilliwack* (1922), 31 B.C. 316. The root of a tree might grow anywhere. There is nothing to shew the builders should have known this root was under the sidewalk and cannot be construed into faulty construction. The Act was to provide for the adjustment of the cost between the Municipality and the property owners. There is nothing in the Act creating any liability: see *City of Vancouver* v. *McPhalen* (1911), 45 S.C.R. 194 at pp. 196, 202 and 209. On the application of section 57 see *Re Medland and City of Toronto* (1899), 31 Ont. 243; Maxwell on the Interpretation of Statutes, 6th Ed., 708; *City of Halifax* v. *Tobin* (1914), 50 S.C.R. 404 at p. 407. As to the light at the time of the accident it was about nine o'clock in June when it was getting dark but the accident was close to the intersection of two streets where there was an arc light and she should have seen any defect in the sidewalk: see *Shaw* v. *Westminster Thoroughbred Association, ante,* p. 361.

Mayers, in reply, referred to Meredith & Wilkinson's Municipal Manual, 819.

Cur. adv. vult.

4th March, 1924.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: This is an appeal by the plaintiff, whose wife was injured by a fall upon a sidewalk in the city of Nanaimo last June. The wife has since died and the plaintiff appeals on his own behalf and as executor of the will of the deceased.

The facts can hardly be said to be in dispute. The accident was caused by the deceased stubbing the toe of her boot against a block of cement, part of the sidewalk, which had been heaved up about an inch and a half above the adjoining block. The evidence of McKenzie, the foreman of the defendant, I think, entitles me to say that this defect in the sidewalk was caused by the root of a tree growing within a few inches of the sidewalk, having heaved the cement up. The question then resolves itself into this: Was the accident caused by original

faulty construction of the sidewalk? in which case, the plaintiff would be entitled to succeed; or was it simply non-repair, and therefore nonfeasance only which cannot be the subject of an action?

The engineer who passed the original construction work 12 or 13 years before the accident, was called and stated that the work was done according to good engineering practice. It is admitted that the tree was growing at the time the sidewalk was laid, and was within 12 or 13 inches of the edge of the sidewalk. It appears to me that the defect in the sidewalk was caused by the root of the tree growing and expanding upward, thus forcing the one block up above the other.

It is common knowledge that trees are planted in boulevards along the city streets and sidewalks in every city in Canada, and that sidewalks are built over the roots of such trees. The obligation upon the Municipality was to build its sidewalks according to good engineering practice. It is not required to build them so as to avoid every possible source of disturbance. As to whether the engineering practice is a good one, one has to look to disturbances which might fairly be anticipated or foreseen, and in the circumstances, I cannot say that the learned judge who dismissed the action came to a wrong conclusion, particularly in the face of the said evidence of the engineer.

MACDONALD, C.J.A.

The appeal should, therefore, be dismissed.

MARTIN, J.A.: With every respect for the contrary opinion of my brothers, I find myself unable to take any other view of the appeal than that it should be allowed. As I read the statute (section 57, Municipal Act, Cap. 170, R.S.B.C. 1911) its intention is to impose upon the Municipality a new obligation to keep a street "in good and sufficient state of repair" for a limited period, when the Municipality has assumed the responsibility of passing a by-law under section 54 authorizing a scheme of "local improvement" of that street. In other words, when acting on behalf of the general municipal public it obtains under the statute, and at the expense of the local proprietors immediately benefited (or shares the expense with them, *e.g.*, under section 60) the great public advantage and asset of improved streets within its boundaries, it must assume the corresponding

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obligation to the public to maintain the streets which it has undertaken to improve in a state of real and continuous improvement for the designated period. I can perceive nothing in this view which is at all opposed to the statute, considering it in the light of an enactment reasonably and beneficially designed to put streets which are improved by its means for the public benefit upon a new and different plane from that in which old and unimproved (in the modern sense of highway development) streets have been placed. It is true that in certain circumstances this may lead to anomalous results, but that fact should not frustrate the, to me, clear object of the statute, particularly when it is borne in mind that it is almost impossible, I think, to find any municipal statute of this or a similar nature whose general provisions cannot be shewn to create anomalies in particular cases; if statutes in general are to be deemed inoperative because they may lead to unexpected consequences, few will survive the test. Moreover, in the present case, there is no hardship because the Municipality has full control of the situation and may limit the duration of its obligations to repair by curtailing the "estimated lifetime of the work," beyond which it has no repairing duty, under the section in question. This view which I take of the new duty of the Municipality is supported, I think, by section 45 of Cap. 49 of the Local Improvement Act, B.C. Stats. 1913, and the right conferred by section 46 upon "any owner or occupant" to apply to a judge for an order upon the municipality to repair in certain circumstances, does not, in my opinion, shew an intention to limit the duty cast upon it by said section 57 but rather to recognize it.

MARTIN, J.A.

GALLIHER, J.A.

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

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: The facts would seem to establish that the case is one of nonfeasance. There is no evidence of negligent construction of the cement sidewalk and it is apparent that the disrepair came about after the lapse of some four years. What happened was this: The root of a growing tree shoved up a portion of the cement sidewalk, raising it about one and a half inches, causing an inequality of surface upon the sidewalk, and the plaintiff, Margaret Scott, unfortunately struck her foot

against the upraised section of the sidewalk, and thereby met with the injury sued for.

I cannot persuade myself that there has been any change in the statute law admitting of it being successfully contended that there is any liability upon municipalities for nonfeasance where the municipalities are governed by the general Municipal Act (Cap. 52, 1914), which is the present case. This Court has in a number of cases so decided (*Von Mackensen* v. *Corporation of Surrey* (1915), 21 B.C. 198 at pp. 208-212; *Clarke* v. *Corporation of Chilliwack* (1922), 31 B.C. 316, and also see *Municipal Council of Sydney* v. *Bourke* (1895), A.C. 433; *The City of Saint John* v. *Campbell* (1896), 26 S.C.R. 1). In the *Campbell* case, being a case similar to the present case, and no provision expressly imposing any duty to repair, the Supreme Court of Canada held that a municipal corporation was not liable in damages for injury caused to a citizen by reason of a sidewalk having been raised to a higher level than a private way or having been allowed to get out of repair.

The Local Improvement Act (Cap. 49, 1913), section 45, is relied upon by the appellant, reading as follows:

"(1.) After a work undertaken has been completed, it shall during its lifetime be kept in repair by and at the expense of the corporation.

"(2.) Nothing in this Act shall relieve the corporation from any duty or obligation to keep in repair the highways under its jurisdiction to which it is subject either at common law or under the provisions of the Municipal Act or otherwise, or impair or prejudicially affect the rights of any person who is damnified by reason of the failure of the corporation to discharge such duty or obligation.

"(3.) Nothing in this section shall make the corporation liable for any damages which it otherwise would not have been liable for."

MCPHILLIPS, J.A.

I cannot see that there has been brought about by apt words that great organic change which would admit of it now being held that liability has been imposed for nonfeasance. It is such a serious change involving, as it would, the imposition of heavy responsibilities to the public not heretofore borne by municipalities, that one reasonably looks for intractable language to that effect, and that language I do not find; on the contrary, section 45(3) would seem to accentuate the matter and plainly indicates that the Legislature had no intention of making any change in the law.

Section 46 of the Act (Cap. 49, 1913) gives any owner or

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occupant of any land specially assessed the right to apply to the Court for an order requiring the corporation to put the work into repair, but there is in this no indication that the Legislature intended to create or impose any obligation upon the corporation to repair at the demand of the public or that there was to be liability for non-repair to the public. The situation is undoubtedly one of some nicety, but as it is a cardinal rule that in municipal law the statute only can be looked at to determine the powers and liabilities of the corporation, I feel constrained to hold that the statute law does not support the imposition upon the corporation of liability for this accident. It is with regret that I am compelled to arrive at this conclusion.

With the policy of the law which gives this immunity, the Court cannot deal. It is to be remembered, though, that even as it is, municipal corporations have imposed against them serious liabilities in respect of acts of misfeasance, and in some cases for nonfeasance as well, noticeably the City of Vancouver (*McPhalen* v. *Vancouver* (1910), 15 B.C. 367; (1911), 45 S.C.R. 194), but that City comes under the provisions of a private Act, and the Act imposes on the corporation the duty of keeping its highways in repair. It is a matter for remark, though, that even in England today, no action will lie against a road authority for an injury caused by mere omission to keep the road in repair (*Cowley* v. *Newmarket Local Board* (1892), A.C. 345; 67 L.T. 486; *Oliver* v. *Horsham Local Board* (1893), 63 L.J., Q.B. 181; 70 L.T. 206; (1894), 1 Q.B. 332), and the present case is one of that class.

MCPHILLIPS, J.A.

In my opinion MURPHY, J. arrived at the right conclusion in deciding that there was no liability upon the Municipality for this unfortunate occurrence.

The appeal should be dismissed.

EBERTS, J.A.

EBERTS, J.A. would dismiss the appeal.

Appeal dismissed, Martin, J.A. dissenting.

Solicitor for appellant: *F. S. Cunliffe.*

Solicitors for respondent: *McDiarmid, Shoebotham & McDiarmid.*

DUTHIE v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY LIMITED.

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DUTHIE v. B.C. ELECTRIC RY. CO.

Negligence — Level crossing — Collision — Freight train and street-car — Signal—Obligation to look out—Charge—Jury's findings—Liability to passenger.

The plaintiff and her husband were passengers on a west bound street-car of the defendant on Venables Street in Vancouver at about 10.20 on a December evening. On nearing the intersection of the street by the Great Northern Railway track the car was stopped by a flagman of the Great Northern who was there to stop traffic until a freight train backing in from the south had passed over. After stopping the street-car he signalled the freight train to back across the street. The motorman mistook the signal as being made to him and he started his car. The signalman made frantic efforts to stop him but he continued on and when half way across the Great Northern track his car was struck by the freight train and thrown over. The plaintiff's husband received injuries from which he died. In an action for damages the jury found the defendant Company negligent and in answer to the question "In what did the negligence consist?" answered "that the motorman did not exercise ordinary care and prudence in restarting his car." Judgment was given for the plaintiff.

Held, on appeal, affirming the decision of MORRISON, J., that there was evidence to support the finding of the jury that the motorman did not exercise ordinary care and prudence in restarting his car, that the jury's answer to the question as to in what the negligence consisted was free from uncertainty and the appeal should be dismissed.

APPEAL by defendant Company from the decision of MORRISON, J. of the 22nd of November, 1923, in an action for damages for injuries sustained by her husband resulting in his death while a passenger on a car of the defendant Company. Deceased and his wife were passengers on a street-car going west on Venables Street in Vancouver at about 10.20 in the evening of the 27th of December, 1922. When nearing the intersection of the Great Northern Railway Company the street-car stopped when a car length from the track in answer to a signal by lantern from a Great Northern signalman. After having signalled the street cars to stop (there being another street-car on the opposite side of the railway track going east) he then signalled with his lantern to a freight train backing

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northerly to proceed across the street. This signal was taken by the motorman on the west bound street-car as a signal to himself to proceed. He started his car forward and in spite of the frantic efforts of the signalman to stop him he proceeded and when half way across the railway track was struck by the rear end car of the freight train and his car was thrown over. The plaintiff's husband was pinned under the wreckage and received injuries from which he died. By order of the Railway Board it was the duty of the Great Northern Railway Company to have a flagman at the crossing to stop traffic on every occasion when a train was to cross the road and all street-cars passed over without stopping unless signalled by a flagman. The jury found the defendant Company guilty of negligence which was the proximate cause of the accident and to the question "In what did such negligence consist?" answered "that the motorman did not exercise ordinary care and prudence in restarting his car." The damages were fixed at $12,000 for which judgment was entered.

The appeal was argued at Victoria on the 16th and 17th of January, 1924, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Argument

McPhillips, K.C. (*Riddell,* with him), for appellant: On the verdict we are entitled to judgment. The jury's answer to the question "In what did the negligence consist?" negatives negligence except as to restarting his car. This is a finding that the signalman gave the motorman a signal to go forward and he was justified in obeying the signal without further precaution: see *British Columbia Electric Rway. Co.* v. *Dunphy* (1919), 59 S.C.R. 263 at p. 268; Macnamara's Law of Carriers by Land, 2nd Ed., 592; *Stapley* v. *The London, Brighton, and South Coast Railway Co.* (1865), L.R. 1 Ex. 21; *Lunt* v. *London and North Western Railway Co.* (1866), L.R. 1 Q.B. 277; *Directors, &c. of North Eastern Railway Co.* v. *Wanless* (1874), L.R. 7 H.L. 12; *Smith* v. *South Eastern Railway Co.* (1896), 1 Q.B. 178; *Mercer* v. *S.E. & C. Ry. Cos.' Managing Committee* (1922), 2 K.B. 549; *Steeves* v. *Grand Trunk Pacific Ry.* (1922), 1 W.W.R. 28.

Long, for respondent: The signalman did everything he could

to stop the street-car but the motorman paid no attention to him. If he had looked he would have seen the signalman trying to stop him and he would have seen the train coming. Even if he were signalled he must look. He must not leave his common sense behind him: see *Mercer* v. *S.E. & C. Ry. Cos.' Managing Committee* (1922), 2 K.B. 549 at p. 553; *Graham* v. *Great Western R.W. Co.* (1877), 41 U.C.Q.B. 324; *Cottingham* v. *Longman* (1913), 48 S.C.R. 542; *Canadian Pacific Rway. Co.* v. *Hinrich, ib.* 557 at p. 559. As to the charge see *British Columbia Electric Rway. Co.* v. *Dunphy* (1919), 59 S.C.R. 263 at pp. 269 and 273; *Leech* v. *The City of Lethbridge* (1921), 62 S.C.R. 123.

Argument

McPhillips, in reply.

Cur. adv. vult.

4th March, 1924.

MACDONALD, C.J.A.: The plaintiff sues for damages for the death of her husband, killed in a collision between the tramcar of the defendant, in which he was riding, and a railway train, which was backing across the line. A flagman of the railway company was at the crossing and the backing train displayed a lighted lantern in a conspicuous position on the rear car. The defendant's tram driver had stopped before attempting to cross the railway tracks, and either misinterpreted the signal, or having got the wrong signal given by the flagman, attempted to cross, when his car was struck by the train, resulting in the injury aforesaid.

MACDONALD, C.J.A.

The only defence worthy of notice was that defendant's driver was entitled to assume, because of the signal given by the flagman, that there was no danger and that he was therefore guilty of no negligence towards the passenger in so attempting to cross the track. The jury found the defendant guilty of negligence and said that the negligence consisted in the driver restarting his car without exercising ordinary care.

The learned judge had, in his charge to the jury, said:

"Now, the first question is: Did Meagher give the signal that the tram-man said he did? And if he did, then could not the tram-man scent the imminence of collision if he had proceeded, notwithstanding the fact he was told to go on?"

The defendant submitted that the jury must have had this

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instruction in mind when they answered the question, and that the answer must on the whole case necessarily mean that the driver was negligent in obeying a signal of the flagman, whereas they contended it was not negligence on the driver's part to come on in reliance upon the signal. There are at least two fallacies in this reasoning. There was evidence that a signal to cross the railway had not been given, and secondly, I think that even if the signal had been given, that fact could not relieve the defendant of its duty to its passenger, but at best would only relieve them of blame in an action between them and the railway company, on the footing that the railway company having invited the tram-driver to cross, he was relieved from obligation to look himself for danger. Moreover, it cannot be assumed that the jury meant to answer any question other than the one submitted to them, and the answer to that question is free from uncertainty.

MACDONALD, C.J.A.

The flagging was done pursuant to an order of the Railway Board, made on the application of the railway company. In the view I take of the appeal, I do not find it necessary to consider whether or not the Board had authority to make an order affecting third parties at crossings. I therefore express no opinion on this phase of the case.

I would, therefore, dismiss the appeal.

MARTIN, J.A.: There is, I think, ample evidence to support the finding of the jury that "the motorman did not exercise ordinary care and prudence in restarting his car," even if that finding would be taken to assume that he did get a signal to come on, though there is much evidence to the contrary. That is really the substantial point of the case and which I regard as one of fact in its essentials, and therefore it is unnecessary to enlarge upon the matter further.

MARTIN, J.A.

GALLIHER, J.A.: At the close of the argument I was clearly of the view that this appeal should be dismissed. A further consideration of the evidence and the authorities confirm me in that view.

GALLIHER, J.A.

MCPHILLIPS, J.A.: This appeal is from a judgment entered in favour of the respondent following upon a trial before Mr.

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Justice MORRISON and a special jury, the husband of the respondent being killed consequent upon a collision between a Great Northern Railway train and a tramcar of the appellant, the husband of the respondent being at the time of the accident with his wife, passengers on the tramcar. The verdict of the jury was in writing and was as follows:

"1. Was the defendant, B.C. Electric Railway Company, guilty of negligence which was the proximate cause of the accident? Yes.

"2. If so, in what did such negligence consist? That the motorman did not exercise ordinary care and prudence in restarting his car.

"3. Damages? $12,000."

The action was based upon the Families Compensation Act, otherwise known as Lord Campbell's Act. The learned counsel for the appellant strenuously contended that the verdict was vague and inconclusive, importing that the signalman of the Great Northern Railway Company did give the signal "to come on" after the tramcar had been stopped by the railway signalman, and the signal "to come on" justified the motorman of the tramcar starting up his car and that there should be, in any case, a new trial, but also submitted that there should be judgment for the appellant and the action dismissed. Further, that the verdict was perverse, which would entitle a new trial being granted. That the verdict amounted to a finding that the signal given to the motorman was a signal "to come on," and that the learned trial judge had erroneously charged the jury in refusing to tell them that the motorman was justified in going on if the signal "to come on" was given. Finally, that the learned trial judge erred in law in interpreting the verdict to be a general verdict for the respondent, but that, on the contrary, it could not be so interpreted, that at most it was a finding that the "come on" signal was given and, if given, that entitled the motorman without more to restart the tramcar and cross the tracks of the railway. The following is an excerpt from the order of the Board of Railway Commissioners for Canada, dated the 23rd of April, 1907:

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"That all the trains and engines of the applicant company [the Vancouver, Westminster or Yukon Railway Company, otherwise known at the point in question as the Great Northern Railway Company] come to a full stop before crossing the street, and do not proceed to cross until a trainman shall signal that the way is clear and to proceed. That the cars of the British Columbia Electric Railway Company, Limited, approach the

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said crossing cautiously, and if not flagged may proceed to cross without coming to a stop."

The tramcar of the appellant was flagged to stop by the Great Northern signalman, the point of crossing being switching yards of the Great Northern Railway Company. There is no express statement in the order of the Board that when the line is clear the signalman or trainman, after having stopped the tramcar of the appellant Company, would be entitled to or should give to the motorman of the tramcar the proper signal to restart the tramcar and proceed and cross the railway track. I, however, am of the opinion that that must be implied, unless implied it would mean that there would be paralysis of the tramcar service and other traffic would be held up indefinitely. Common sense requires that the order of the Board must be so construed. Now the motorman of the tramcar says he got the well-known signal from the signalman or trainman to cross, but that is denied by Meagher, the signalman of the railway company. It was admitted though by the learned counsel for the respondent at this Bar that the signal at the time might reasonably be interpreted by the motorman as a signal to cross the track, but it was not really that signal but a signal not given to the motorman but to the train of the railway company, and was given by the signalman when he was properly facing the on-coming train and for the guidance of the train not the tramcar. It is common knowledge that at switching yards the cars of a railway are shunted to and fro and it is only the signalman of the railway that can properly advise the other traffic as to the movements of the railway train. The fact that the train is on the move is no definition that the train will cross the intersection of the tracks of the railway and the tram line, as frequently the train may go to and fro in shunting with no intention whatever of crossing over, and it is a fair assumption that the motorman so believed when getting the signal which he said he got at the time of the accident and restarted his car. It is a monstrous idea to assume that the motorman restarted his car without the belief that he had got the proper signal. There is, however, rival evidence upon this point, and the verdict of the jury may be interpreted as a declaration upon the part of the jury that the signal was not given and that the motorman started up

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without it. Even if the motorman is right and he got the signal "to come on," he would nevertheless be negligent if he was aware or should have been aware that the train was about to cross. The default or mistake of the signalman of the railway company would not absolve the motorman from taking due and proper care in view of all the circumstances. It is not clear though that the motorman could have reasonably advised himself that the train was at the time actually proceeding in its course to cross the tracks. There is some evidence that the motorman could not see the on-coming train and could not at the moment apprise himself that the train was actually in the course of crossing, rather that he was entitled to assume that the signalman knew best the situation and that he would be right in acting upon the signal to cross given to him as he believed. However, the verdict of the jury may well be interpreted, and I so interpret it, as the learned trial judge also interpreted it, to mean that the motorman never did get the signal "to come on" and that coming on he was negligent, which would entitle the jury to find actionable negligence against the appellant. I cannot say that the verdict is other in effect than a general verdict for the respondent. In my opinion, Mr. Justice Duff, in succinct language stating the proposition of interpretation to be applied to the findings of the jury in the *Dunphy* case ((1919), 59 S.C.R. 263), really covers the situation presented in the present case, and that language and the proposition laid down is equally applicable here. At pp. 268-9, Mr. Justice Duff said:

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"Mr. Tilley's second contention was that the findings were insufficient to support the judgment. I concur with the opinion of the learned trial judge, Macdonald, J. that the verdict presents no difficulty. It is quite true that the jury did not respond to an invitation by the learned trial judge to particularize the charges of negligence which they found to be proved. But as the learned trial judge observed in pronouncing judgment upon the motion for judgment, when the answer to the second question is read with the charge, it becomes perfectly intelligible.

"I may add that the answers to these questions read together are equivalent to an affirmation that the plaintiff's injuries were due to the negligence of the defendant company and that the plaintiff is entitled to recover as damages the amount mentioned. Read together the answers constitute a perfectly good finding for the plaintiff for that sum. There can be no practical difficulty in giving effect to this as a general verdict because the instructions in the charge were quite sufficient to enable the jury intelligently to return a general verdict.

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"Had the answers been objected to as insufficient at the time they were given, the trial judge, no doubt, could have presented to the jury the alternative of specifying their findings of negligence more particularly, or returning a general verdict in the usual form. No such exception having been taken, it is not, I think, open to the defendants to take exception to the form—albeit an unusual form—in which the jury have expressed their findings."

It might well be that the jury believed that no signal was given "to come on" or even if the signal was given that in the circumstances with the on-coming train seen or which should have been seen by the motorman, he had acted recklessly and negligently in restarting the tramcar and attempting to cross. The motorman, whilst reasonably entitled, speaking generally, to act upon the signal of the trainman at the crossing, being the flagman for the time being at the point of intersection, would be disentitled to restart his car if the flagman upon his part gave him a noticeably negligent order, that is, the motorman must as well advise himself that it is safe to cross, and there is some evidence that the motorman allowed passengers at the time to remain in the vestibule of the tramcar obscuring a line of vision towards the on-coming train that would otherwise have been available to him, and it may reasonably be said that the jury believed that if this line of vision was not so obscured he would have seen that to restart his car would be a reckless and negligent act, as the result proved. It was a most unfortunate happening but it is impossible to say that the jury came to an unreasonable conclusion. The learned trial judge in the present case charged the jury in an admirable and very complete manner. Nothing was left unsaid that could usefully have been said, and the special jury heard the whole case presented to them in a manner that enabled them to effectively render their verdict, and the verdict, in my opinion, is understandable as meaning a general verdict, and in the words of Mr. Justice Duff above-quoted, "there can be no particular difficulty in giving effect to this as a general verdict because the instructions in the charge were quite sufficient to enable the jury intelligently to return a general verdict." The reasoning of Mr. Justice Anglin in the *Dunphy* case at pp. 270-71, is also most helpful in arriving at a proper conclusion in the present case as to the effect of the verdict and to meet the objection of the learned counsel for the

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appellant "that the verdict is vague and inconclusive." In the *Dunphy* case the contention was that the jury "do not specify the negligence," a somewhat analogous contention to that made in this case. Mr. Justice Anglin said:

"The second point made by Mr. Tilley is that the jury, having found the defendant guilty of negligence which caused the accident, failed, in answer to the second question—'If so, in what did such negligence consist?'—to specify the negligence. They said—'Insufficient precaution on account of approaching crossing and conditions on morning in question.' As Mr. *Mayers* very properly pointed out, the words 'in approaching crossing' make it clear that it was negligence on the part of the motorman which the jury had in mind. Only two faults on his part were charged—failure to sound the air-whistle and excessive speed—both of them matters of more than unusual importance in view of the 'conditions on the morning in question,' by which the jury, no doubt, meant the failure of the automatic warning signals at the crossing known to the motorman. The learned trial judge in his charge distinctly warned the jury that they must confine themselves to the negligence charged and should not import matter 'in the nature of a suggestion . . . . that some other precaution could have been taken.' We may not assume that the jury ignored this direction and unless we do so it would seem reasonably certain that the motorman's failure to sound his air-whistle and to moderate the speed of his car was the 'insufficient precaution' which, in the jury's opinion, constituted the 'negligence which was the cause of the accident.' Meticulous criticisms of a jury's findings are not admissible and they must always be read with and construed in the light of the issues presented by the pleadings, the evidence and the charge of the trial judge. While it might have been more satisfactory had the second finding been more specific, if dealt with in the manner I have indicated it seems to be sufficiently certain what the jury meant by it."

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In *Canadian National Railways* v. *Clark* (1923), S.C.R. 730, Mignault, J. laid down a proposition of law which really covers the present case. There it was dealing with the position of the plaintiff bringing an action for negligence consequent upon the collision of a railway train with the plaintiff's automobile at a railway crossing, and the question was whether there was contributory negligence? The jury there negatived contributory negligence and the Court of Appeal for Saskatchewan affirmed the judgment of the trial judge giving effect to the verdict of the jury, *i.e.*, supporting the finding of the jury and maintaining the respondent's action.

"The rule which has frequently been applied in cases of this character is that a person in the position of the plaintiff is bound to exercise reasonable care, having due regard to all the circumstances of the case [and in the present case the servant of the British Columbia Electric Railway, the motorman, also was under the like requirement]. Whether he has or has

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not done so is a question for the jury, properly instructed, to decide, and an appellate Court will not interfere with their finding if there was evidence on which it could reasonably be based."

I rely particularly upon the words of the last sentence above quoted. Here the special jury were "properly instructed" and the jury found the appellant guilty of negligence. It would not be proper, in the present case, in my opinion, for the Court of Appeal to disturb this finding if, in the language of Mr. Justice Mignault "there was evidence on which it could reasonably be based." Here, there was ample evidence upon which to base the finding.

I would also refer upon this point of the disturbance of the finding of a jury to the language of the Lord Chancellor (Lord Loreburn) in *Kleinwort, Sons, and Co.* v. *Dunlop Rubber Company* (1907), 23 T.L.R. 696 at p. 697:

"To my mind nothing could be more disastrous to the course of justice than a practice of lightly overthrowing the finding of a jury on a question of fact. There must be some error of law, which the Court believes has affected the verdict, or some plain miscarriage, before it can be disturbed. I see nothing of the kind here. On the contrary, it seems to me that the jury thoroughly understood the points put to them and came to a sensible conclusion."

MCPHILLIPS, J.A.

In my opinion, the jury in the present case "came to a sensible conclusion." The finding of the jury is in effect a general verdict and may rightly be so treated. The jury have said in unmistakable terms that in the then existing circumstances, that is to say, with an on-coming train, which, if not seen by the motorman, should have been seen by him, was negligent in restarting the tramcar, and that was the proximate cause of the accident.

I would, therefore, for the foregoing reasons dismiss the appeal.

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

Appeal dismissed.

Solicitors for appellants: *McPhillips, Smith & Gilmour.*
Solicitor for respondent: *G. Roy Long.*

REX v. FERRARO.

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

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REX v. FERRARO

Criminal law—Summary conviction—Intoxicating liquor—"Sell or keeping for sale"—Habeas corpus—Certiorari—B.C. Stats. 1915, Cap. 59, Sec. 99(1); 1921, Cap. 30, Sec. 91; 1923, Cap. 38, Sec. 13.

Section 91(1) of the Government Liquor Act having been repealed, the Court may examine into the proceedings where there is a defect in a warrant of commitment upon which a prisoner is held, and if satisfied that accused was rightly convicted uphold the conviction.

An accused was convicted by two justices of the peace for that he did sell or keep for sale intoxicating liquor contrary to section 26 of the Government Liquor Act. On the return to a writ of *habeas corpus*, counsel for the Crown moved for and obtained a writ of *certiorari* and all proceedings in the Court below were then filed. The main objection to the warrant of commitment was that there was duplicity in the charge.

Held, that the duplicity in the charge was a mere irregularity, the fundamental question being whether the accused was guilty of an infraction of section 26 of the Act, and where an accused received $4.10 a day in wages and purchases $172 worth of liquor in two months it is against reason to accept his story that the liquor was purchased for his own use. The conviction and warrant of commitment were amended by striking out the words referring to "selling" and the conviction sustained.

APPLICATION for a writ of *habeas corpus*. The accused was convicted at Powell River by two justices of the peace for and infraction of the Government Liquor Act. The warrant of commitment did not state the time or place, when or where the offence was committed and recited that accused was convicted "for that he did sell or keep for sale intoxicating liquor contrary to section 26 of the Government Liquor Act." On the hearing counsel for the Crown pointed out that subsection (1) of section 91 of the Government Liquor Act which took away the right of *certiorari* either at the instance of the Crown or any other person, had been repealed by section 13 of the 1923 amendment to said Act and said counsel then applied for a writ of *certiorari* which with the assent of counsel for accused was granted. Counsel for the Crown then filed the proceedings before the justices of the peace including the evidence. Heard by HUNTER, C.J.B.C. at Chambers in Vancouver on the 13th of March, 1924.

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Wood, for the Crown, referred to *Rex* v. *Lewis* (1903), 6 Can. Cr. Cas. 499; *Rex* v. *Nelson* (1908), 15 Can. Cr. Cas. 10 and *Rex* v. *Leahy* (1920), 28 B.C. 151.

J. Ross, for accused.

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HUNTER, C.J.B.C.: I understand this is the first case that has come before the Court since the amendment of the last session of the Legislature to section 91 of the Government Liquor Act. I consider that this amendment is a step in the right direction and if it were supplemented by an enactment making the depositions part of the record the Court would have power to remedy any injustice, and on the other hand where it is apparent on the face of the proceedings that the accused was rightly convicted it would be difficult for him to escape on any legal technicality. The Summary Convictions Act, section 99, provides:

> "No conviction or order made by any justice, and no warrant for enforcing same, shall, on being removed by *certiorari*, be held invalid for any irregularity, informality, or insufficiency therein if the Court or judge before which or whom the question is raised, upon perusal of the depositions, is satisfied that an offence of the nature described in the conviction, order, or warrant has been committed."

One of the objections is that there is duplicity in the charge. I think that the so-called duplicity, which is that the accused is charged with "keeping for sale or selling," is a mere irregularity, and that the fundamental question was whether the accused was guilty of an infraction of section 26 of the Government Liquor Act.

Judgment

The evidence shews that the accused purchased $172 worth of liquor in two months, 360 bottles of beer, 12 bottles of Scotch whisky, and 12 bottles of rye whisky. In the face of that it is against all reason to accept his story that this liquor was being purchased for his own use and for distribution among his friends.

The case among those quoted by Mr. *Ross* which is nearest the present one is *Rex* v. *Kennedy* (1921), 2 W.W.R. 88. In that case the police found a comparatively small quantity in a garage. The accused's means were not disclosed but the Court came to the conclusion, not without some doubt, that the explanation given by the accused was sufficient. But this is a very

different case. The accused on his own statement was earning wages at the rate of $4.10 per day and during the months of January and February earned considerably less money than he expended in the purchase of liquor, and in my opinion it is against all reason to accept his story. He was clearly in the bootlegging business and was therefore rightly convicted.

The conviction and warrant of commitment will, therefore, be amended by striking out the words referring to selling, and also by inserting the time and place of the offence.

Application refused.

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

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Judgment

STANDARD BANK OF CANADA v. WADE.

MCDONALD, J.

1924

April 2.

STANDARD BANK OF CANADA v. WADE

Practice — Action on promissory notes — Receiver — Subsequent action by another creditor—Order that receiver hold assets subject to order.

The plaintiff brought action on two promissory notes and before service of the writ obtained an order appointing a receiver to receive the share to which the defendant was entitled from a certain estate. Shortly after the order was made The Royal Trust Company issued a writ against the defendant for a debt due and owing and then applied in this action for an order that the receiver do hold all moneys received by him subject to further order of the Court.

Held, that the plaintiff by obtaining its receivership order has not obtained priority over other creditors existing on the date that the order was made and the motion should be granted.

Held, further, that The Royal Trust Company although not a party has taken the proper procedure in moving in this action.

Searle v. *Choat* (1884), 25 Ch. D. 723 followed.

MOTION by The Royal Trust Company for an order that the receiver appointed in this action to receive the share to which the defendant is entitled from the estate of the late William Braid, do hold all moneys received subject to further order of the Court. The defendant Wade was a beneficiary of a certain sum of money under the will of the late William Braid. The plaintiff Bank brought this action against Wade for pay-

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STANDARD BANK OF CANADA v. WADE

Statement

ment of two promissory notes amounting in all to $17,000 and upon the issue of the writ the plaintiff applied for and obtained an order whereby one J. W. Ruggles was appointed to receive the share to which the defendant Wade was entitled from said estate. Shortly after this order was made The Royal Trust Company issued a writ against the defendant for certain sums due and owing said Company and now applies in this action for said order. A third creditor who had not yet taken proceedings was represented on the application. Heard by MCDONALD, J. at Vancouver on the 28th of March, 1924.

Symes, for the motion.
E. A. Lucas, for plaintiff.
Hogg, for a third creditor.

2nd April, 1924.

MCDONALD, J.: In this action an order was made immediately upon the issue of the writ and before service thereof, whereby J. W. Ruggles was appointed receiver to receive the share to which the defendant was entitled from the estate of the late William Braid, the plaintiff's claim in the action being founded upon two promissory notes, amounting in all to some $17,000.

Shortly after the order was made The Royal Trust Company issued a writ against the said defendant and now applies in this action for an order that the receiver do hold all moneys received subject to the order of the Court, the contention being that all moneys received by the receiver should be divided *pro rata* among the creditors of the defendant. Another creditor represented by Mr. *Hogg* has taken no proceedings as yet, but Mr. *Hogg* appeared on this motion in support of the contentions made by Mr. *Symes* on behalf of The Royal Trust Company. Mr. *E. A. Lucas,* for the plaintiff, takes the preliminary objection that this motion cannot properly be made in this action by The Royal Trust Company, which is not a party to the action. I think upon the authority of *Searle* v. *Choat* (1884), 25 Ch. D. 723, that the applicant has taken the proper procedure in moving in the present action. Mr. *Lucas* contends that by virtue of his receivership order his client has obtained priority

Judgment

over other creditors of the defendant Wade, and relies upon the decision in *In re Marquis of Anglesey* (1903), 2 Ch. 727. Mr. *Symes* relies upon *Kewney* v. *Attrill* (1886), 34 Ch. D. 345. Neither case is identically in point. In *In re Marquis of Anglesey, supra,* the decision was that the person who had obtained the order appointing a receiver of the plaintiff's interest in certain residuary personal estate, obtained priority over persons who had obtained stop orders on the fund in Court after the receiving order had been made, but there was no decision as to the rights of others who were creditors at the time the receivership order was made. As said by Swinfen-Eady, J., at p. 731:

"In my opinion it [the receiving order] prevents the debtor from dealing with the moneys to the prejudice of the execution creditor; and it also prevents any subsequent execution creditor from gaining priority over the creditor obtaining the order, if at the date when obtained the property of the judgment creditor cannot be taken in execution or made available by any other legal process."

At p. 732, the learned judge says:

"The question then arises, Has any other person subsequently obtained priority over Hartog [the person who obtained the receivership order]?"

No such question arises here. In *Kewney* v. *Attrill, supra,* the facts were that a judgment had been pronounced in a Chancery action for dissolution of partnership, and a receiver had been appointed. Later a creditor obtained judgment in the Queen's Bench Division against the firm. The judgment creditor applied in the Chancery action and was given a charge for his debt on all the partnership moneys coming to the receiver, the creditor undertaking to deal with the charge according to the order of the Court. Kay, J., who made the order, stated that the intention of the Court was to preserve to the creditor all the rights which he would have had if he had issued execution and the sheriff had seized and sold the assets on the day the order was made. Here, again, no question arises as to the right of one creditor to priority over another in such a case as the present.

Judgment

It seems to me, however, that the correct principle to be applied here was enunciated by Mr. *Hogg,* namely, that the plaintiff in this action, in asking to have a receiver appointed, is applying for relief in equity—relief which he could not claim in a Court of Common Law.

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Coming into equity, he must be governed by the rules of equity, and it seems to me that the dominant maxim to apply is that, "equality is equity."

Something similar to this is said by Stirling, J., in *In re Wells. Molony* v. *Brooke* (1890), 45 Ch. D. 569 at p. 572:

"Under these circumstances, seeing that the executor was not unwilling that the assets of the testator should be distributed in the manner which is favoured, if I may say so, by a Court of Equity where lawfully it can be done—that is to say, in such a way as to produce equality among the various creditors—I thought the best course to take was to appoint a receiver."

Judgment

There will be an order, therefore, declaring that the plaintiff, by obtaining its receivership order, has not obtained priority over other creditors existing on the date when the order was made. Costs of all parties to be paid out of the fund. Liberty to apply.

Motion granted.

MCDONALD, J.

1924

April 1.

IN RE BELL IRVING ASSESSMENT

IN RE BELL IRVING ASSESSMENT.

Taxation—Assessment—Vancouver Incorporation Act—Court of Revision—Appeal under section 56—Application of section 39 as to evidence of "fair actual cash value"—B.C. Stats. 1921 (Second Session), Cap. 55, Secs. 39 and 56.

An appeal to a judge of the Supreme Court under section 56 of the Vancouver Incorporation Act, 1921, from a decision of the Court of Revision on an assessment is (as provided by subsection (3) thereof) "limited to the question whether the assessment in respect of which the appeal is taken is or is not equal and rateable with the assessment of other similar property in the City having equal advantage of situation" and does not bring within its scope the provisions of section 39 of said Act.

Statement

APPEALS by Maria Isabel Del Carmen Bell Irving and Henry O. Bell Irving to a judge of the Supreme Court under section 56 of the Vancouver Incorporation Act, 1921, from the decision of the Court of Revision of the City of Vancouver in respect to the assessment of certain property on Cordova Street

in the City of Vancouver. The facts are set out in the reasons for judgment. Argued before McDonald, J. at Vancouver on the 27th of March, 1921.

MCDONALD, J.

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IN RE BELL IRVING ASSESSMENT

Abbott, for appellants.
McCrossan, for respondent.

1st April, 1924.

McDonald, J.: These appeals come before me as a judge of the Supreme Court sitting as *persona designata* under section 56 of the Vancouver Incorporation Act, 1921. Section 39 of that Act provides that:

"All rateable property, or any interest therein, shall be estimated at its actual cash value as it would be appraised in payment of a just debt from a solvent debtor."

Further sections of the Act provide for an appeal from the assessor to the Court of Revision, and section 56 provides that:

"If a person be dissatisfied with the decision of the Court of Revision, he may appeal therefrom to a judge of the Supreme Court."

Subsection (3) of section 56 provides that:

"The judge shall hear the appeal and evidence adduced upon oath . . . . in a summary manner . . . . provided, however, that the appeal from the decision of the Court of Revision shall be limited to the question whether the assessment in respect of which the appeal is taken is or is not equal and rateable with the assessment of other similar property in the City having equal advantage of situation."

It is contended for the appellant that notwithstanding the proviso last mentioned, it is open to me to hear evidence as to whether the lands in question were actually assessed at their fair actual cash value as required by section 39, and reliance is placed upon the decisions in such cases as *In re The Improvement District Act and C.P.R. Assessment* (1924), 1 W.W.R. 513; *Rogers Realty Co.* v. *City of Swift Current* (1918), 57 S.C.R. 534; *Dreifus* v. *Royds* (1920), 61 S.C.R. 326, and *Castor* v. *Fenton* (1917), 1 W.W.R. 1474.

Judgment

The appellants' counsel contends that notwithstanding the proviso contained in section 56, I must nevertheless remember that section 39 is the dominant provision, and if after hearing the evidence, I am satisfied that section 39 has not been obeyed, I ought to vary the assessment, reducing it to the amount of the actual cash value of the lands.

I have examined the cases cited, and the statutes upon which

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those decisions are based. The nearest case to the one we are considering is *In re The Improvement District Act and C.P.R. Assessment, supra.* At first blush that case seems almost indistinguishable, but on further examination I am satisfied that it is distinguishable and that I have no jurisdiction to consider any question on these appeals except the question whether the assessments are or are not "equal and rateable with the assessment of other similar property in the city having equal advantage of situation." I consider no other statute that has been brought to my notice so distinctly limits the jurisdiction on appeal as section 56. Under the proviso, as I understand it, I have no power to enter upon the question as to whether the property was assessed at more or less than its actual cash value. The Alberta statute, under which *In re The Improvement District Act and C.P.R. Assessment, supra,* was decided, provided that lands should be assessed at their fair actual value, and then by another section provided that if the value at which any specified land had been assessed appeared to be more or less than its fair actual value, the amount of assessment should nevertheless not be varied on appeal if the value at which the land had been assessed bore a fair and just proportion to the value at which lands in the immediate vicinity were assessed. That seems to me to presuppose in the Appellate Court a right to consider whether the specified land was assessed for more or less than its fair actual value. It may be that the result is practically the same, nevertheless, I think the clear intention of the Legislature in passing the proviso in section 56, was to leave no question open to the judge sitting in appeal other than the question whether the assessment is equal and rateable with the assessment of other similar property in the city having equal advantage of situation. I am accordingly dealing with this case on that basis.

The respondent called as its only witness Mr. Painter, the city assessor, a man of long experience and undoubted ability and integrity. He assessed both the properties in question at $550 per front foot and he gave his reasons for doing so. He paid practically no attention to the income which may be expected to accrue upon the lands in question, but paid very great

attention to what are called the potentialities, in other words, to what the lands may be expected to produce in the future. He gave the history of Cordova Street, on which the lands are situated, shewing that the largest retail stores had long since moved from there to Hastings and Granville Streets, but he contends that by reason of Cordova Street's nearness to the waterfront, it may be expected (and it is even now the case) that much business would come to Cordova Street from the waterfront.

For the appellants three witnesses were called: Mr. Hope, Mr. Ames, and Mr. Reeve, all men of long experience and of equal integrity, who have had many years of training in the valuing of lands in the City of Vancouver and other cities. Each of these witnesses, in arriving at the valuation of a piece of land, has considered not only the past but the present and the future, as was held by the Court of Appeal in *In re Charleson Assessment* (1915), 21 B.C. 281, as being the proper procedure. Keeping all these matters in mind, these witnesses have made comparisons of assessments made upon properties on Main Street, Seymour Street, Pender Street and Water Street, and have given evidence which convinced me that the assessor in making the assessments in respect of which these appeals are taken, failed to observe the rule that the assessments "must be equal and rateable with the assessment of other similar property in the city having equal advantage of situation."

Each of these witnesses was skilfully cross-examined, and yet each maintained the position taken in giving his evidence in chief. The weight of the evidence is overwhelmingly with the appellants, and I can only reach my decision upon the evidence adduced before me. Counsel for the City points out that this judgment will be one of far-reaching effect if adverse to the decision of the assessor as confirmed by the Court of Revision, and states that such a decision will necessarily force an entirely different basis upon which assessment values should be based in the whole down-town district, and that such a decision "will undo the standards and stability which both the assessment department and the Court of Revision have been endeavouring to attain."

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IN RE BELL IRVING ASSESSMENT

I quite realize the responsibility I am assuming in reaching the decision I have reached, but in taking that responsibility I have acted entirely and only upon the weight of evidence. I have no opinion in the matter myself, nor do I think I ought to have. If the respondent was satisfied that the assessment was correct, it ought to have come before the Court with sufficient evidence to substantiate its position. No other evidence being called than that of the assessor, I can only assume that no other evidence was available, and I am satisfied that the evidence adduced before me would satisfy any Court, that the weight of the evidence was, as stated, overwhelmingly with the appellants.

Judgment

Considering, therefore, that the assessments in question are not equal and rateable with the assessments of other similar property in the city having equal advantage of situation, I reduce the assessment on Mr. Bell Irving's property to $350 per front foot, and that on Mrs. Bell Irving's property to $450 per front foot.

It will be, of course, at once noted that the result of this decision is that while I am (so far as I am concerned) bound to hold in one breath that Mr. Painter assessed the properties in question at their actual cash value as required by section 39, I hold in the next breath that the assessments must be reduced. This, however, is the result of the legislation, and is something over which I have no control.

Appeals allowed.

REX v. IACI.

MORRISON, J. (At Chambers)

1924

April 29.

REX v. IACI

Criminal law—Search of premises under search warrant—Quantity of liquor found—Arrest of occupants without warrant—Offence charged under Government Liquor Act—Conviction—Habeas corpus and certiorari—B.C. Stats. 1921, Cap. 30, Sec. 26—1921 (Second Session), Cap. 55, Sec. 245—R.S.B.C. 1911, Cap. 1, Sec. 14.

Police officers entered a premises under a search warrant and on finding a large quantity of liquor arrested the occupants without a warrant to arrest. Upon being charged of an infraction of section 26 of the Government Liquor Act the accused did not plead and their counsel raised the objections (1) that having been arrested without a warrant the magistrate had no jurisdiction to hear the charge; (2) that the police magistrate for Vancouver City alone and not the stipendiary magistrate for the County of Vancouver had jurisdiction to hear the charge under section 245 of the Vancouver Incorporation Act, 1921; (3) that no offence known to the common law was described in the warrant of committal inasmuch as the charge read, "unlawfully did keep for sale" whereas the section of the statute says "expose or keep for sale." Upon *habeas corpus* and *certiorari* in aid after conviction:—

Held, as to the first objection that it is immaterial how the accused came before the magistrate if he had jurisdiction to take cognizance of the offence, which he had notwithstanding the objection raised to the jurisdiction at the time. That section 14 of the Interpretation Act, R.S.B.C. 1911, is an answer to the second objection and as to the third the offence was properly laid.

APPEAL by way of *habeas corpus* with *certiorari* in aid from a conviction by H. O. Alexander, stipendiary magistrate for the County of Vancouver, on a charge for an infraction of section 26 of the Government Liquor Act. The accused's premises were entered by police officers under the authority of a search warrant. They found a large quantity of liquor in both the dwelling-house and the adjoining garage. Both occupants were thereupon arrested without a warrant. Upon being charged they did not plead and counsel took the objections: (1) that having been arrested without a warrant the magistrate had no jurisdiction to hear the charge as laid; (2) that the police magistrate for the City alone and not the stipendiary magistrate had jurisdiction to hear the charge under section 245 of the Vancouver Incorporation Act, 1921; (3) that as the charge

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read "unlawfully did keep for sale" whereas the section of the statute reads "expose or keep for sale" there is no offence known to the common law as described in the warrant of committal. Argued before MORRISON, J. at Chambers in Vancouver on the 15th of February, 1924.

J. W. deB. Farris, K.C., and *Brougham*, for accused.
Carter, D.A.-G., for the Crown.

29th April, 1924.

MORRISON, J.: The parties were arrested by Provincial constables at their residence in the City of Vancouver for an infraction of section 26 of the Government Liquor Act, B.C. Stats. 1921, Cap. 30. The premises were entered under the authority of a search warrant, the validity of which is not questioned. The officers had no warrant to arrest. They found, upon entering the dwelling-house, a large quantity of liquor both in the house and in the adjoining garage, and thereupon brought both the occupants before the stipendiary magistrate having jurisdiction in the County of Vancouver. In due course, upon being charged as above, and without pleading, their counsel raised the objections (1) that having been arrested, without a warrant of arrest, the magistrate had no jurisdiction to hear the charge as laid; (2) that it was the police magistrate for the City of Vancouver alone and not the stipendiary magistrate who had jurisdiction to hear the charge pursuant to B.C. Stats. 1921 (Second Session), Cap. 55, Sec. 245; (3) that no offence known to the common law was described in the warrant of committal, inasmuch as the charge read "unlawfully did keep for sale" whereas the section of the statute says: "expose or keep for sale."

Judgment

As to the first ground, Mr. *Farris* relies on the case of *Rex* v. *Suchacki* (1923), 3 W.W.R. 1202; (1924), 1 D.L.R. 971, in which nearly all the cases opposite are dealt with. There is one element in the case before me which is absent in the *Suchacki* case, *viz.*, the existence of a search warrant. The accused were found, *prima facie*, at least in the unlawful possession of the liquor. On this branch the neat point with which counsel confront me is whether the officers were legally entitled to arrest the

accused armed only with a search warrant. With deference, I do not agree that that is the point to be considered at this juncture. As to the justification for the conduct of the officers in bringing the parties before the magistrate, that is a matter for the consideration of another tribunal in another form of proceedings. For ought I know the arrest may have been illegal and the prosecution malicious. I do not think, however, that it follows that the magistrate had no jurisdiction to hear the charge, which specified an offence included in the category of offences which he is given the power to entertain. I incline to the school of legal thought which supports the view that it is immaterial how the men charged came to be before the magistrate if he had jurisdiction to take cognizance of the offence, which he had in this case, notwithstanding that an objection is raised to the jurisdiction at the time. There is a marked conflict of judicial opinion in the Canadian Courts on this question of arrest without a warrant and as to the efficacy of an objection raised to the magistrate proceeding to hear the charge.

The accused, although perhaps incommoded, were not prejudiced by the officers not letting the time elapse which would be necessary to go through the formality of securing a warrant for arrest, which time might enable them to escape and to remove the liquor which they had in their possession in violation of a Provincial statute, which breach is by the Criminal Code of Canada an indictable offence. In the view I take as to the magistrate's jurisdiction, I do not intend to deal with the submission of counsel for the Crown that the officers had the right without warrant to arrest the accused when caught in the act of committing an indictable offence, further than to observe that the Government Liquor Act does provide for a penalty. Apart from the objection that there was no warrant of arrest, it is not suggested but that they had had a full opportunity of defending themselves and that they had a full and fair consideration of their case.

Judgment

I think that the second ground relied upon by counsel for the accused is met by the Interpretation Act, R.S.B.C. 1911, Cap. 1, which establishes the jurisdiction of the stipendiary magistrate. Section 14 reads as follows:

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"14. Whenever any Act is repealed in whole or in part, and other provisions are substituted by way of amendment, revision, or consolidation, any reference in any unrepealed Act, or in any rule, order, or regulation made thereunder to such repealed Act or enactment, shall, as regards any subsequent transaction, matter, or thing, be held and construed to be a reference to the provisions of the substituted Act or enactment, relating to the same subject-matter as such repealed Act or enactment; Provided always that where there is no provision in the substituted Act or enactment relating to the same subject-matter, the repealed Act or enactment shall stand good, and be read and construed as unrepealed, in so far, but in so far only, as is necessary to support, maintain, or give effect to such unrepealed Act, or such rule, order, or regulation made thereunder."

Judgment

Then there is subsection (3) of section 91 of the Government Liquor Act.

As to the third ground, I am of opinion that the offence is properly laid. I see no reason why "and" should be substituted for "or" as has been urged by counsel.

Appeal dismissed.

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March 27.

McINTYRE v. COMOX LOGGING AND RAILWAY COMPANY.

McINTYRE v. COMOX LOGGING AND RAILWAY CO.

Negligence—Forest fires—Logging—Railway used in operations—Spark arresters—Clearing of debris—Powers of fire warden—Excessive wind "Act of God"—B.C. Stats. 1912, Cap. 17, Sec. 127A(1).

The defendant Company was incorporated by special Provincial Act in 1910, and has since carried on logging operations in the Comox district extending northerly from Courtenay on lands belonging to the Canadian Western Lumber Company with which company it had contracted for logging this area. The defendant's operations had by 1922 cleared an area of over 10,000 acres and in 1919 the Canadian Western Lumber Company sold to the Land Settlement Board a block of land containing a portion of the cleared area. The Board sold lots to returned soldiers and there became a community centre where the school and post office were located called Merville. In the spring and summer of 1922 the defendant continued logging operations from the north end of the cleared area and from there it laid railways over the cleared area to assist in its operations. It had seven engines working that were equipped with spark arresters. The area that had been

logged was never properly cleared, the broken portions of trees with other debris remaining with the natural undergrowth. In April a fire started along one of the defendant's tracks and worked its way along southerly and never appeared to have been entirely put out. In May another fire started along one of the tracks that covered only a small area but there was no evidence of its having been put out. The spark arrester was defective on one of the engines and on the 8th of June another fire was started and aided by wind, spread rapidly. On the same night the district fire warden (who had previously discussed with the defendant the clearing of debris and slash by fire) came on the scene and said this fire should be allowed to burn over the slashed area but should otherwise be kept under control. This fire was checked in places but was allowed to spread in certain directions over the whole cleared area. It burned itself out considerably by the end of June but was still smouldering in spots on the 6th of July, when a strong wind came up which appeared to fan into flame all the smouldering fires and late that evening Merville was destroyed, which included the plaintiff's property. The plaintiff's action for damages was consolidated with those of about fifty others to determine the question of liability. Three defences were raised: (a) that the effective cause of the damage was a fire that originated on an adjoining property; (b) that the fire of the 8th of June was in pursuance of a demand of an officer authorized by the forest branch of the department of lands under section 127A(1) of the Forest Act; (c) that such a wind as that of the 6th of July was never previously experienced in the district and constituted an "act of God" which would relieve the defendant from liability.

Held, that on the evidence the fires that originated upon the various parts of the cleared area first reached the plaintiff's properties; that a fire started through a defective spark arrester on a locomotive which later gets out of control through a high wind cannot be adopted by an officer of the department as a legal fire pursuant to a demand as contemplated by section 127A(1), and the defendant is not relieved from the consequences of his negligence by the fact that an "act of God" has intervened.

Held, further, that the defendant is guilty of negligence: (a) in operating a locomotive with a defective spark arrester at a time of year when everything surrounding the railway is in an inflammable condition; and (b) in allowing the debris to accumulate along the tracks, and the plaintiff is entitled to judgment.

ACTION for damages for the loss of certain property owing to the alleged negligence of the defendant Company in starting a fire and allowing it to spread to and destroy the plaintiff's premises. Some fifty similar actions were brought and an order was made that they be tried together and the question of liability be first determined. The facts are set out fully in the reasons for judgment. Tried by McDONALD, J. at Vancouver

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on the 20th to the 28th of February, and the 3rd to the 20th of March, 1924.

March 27.

MCINTYRE v. COMOX LOGGING AND RAILWAY CO.

J. Edward Bird, and *R. M. Macdonald,* for plaintiff.
Davis, K.C., and *Hossie,* for defendant.

27th March, 1924.

MCDONALD, J.: This is an action for damages brought by the plaintiff who alleges that he suffered the loss of certain property by reason of the negligence of the defendant in starting a fire and allowing it to escape on to the plaintiff's premises. Some 50 other similar actions were commenced and an order was made that the actions should be all tried together and that the question of liability or no liability should be considered before the question of the amount of damages should be taken up. At the trial, it was agreed that such of the plaintiffs, as should be called as witnesses on the main facts, should, at the same time, give evidence as to the damages suffered by them and that other plaintiffs should give evidence later as to the amount of their respective damages in case the defendant Company should be held to be liable.

The defendant Company was incorporated under a special Act of the Province of British Columbia, being Cap. 63 of the statutes of 1910. Certain powers were given to the Company and it was provided by section 10 that the British Columbia Railway Act should apply to the Company in relation to its railway in the same manner and to the same extent as if the same had been set forth clause by clause in the special Act save and except in case of any conflict, inconsistency or repugnancy, in which latter case the special Act should govern.

Judgment

For some fifteen years, the defendant Company has been carrying on logging operations over a very large area in Comox district on Vancouver Island working in a general northerly direction from the vicinity of Courtenay. The land on which it had been operating belongs to the Canadian Western Lumber Company, the defendant Company operating under a contract with that Company. About the year 1919, the Canadian Western Lumber Company sold to the Land Settlement Board a considerable area of the land which had been logged over and that Board, acting under the directions of the Provincial Gov-

ernment, sold to a number of returned soldiers various lots of land with a view to their building homes and settling there. The greater number of the plaintiffs are returned soldiers who so purchased from the Land Settlement Board and their holdings comprise what is known as Merville. At some points in the evidence Merville is referred to as what may be called the community centre where the school, post office, blacksmith shop and the like were situate and in some places it is referred to as the whole settlement extending for some miles from this centre. Prior to 1922, the defendants had logged off some 8,000 or 10,000 acres in a general northerly direction from Merville and were in the spring and summer of 1922 carrying on logging operations in the vicinity of what is known as camp 2 in sections 16, 17, 21, 22 and 28 of block 29, and to carry on these operations they had laid railway tracks throughout various portions of the area as shewn on Exhibits 2-A. These railway tracks were laid on ties 8 feet in length and some seven locomotives were used in hauling logs over various of the railway lines and in taking the men to and from their work. The 8,000 or 10,000 acres, above referred to, had, except as to about 2,000 acres, been burned over prior to 1922, some parts of it on more than one occasion; but even on the parts so burned over much inflammable material in the way of logs, stumps, trees which had been left standing by reason of being unmerchantable, and bracken which had grown up from time to time, still remained on the ground. Approximately 2,000 acres was what was termed by one witness virgin slash, *i.e.*, it remained as it was left after the merchantable logs had been removed. In laying their railway tracks the defendant Company cleared only a sufficient space to permit them to lay their ties and steel. At many places alongside the tracks, where logs had been loaded on the cars, accumulations of bark and pieces of wood, which would naturally accumulate where logs were loaded by machinery and tackle, were allowed to remain. No systematic effort had been made to burn up this debris, which had accumulated along the tracks and which had either been caused by the loading operations or by the clearing of the way on which to lay the tracks. The spring and summer of 1922 was an almost

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MCINTYRE v. COMOX LOGGING AND RAILWAY CO.

unprecedentedly dry season. From April until July there was scarcely any rain. In the month of April a fire started near one of the defendant Company's tracks between old camp 3 and camp 1 and, so far as the evidence goes, that fire gradually crept over the ground toward the south and south-east and was never actually put out. At that period the defendant had no spark arresters upon its engines but on the 1st of May all of its engines were duly equipped with spark arresters approved by the fire warden of the district. Sometime during the latter part of May another fire was started near the Company's railway track but it would appear that this fire did not cover any great area. There was no evidence that this fire was ever extinguished.

On the 6th of June, Mr. Byers, the district fire warden, had an interview with Mr. Filberg, the defendant's superintendent, regarding the burning of the slash covering generally the whole of block 29 south-east and east of the Company's camp 2 operations. As it becomes necessary to consider the effect of this interview, I shall refer later to the evidence relating thereto. On the 8th of June, about 2 o'clock in the afternoon, defendant's locomotive No. 7 emitted sparks at a point in the south-east quarter of section 22 and near to one of the Company's branch lines, thereby causing a fire. The spark arrester on the engine at that time was defective. There was a considerable wind blowing from the north-west and the fire spread rapidly in a south-easterly and easterly direction and before evening had extended some two miles through an area about half a mile wide. Late that night, Mr. Byers arrived on the scene. It was then a physical impossibility to put the fire out and Byers then said that it should be allowed to burn so as to burn over the area covered by slash, but should be kept in control. At this time, the defendant Company had about 150 men engaged building a fire trail to the north-east of the point where the fire started and across section 22 and part of section 28, as shewn on Exhibit 2-A. That fire, so started on the 8th of June, spread during the next three or four weeks over practically the whole of block 29 south and east of section 22. On various occasions, it was necessary to call out men to protect the property of plaintiff

Judgment

LeSueur in lot 24. It was also necessary to build another fire trail on section 23 to protect camp 2 and also to protect the premises of one Cecil Smith situate in section 24. That fire extended easterly across the Island Highway, across Black Creek and went further easterly joining with the April fire in that portion east of the Island Highway and south of sections 30 and 31 and then crossed westerly over the highway and extended as far southerly as the shingle mill truck road and as far south-westerly as the fire trail which extends south-easterly from a point near Joe's shack on the Company's main line. There were points all through sections 23, 29, 30 and 31 and lots 124 and 123 and throughout the whole area south and south-east of these sections and lots where the fire was burning, though in very many places it appeared to have burned itself out by the end of June. There is considerable conflict of evidence as to just at what points fires were visibly burning on the 5th of July, the defendant's contention being that this extensive fire had burned itself out except at two places, *viz.*, at the shingle mill truck road and the fire trail adjoining same and in an area to the east and north of lot 88; and the plaintiffs' contention being that fires still burned on the evening of the 5th of July throughout the whole area south and south-east of the defendant Company's scene of operations, both east and west of the Island Highway and south-east and east of Black Creek. It is beyond question that the fire of the 8th of June, having merged with several other smaller fires, did, at sometime between the 8th of June and the 5th of July cover practically the whole 8,000 or 10,000 acres. The evidence of both Byers and Filberg satisfies me of this. Other evidence offered by the defendant is more or less negative and amounts simply to this that various people going up and down the highway and passing back and forth on the railways, on their way to and from work, failed to notice any fires in the latter part of the month of June. In any event, as stated by HUNTER, C.J., in *Crewe* v. *Mottershaw* (1902), 9 B.C. 246 at p. 247:

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> "Anyone having personal experience of the matter knows, fire at that season of the year is apt to smoulder among the roots of the brush and break out with renewed energy when least expected."

MACDONALD, J. makes a similar reference in *Stevens* v.

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Abbotsford Lumber Co. (1923), 3 W.W.R. 349 at p. 352, where he says (referring to a witness):

"He should not have overlooked as well the chance, even although there was no smoke appearing, that still there might be fire at the roots of some of the many trees which it [the defendant] had cut down in times past."

As late as the 26th and 28th of June fires were started in debris near the main line track north of Joe's shack, the proper inference being that these fires were started by the defendant Company's locomotive. Mr. Filberg saw one of these fires shortly after it started but made no effort to extinguish the same because, as he says, it was within about 200 yards of the fire of 8th June which was covering the area nearby and would very shortly merge with same. For several days prior to the 5th of July a number of men had been engaged under the direction of the assistant fire warden in constructing the fire trail to the north-west of lot 232 and along the shingle mill truck road with a view to preventing the fire from spreading to McLeod's shingle mill. On the night of the 5th of July, it appeared that this fire was under control and that there was no immediate danger of its spreading further and most of the men were allowed to go home. Nothing had been done to control or take care of the fire to the north and north-east of lot 88 nor in any other portions of the area in question except at LeSueur's home and at the fire trails at camp 2 and on lot 22. I think it is a fair conclusion to reach upon the whole evidence that, on the evening of the 5th of July, throughout this area of 8,000 or 10,000 acres, while there were no fires that might be considered formidable there were here and there fires in a quiescent state ready to burst into flame if a wind should spring up.

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On the same evening of the 5th of July there was a fire also in a quiescent state on lot 39 north of the Oyster River near the pump marked on Exhibit 2-A in an area where the International Timber Company was carrying on logging operations. At least this fire, a day or two previously, was, in the opinion of the fire warden, in a quiescent state and men of the International Timber Company were endeavouring to extinguish it. About noon on the 6th of July, a considerable wind sprang up blowing generally from north-west to south-east. About 2.30

o'clock in the afternoon the fire at the shingle mill truck road got out of control and as the witnesses say "jumped" the fire guard. Many men worked until late in the evening protecting the shingle mill and buildings used in connection therewith and succeeded in doing so. While this fire passed out of their vision and toward the ridge lying between the shingle mill and Merville, fires meanwhile freshened up in various places throughout the area. The wind continued to increase. About 4.30 the fire in the International Timber Company's property, having been blown into a flame, crossed lots 28, 21 and 16 into lot 22 and there started a fire in the defendant Company's scene of operations which developed into what counsel for the defendant very properly described as an "inferno." Lying on the ground, at the scene of those operations, were some ten million feet of logs and all about were the branches and other debris which had accrued during the logging operations. The wind developed into what was described, I have no doubt properly, as a "hurricane." In any event, it was a stronger wind than any of the witnesses had previously experienced in that locality. Fire was carried from lot 22 in a south-easterly direction toward LeSueur's house, and towards old camp 3, burning all the property at both places. Fires sprang up throughout the whole countryside and extended in a south-easterly direction on both sides of the Island Highway, and sometime about 6.35 had reached Hanley's place on lot 14 and by about eight o'clock at night Merville had been destroyed. Much time was taken at the trial in getting from the various witnesses the times at which various places took fire and I find it almost an impossible task to reach a definite conclusion, as to the exact time when any particular place did take fire. This task has been made the more difficult for two reasons: One, that I am satisfied the witnesses called on both sides were doing their best, under trying circumstances, to tell the truth; and the other that, at that time, throughout the area in question, no less than four standards of time were being used, *viz.*, headquarters' time, which was 30 minutes in advance of standard time; camp No. 2 time, which was 35 minutes in advance; old camp 3 time, which was 55 minutes in advance; and standard time itself. One period of time, I have men-

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tioned, does seem to be fairly definitely fixed and that is by the witness, Mrs. Simmons, who was watching the time by reason of the fact that she was then employed by the Telephone Company in Courtenay and was returning to her work. She fixes the time definitely as about 6.35, when they were compelled to run from Hanley's house to save their lives. I can see no possible advantage in entering fully in this judgment into the evidence given by the various witnesses upon this question of time. I am satisfied, upon the evidence, that fires from various parts of the 8,000 to 10,000 acres, area above referred to, did reach McDonald's property and Hanley's property and from there did spread into Merville before the fire which came from the International Timber Company reached Merville; though I am equally satisfied that the fire which swept down from the International Company premises and passed through the area where the defendant Company's fires were burning was a much more intense fire than that which spread as a result of the defendant Company's fire. It does not seem possible to me to distinguish what damage was done by these respective fires and I hold that the damages for which these actions were brought were caused by both fires, or, as counsel on both sides put it, by a joint fire. In such case, as I understand it, the defendant Company is liable for the whole of the damages unless it can escape liability by reason of some defence in law being available to it.

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The defendant Company raises three main defences. In the first place, it is contended that the real and effective cause of the damage was the International Timber Company fire. As mentioned above, I hold against that contention.

It is next contended that, in any event, the defendant Company is not liable because it is not guilty of any negligence inasmuch as the fire of the 8th of June was set out pursuant to a demand of an officer authorized by the forest branch of the department of lands as required by section 127A(1) of the Forest Act. I now advert to the evidence which is given to substantiate this contention. Byers gives evidence as follows:

"Now, as a matter of fact, prior to the 8th of June isn't it correct that you had an interview with Mr. Filberg with reference to setting out fires in the slash that was still there, which had not been entirely bruned up, you say? Yes, I had already made plans with Mr. Filberg, around a large

area of slash which was consumed in the fires that accidentally started—

"THE COURT: I can't hear you, witness.

"My lord, I had already made arrangements with Mr. Filberg to destroy the slash which was eventually burned by the accidental fires occurring in that area previous to July 6th.

"MR. DAVIS: Now, when the June 8th fire started, did you have a conversation with Mr. Filberg with reference to whether or not you should try to put that out, or whether it should be allowed to continue under supervision? Yes, I discussed the situation with Mr. Filberg, as to the putting of the fire out. I considered it was a physical impossibility.

"And in addition to that, what? Isn't it fair that you had intended to have him set out, wasn't it over an area—— It was the same area exactly.

"The same area that you were going to instruct him, or had arranged with him, to set fire on? Yes, part of it.

"So long as that fire wouldn't escape so as to do damage, it would be carrying out the accepted ideas, would it not, of ridding the place more or less of inflammable material? Exactly."

Filberg gives the following account:

"Had you any discussion with reference to this fire of June 8th with Byers, the fire warden? Yes, Mr. Byers arrived—this will require some explanation. May I explain the whole thing?

"Yes. It had always been the practice during the winter and the spring of the year for the fire warden, whoever he might be, in charge of the district we were working in, to come through the operation and decide what area he wanted burned; and we would then make plans to burn so many acres and would remove our machines out of the way of the fire and would try to stop the fire where it should be stopped, but we would burn the area that he prescribed anyway. Well, this occurred in the spring of 1922. He was over the area with myself a number of times—two or three, or four times; and we decided we would start the fire that year where the——can I go over to the map?

"Yes. He decided that he wanted it burned from here.

"Here being what? On this railroad branch here.

"Well, do you mean—— He wanted it burned south of where the fire started on the 8th of June.

"How far south? He wanted us to start it on the other side of the railway and use this——

"Where the word—the letter 'J' is? Yes, and to use this railroad for the fire trail and prevent the fire spreading.

"This railroad being what? The one running south from 'J'? Yes, running approximately from 'J' and north——straight south from 'J'; and using this for a fire trail to prevent it going north.

"This being what? This part here.

"Being the railway grade to the east of 'J'? Yes—to the Island Highway. He wanted all this area down here burned over.

"This area being what? South and east of the point I am speaking of.

"Of 'J'? Yes. This area in here had never been burned.

"In here being where? Section 29 and a portion east of 29 in section 30,

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which had never been burned and there was an accumulation of dry ferns and bracken over this area down here which had——

"Over where—when you say 'here'? East and south—south of old camp 3.

"South of old camp 3? East and south of old camp 3.

"Well, you had better put 'O.C.3' there and mark it with your pencil. All right 'O.C.3.' Well, roughly he wanted this area burned.

"This area being what? The area I have described—he wanted it burned over.

"Yes. And my arrangement with Mr. Byers was that we were to start the fire here.

"'Here' being where? At the point 'J' that I have spoken of—during June. On the Saturday night and let it burn during the night and guard it. The fire occurred on the 6th and the 8th was on Thursday and our plans were to start it on this side of the track——that is to the east of where it did start on Sunday. That is the difference. And he came in on the evening that the fire started and said, 'well now, that the fire is started there now we had better let it go and use that for a slash fire.' You see, it had really started two or three days before we had intended to start it."

This evidence is corroborated, to some extent, by the witness Harding, while McDonald, who was Byers's supervisor, states that he had arranged with Byers that the slash in question should be disposed of at the first favourable opportunity, *viz.*, sometime about the middle of June and that after the fire of the 8th of June had been reported to him he decided with Byers that it was a favourable time "to let it go as a slash fire." I was at first impressed by the argument that inasmuch as it was proposed to start a fire on the 10th of June, to burn over the area in question, pursuant to Byers's desire that the slash on that area should be burned, and, inasmuch as the fire warden decided that the fire of the 8th of June should be permitted to continue to burn over the slash, what took place could be construed as a demand of an officer authorized by the department within section 127A(1) of the Forest Act. Upon reflection, I am satisfied that this is not the correct view to take. That section contemplates a formal demand that slash be disposed of by burning or otherwise to the satisfaction of the department, and of course under proper supervision by the department, at a time and at a place when conditions should be favourable for the carrying on of such a dangerous operation. Surely it was never intended that a fire started at a different point (though not far distant), on a different day, at a different hour of the day, at a time when

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a strong wind was blowing, and by an engine with a defective spark arrester,—that a fire so born in sin (if one may so express it) could be adopted by an officer of the department as a legal fire lighted pursuant to the demand contemplated by the section in question and particularly when the fire warden says it was a physical impossibility to extinguish the fire when he first saw it. At any rate, I have reached the conclusion that this contention of the defendant is unsound. In this connection I should observe that I granted leave to the plaintiff to amend paragraph 6, sub-paragraph (a) of the statement of claim by adding after the word "occasions" in the last line thereof the following words:

"which debris was caused and created by the defendant in the course of its logging operations, and negligently allowed to remain and accumulate, contrary to the provisions of the British Columbia Railway Act, Part XXVI., and the Forest Act, Part XI.,"

and leave was also granted to the defendant Company to amend its statement of defence as might be necessary to meet the plaintiff's amendment.

Finally, the defendant contends that, in any event, the very, very strong wind which blew on the 6th of July, such a wind in fact as had not previously been known in the district, constituted an act of God which would relieve the defendant from any liability. Here again I think the defendant is out of Court. I can find no case where a defendant has been relieved from the consequences of his negligence, by reason of the fact that an act of God had intervened. In this case, the defendant was guilty of negligence in at least two particulars: (1) in operating a locomotive with a defective spark arrester at a season of the year when everything surrounding the railways was in a very inflammable condition and (2) in allowing the debris to accumulate alongside its tracks. The defendant relied upon the decision in *Nichols* v. *Marsland* (1873), L.R. 10 Ex. 255; (1876), 2 Ex. D. 1, but it was the basis of that decision, as I understand it, that the defendant was guilty of no negligence and that fact is insisted upon throughout all of the judgments. See also *Baker* v. *Snell* (1908), 2 K.B. 352; *Nitro-Phosphate and Odam's Chemical Manure Company* v. *London and St. Katharine Docks Company* (1878), 9 Ch. D. 503 and the very instructive article in 1 C.B. Rev. 140.

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In view of the above findings it becomes unnecessary to consider the effect of section 214 of the British Columbia Railway Act, relied on by the plaintiffs.

There will be judgment accordingly for the plaintiffs.

The evidence, as to damages, may be completed at a date convenient to the parties.

Judgment for plaintiffs.

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Master and servant—Railway company—Assault on passenger by conductor —Liability of company.

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The plaintiff, a coloured man, was a passenger on the Canadian Northern Railway and immediately after collecting his ticket the conductor made a violent assault upon him. It appeared from the evidence that the conductor resented having the plaintiff call his attention to the fact that he had omitted to take up his ticket when he took those of the other passengers. In an action for damages against the Railway Company:—

Held, that as the act of the conductor was solely for the purpose of wreaking his own vengeance or spite upon the plaintiff and not to further the interest of his employer, the Company was not liable.

Statement

ACTION for damages for assault. The plaintiff, a coloured man, was violently assaulted by the conductor while a passenger on the Canadian Northern Railway. The conductor took the plaintiff's ticket and immediately afterwards struck him violently as he was sitting in his seat. The conductor was not called as a witness and the only inference to be drawn from the evidence was that the conductor resented having the plaintiff call his attention to the fact that he had omitted to take up his ticket when he took those of the other passengers. Tried by GREGORY, J. at Vancouver on the 8th of April, 1924.

E. A. Lucas, for plaintiff.

R. W. Hannington, and *A. R. MacLeod,* for defendant.

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GREGORY, J.: The plaintiff admits that the action must be dismissed as against the Canadian National Railways.

The facts of the case are very simple. Plaintiff was a passenger on the Canadian Northern Railway. He had duly paid his fare, and the conductor, immediately after collecting his ticket, violently assaulted him. The assault was made without the slightest justification or excuse. The actual striking of plaintiff was after the ticket had been taken up, but the difference in time was practically nil, it was all one act—the ticket taken and the blow struck plaintiff sitting in his seat. No explanation or excuse for the blow is offered by the defendant. The conductor was not called as a witness. The only inference that I can draw from the fact is that the conductor resented having the plaintiff, who is a coloured man, draw his attention to the fact that he had omitted to take up his ticket when he took those of the other passengers. Is the Company liable for the conductor's assault? I think not. It was a wanton assault for the purpose of wreaking a private spite.

In support of his claim, plaintiff cites *Limpus* v. *London General Omnibus Co.* (1862), 1 H. & C. 526. That was a jury case, and the report deals entirely with the directions of the trial judge to the jury, which were approved by the Court of Exchequer Chamber on a bill of exceptions.

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The jury was directed, *inter alia,* that if the defendant's driver, being irritated, acted carelessly, recklessly, wantonly or improperly, but in the course of his employment and in doing that which he believed to be for the interests of defendant, then the defendant was responsible, and that the instructions given by defendant to the driver not to obstruct other omnibuses, if he did not pursue them, were immaterial as to the question of the master's liability, but that if the true character of the driver's act was that it was an act of his own and in order to effect a purpose of his own, then defendant was not responsible. The jury found in favour of the plaintiff. Plaintiff's counsel has, I think, failed to realize the effect of the latter part of these instructions but they are most important, as pointed out by Blackburn, J. at p. 41 in the report of the case in 32 L.J., Ex., where he

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draws attention to the fact that the circumstances were such "from which the jury might have thought that he did it, not at all to further his master's interests, but for the purpose of wreaking a private spite against the driver of a rival omnibus, so doing an act quite unconnected with his service and employment."

The jury found, not unreasonably, that he did it to further his master's interest, probably to delay his rival and enable his master to collect the fares which the first bus to arrive would certainly collect. His act was one from which his employer could profit. In the present case nothing of that kind could be said, the employer could in no way profit by his act nor could the collection of the ticket be in any way furthered. It was already in the conductor's hand. It had never been refused; in fact it was voluntarily tendered.

Bayley v. *Manchester, Sheffield, and Lincolnshire Railway Co.* (1873), L.R. 8 C.P. 148, also relied on, the Court only held that in that case there was evidence upon which the jury could find that the act of the porter in pulling the plaintiff out of the carriage was an act done in the course of his employment as defendant's servant. The *Limpus* case was referred to but no objection was taken to that portion of the direction to the jury to which I have already referred. Blackburn, J. says, at p. 151:

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"The question is, whether there was any evidence for the jury of an authority to the porters to remove a person from the wrong carriage."

And Pigott, B. at p. 152, says:

"Is not the question here, whether he was acting within the scope of his employment? . . . . . A general duty was cast upon him to prevent passengers from riding in the wrong carriages. What he erred in was the mode in which he performed such duty."

There the company had put him in a position where he had to decide what to do. He decided wrongly and the company had to pay. In the present case, the conductor was in no dilemma—he had already done all he was required to do. The act was complete—his duty fully performed.

Dyer v. *Munday* (1895), 1 Q.B. 742 was also a jury case, and the jury expressly found that the assault had been committed (by defendants' agent) in the course of his employment. The question before the Court of Appeal was whether there was

evidence on which the judge might leave the case to the jury. Lord Esher, M.R., at p. 746, approves of the direction given in the *Limpus* case, *supra,* and says:

"The question, therefore, for the jury was whether Price was employed to get back the bedstead, and did the acts complained of for the purpose of furthering the employment, and not for private purposes of his own; and there was evidence on which they might find as they have done."

A sympathetic jury might have made a similar finding here but I cannot, for, at the time of the assault, as I have already stated, there was nothing to further the employment, *i.e.,* the taking of the ticket was completed. Had the plaintiff refused to give up his ticket and then been assaulted the case would, I think, be very different and there would have been evidence to go to a jury that the assault was committed in the course of his employment. Much as I sympathize with the plaintiff, I cannot, without legal warrant, make the Company pay damages for the assault of another which, no doubt, it deprecates as much as I do. In the same case, Rigby, L.J. says at p. 748:

"A person who puts another in his place to do a class of acts necessarily leaves him to determine . . . . and consequently he is held answerable for the wrong of the person so entrusted . . . . provided that what was done was done, not from any caprice of the servant, but in the course of the employment."

Joseph Rand v. *Craig* (1919), 1 Ch. 1, also relied on, does not help the plaintiff. It merely approves of the directions to the jury in the *Limpus* case, which I do not question. Eve, J. says at p. 10 the acts complained of were

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"outside the scope of the employment. When once that decision is arrived at as a matter of fact there can, I think, be no ground on which the employer could be held liable for the results that followed."

These are all the cases referred to by the plaintiff. I will make only a short reference to some of those cited by defendant's counsel.

Emerson v. *Niagara Navigation Co.* (1883), 2 Ont. 528. The plaintiff, a passenger on defendant's steamer, refused to pay his fare. A porter, by the purser's direction, took hold of a valise which plaintiff was carrying and attempted to hold it for the fare. A scuffle ensued and plaintiff was injured. The The Court, Common Pleas Division, held that the purser was not acting within the scope of his duty in forcibly attempting

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to take possession of the valise and the defendant was not liable. The jury had found for the plaintiff and assessed the damage at $400, but the Court of Common Pleas set the verdict aside. Wilson, C.J. at p. 539 says:

"Although the purser was acting in the interest and for the benefit of his employers he was not acting in the due course of his employment, and within the line of his authority. He was committing an assault, and he might as well have seized the watch from the person of the plaintiff, or put his hand into the plaintiff's pocket. . . . . The company and the purser for them had the right, if in possession of the valise, to keep it for the unpaid fare . . . . but neither the company nor the purser had the right to commit an assault for the purpose of acquiring a lien, and . . . . the company are not liable for the unauthorized act of the purser."

And at p. 544, Galt, J. says:

"The defendants have no right or authority to exercise the power of forcibly taking possession of the passenger's luggage which is in his actual personal possession, by way of asserting a lien, and, consequently, they can confer none on their servants. If, therefore, their officer does not [an] act in that manner, he cannot be said to be acting under their authority, and they are not responsible."

And at p. 547, Osler, J., who dissented, suggests that the company would not be liable for a mere wanton assault, which I hold has been committed here.

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Poulton v. *London and South Western Railway Co.* (1867), L.R. 2 Q.B. 534. The defendant company had statutory authority to take into custody a passenger who had not paid his fare, but where goods were not paid for only authority to detain them. Station master erroneously believing plaintiff had not paid for his horse travelling on same train as plaintiff detained him. Action for assault and false imprisonment. Jury found for plaintiff. On motion to enter verdict for defendant, *held* company not liable. Blackburn, J., at p. 539, says:

"We do not think it is within the scope of his [station master] authority . . . . It was an act out of the scope of his authority, and for which the company would be no more responsible than if he had committed an assault, or done any other act which the company never authorized him to do."

He had previously explained that where a company had on the spot a person acting as its agent, there is evidence to go to the jury that that person has authority from it to do all those things on its behalf which are right and proper in the exigencies of its business, such things as somebody must make up his mind,

on behalf of the company, whether they should be done or not; and the fact that the company is absent and the person is there to manage its affairs is *prima facie* evidence that he was clothed with authority to do all that was right and proper; and if he happens to make a mistake, or commits an excess, while acting within the scope of his authority, his employers are liable for it. The mere fact that there is evidence to go to the jury does not mean that the jury must find authority and so liability but that they may so find. The question is what is the proper inference to be implied or drawn from the circumstances of the case? In the same case, Blackburn, J. says, at p. 540:

"In the present case an act was done by the station master completely out of the scope of his authority, which there can be no possible ground for supposing the railway company authorized him to do, and a thing which could never be right on the part of the company to do. Having no power themselves, they cannot give the station master any power, to do the act."

And Mellor, J. at p. 540 says he is of the same opinion and adds:

"I think the distinction is clear; it limits the scope of authority, to be implied from the fact of being the station master, to such acts as the company could do themselves, and I cannot think it ever can be implied that the company authorized the station master to do that which they have no authority to do themselves."

This case was followed by Rowlatt, J. in *Ormiston* v. *Great Western Railway Company* (1917), 1 K.B. 598, where the facts were very similar.

Judgment

Even if it be admitted that the conductor's act was within the scope of his authority, if not done for the company's benefit the company is not liable. See *Farry* v. *Great Northern Railway Co.* (1898), 2 I.R. 352, which was a case where the company was held liable. A station master had wrongly detained a passenger until his ticket was given up and the Court held that as the act done by the station master (locking station door) was of a class ordinarily within the scope of his authority, under circumstances which rendered it unjustifiable in the course of his employment and for the purpose of the company, the company was responsible.

Palles, C.B. at p. 355 states the law in the following language:

"In actions of this class two separate things are to be considered: first, the act done; secondly, the purpose for which it is done . . . . If the act is outside the scope of the servant's employment, the master is not

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responsible, and in such a case it is unnecessary to consider the purpose. . . . . But, where the act has been shewn to be, or evidence has been given that it is, one within the ordinary scope of the servant's employment, then arises the question whether the act complained of was done for the employer; as if the act, although of a class within the scope of the employment, was done by the servant, for his own purposes, such, for instance, as wreaking his own vengeance or spite upon a particular person, the act, although capable of being done within the scope of the employment, is not in fact done within such scope; it is not done for the employer."

This language, it seems to me, precisely covers the present case. The conductor was wreaking a private spite against the plaintiff possibly on account of his colour.

Judgment

There will be judgment for the defendant but, as I understand they do not ask for costs, it will be without costs, but this question may be spoken to if necessary.

Action dismissed.

REX v. LOW QUONG.

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

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REX v. LOW QUONG

Criminal law—Conviction for having cocaine in possession—Sentenced to six months with hard labour—Habeas corpus—Certiorari—Can. Stats. 1920, Cap. 31, Sec. 5A(e)—Criminal Code, Sec. 1124.

An accused was convicted for having cocaine in his possession without lawful authority and sentenced to six months' imprisonment with hard labour. On an application for a writ of *habeas corpus* with *certiorari* in aid:—

Held, that as there was no power to impose hard labour the conviction was illegal and should be quashed.

Held, further, that assuming an offence of the nature described was committed, section 1124 of the Criminal Code should not be given effect to where the illegal punishment has been partially enforced.

APPLICATION for a writ of *habeas corpus* and *certiorari* in aid. The accused was charged under The Opium and Narcotic Drug Act with having cocaine in his possession without lawful authority. He pleaded not guilty but was convicted by the deputy police magistrate at Vancouver and sentenced to six months in gaol with hard labour. He had partially served his sentence when this application was made. Heard by

Statement

HUNTER, C.J.B.C. at Chambers in Vancouver on the 15th of April, 1924.

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Mellish, for the application.
Saunders, contra.

30th April, 1924.

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HUNTER, C.J.B.C.: *Habeas corpus* proceedings. In this case the accused was charged under The Opium and Narcotic Drug Act, with having cocaine in his possession without lawful authority. He pleaded not guilty but was convicted by the deputy police magistrate of Vancouver, who entered a minute of conviction on the information as follows:

"June 27, 1923.
"Convicted and sentenced to 6 months in jail with hard labour.
"J. A. FINDLAY,
"Deputy Police Magistrate."

"June 27, 1923.
"Convicted to pay a fine of $600 and costs of Court, in default 6 months in jail with hard labour.
"J. A. FINDLAY,
"Deputy Police Magistrate."

The conviction and commitment bear the same date and impose the same penalties.

It is admitted that there was no power to impose hard labour, and therefore the sentence, conviction and commitment were all illegal.

The proceedings have been brought in by a *certiorari* issued at the instance of the Crown, and it is now contended by the learned counsel for the Crown that I should resort to the powers contained in section 1124 of the Code and order the hard labour portion of the penalty struck out.

Judgment

Assuming that I am satisfied in the words of the section "that an offence of the nature described in the conviction has been committed," and I am not suggesting any doubt as to the correctness of the magistrate's conclusion, the section goes on to say that I "have the like powers in all respects to deal with the case as seems just," etc. While it may be just to strike out a penalty which has yet to be undergone, or which the accused could have got the magistrate to set right as not having been imposed by him at the time of the sentence, how can it be "just" to strike out an illegal punishment after it has been suffered in whole or in part in order to save the conviction? How can it be anything but an illusory and empty order so far

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as doing justice is concerned? Would it be "just" to uphold a conviction which unlawfully ordered a whipping after it had been inflicted? If not, where is the difference in principle? I am unable to see that the Court is bound to bolster up a conviction which rests on an illegal sentence and which has been enforced practically to its full extent. I think the conviction ought to be quashed and the prisoner discharged.

Judgment

I would add that I think any person who violates the provisions of the Drug Act ought to get hard labour, but that is not the law.

Conviction quashed.

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REX v. GEE DEW

REX v. GEE DEW.

Criminal law—Conviction under The Opium and Narcotic Drug Act—Habeas corpus—Second application—Jurisdiction—Certiorari.

There was, and still is, the right at common law to renew an application for a writ of *habeas corpus* in criminal cases either on the same or different ground, and it can make no difference in principle whether it is made to another judge of the same Court or a different Court, assuming that all the judges have jurisdiction to issue the writ. This right has not been impaired by the amendment to the Court of Appeal Act, B.C. Stats. 1920, Cap. 21.

The judge hearing a renewed application has exactly the same power as the judge who heard the first application, and is uncontrolled in any way by the former decision.

The doctrine of *res judicata* not only has no application to cases involving the liberty of the subject, but is inconsistent with the nature of the remedy.

Cox v. *Hakes* (1890), 15 App. Cas. 506 followed; *Rex* v. *Loo Len* (1923), *ante*, p. 213 not followed.

Statement

APPLICATION for a writ of *habeas corpus*. The applicant was convicted by the police magistrate at Prince Rupert for unlawfully having opium in his possession. He was sentenced to six months' imprisonment with hard labour, and fined $200, and in default of payment to a further term of three months

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Argument

with hard labour. An application had previously been made for a writ to GREGORY, J. who refused it. Heard by HUNTER, C.J.B.C. at Chambers in Vancouver on the 25th of March, 1924.

Mellish, and *Bray,* for the accused.

Craig, K.C., for the Crown, took the preliminary objection that as the application was a second one, there was no jurisdiction to grant the order *nisi* or hear the application, and referred to *Rex* v. *Loo Len* [(1923), *ante,* p. 213].

6th May, 1924.

HUNTER, C.J.B.C.: *Habeas corpus* proceedings. In this case the applicant, Gee Dew, was convicted by the police magistrate at Prince Rupert, for having unlawful possession of opium under The Opium and Narcotic Drug Act of 1923. The conviction imposed six months' imprisonment with hard labour, and also a penalty of $200, and in default of payment of the $200 a further term of three months with hard labour.

As I am now informed Gee Dew has already been before my brother GREGORY, who refused his discharge. The prisoner is now before the Court on a second application, and it is urged by Mr. *Craig* for the Crown, as a preliminary objection, that I have no jurisdiction to grant the order *nisi,* or to hear the application. And for this proposition he brings to my attention a recent decision of the Court of Appeal in the case of *Rex* v. *Loo Len* [(1923), *ante,* p. 213]. In that case Loo Len was convicted for having opium in his possession prepared for smoking, and was being detained pending deportation. He first of all applied to my brother MORRISON for a writ of *habeas corpus,* but my learned brother having refused to discharge him, he appealed to the Court of Appeal. The appeal was dismissed by two of the judges on the ground that no appeal lay, and by the majority on other grounds. Thereupon his counsel applied to me for a second *habeas corpus,* in which he represented that he was pursuing the matter not only on the same grounds as had been urged before my brother MORRISON, but on the new ground that he had Canadian domicil, and was therefore not liable to deportation.

Judgment

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While the matter was pending before me, and before I had given a decision, the Crown counsel took an appeal to the Court of Appeal from my order. That Court entertained the appeal, and by a majority (MCPHILLIPS, J.A. dissenting) held that I had no jurisdiction to issue the writ, took the matter out of my hands before I had given my decision, and ordered the writ to be set aside. On the hearing of the first appeal, the question of the effect of Loo Len's claim to Canadian domicil was not before Mr. Justice MORRISON or the Court of Appeal. At any rate, there was no such ground taken in the notice of appeal, and a comparison of the two judgments of MCPHILLIPS, J.A. shews that he, at any rate, did not understand that Loo Len's claim to Canadian domicil was in issue on the first appeal.

An appeal was taken from the judgment of the Court of Appeal setting aside my order, to the Supreme Court of Canada. The jurisdiction of that Court in applications arising out of *habeas corpus* proceedings is limited, and the appeal might or might not have been quashed for want of jurisdiction, as it would depend upon the opinion of the Court as to whether or not the appeal was in respect of proceedings arising out of a criminal charge, and there was a difference of opinion among the Court of Appeal judges as to whether or not deportation proceedings are criminal proceedings. The appeal to the Supreme Court of Canada was, however, ultimately abandoned, the reason being, as I am informed by Mr. *Mellish,* that Loo Len got weary of the confinement, and in view of the delay, expense and uncertainty which the appeal necessarily involved, elected to go back to China.

Judgment

With regard to the decision of the Court of Appeal which was put forward in bar of the present application, only one of the judges, the Chief Justice, gave any reasons for setting aside my order. MARTIN and GALLIHER, JJ.A. stated that they agreed with those reasons; EBERTS, J.A. did not join in the reasons, but concurred in allowing the appeal, while, as I have said, MCPHILLIPS, J.A. dissented. He says in his dissenting judgment (pp. 221-2):

"Since then we have had the illuminative judgment of the House of Lords, in the case of *Secretary of State for Home Affairs* v. *O'Brien* (1923), A.C. 603 . . . . and at p. 638, Lord Shaw in his speech said:

"'If release was refused, a person detained might—see *Ex parte Partington* (1845), 13 M. & W. 679, 684—make a fresh application to every judge of every Court in turn, and each Court or judge was bound to consider the question independently and not to be influenced by the previous decisions refusing discharge. If discharge followed, the legality of that discharge could never be brought in question.'

"That the learned Chief Justice of British Columbia had jurisdiction to make the order appealed from, I have no doubt. Again, if the Legislature intended, in giving the right of appeal in *habeas corpus*, to limit the right of application for the writ to a single judge, *i.e.*, intended to do away with the well-understood practice that application could be made from judge to judge, even of the same Court, then we should expect to have the apt words used in the legislation, and they are not to be found. Therefore, I unhesitatingly am of the opinion that there has been no disturbance of the practice which has long obtained in this as well as other Provinces of Canada.

"With regard to the contention made that it was not open to make another application for a writ of *habeas corpus* following an appeal to this Court, which was unsuccessful, I cannot see that there is any point in this. The application made was upon new material, and the considerations which weigh in other cases have no relevancy in *habeas corpus* proceedings."

As I am of opinion that this is an accurate statement of the law which I am bound to follow and administer, notwithstanding the majority judgment, it will therefore be necessary to examine into the matter at length.

The learned Chief Justice says in his judgment that I had no jurisdiction to entertain the matter and allow a second writ to issue, and for that reason the Court was not bound to await my decision. He states that the appeal raised the question as to whether in *habeas corpus* proceedings complaining of unlawful imprisonment, the applicant "is at liberty to go from judge to judge of the same Court in his quest of release," and after referring to the decision of the House of Lords in *Cox* v. *Hakes* (1890), 15 App. Cas. 506, and two Ontario cases, he arrives at this conclusion (p. 217):

Judgment

"These cases shew two things: that there never was the right to go from judge to judge of the same Court, and secondly, that where the Courts are merged and an appeal is given, that is the means by which redress, if any, is to be obtained."

I could, of course, have avoided going into the question on the present occasion, as the application arises out of a conviction under a Canadian Act, and the Court of Appeal were dealing with a deportation case, which they, by a majority, have decided to be a civil matter, and therefore

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within the scope of their powers under the amendment to the Court of Appeal Act, which allows appeals in *habeas corpus* proceedings. But I do not think I ought to take refuge in that circumstance, for in the first place, Mr. *Craig* insists that I am bound by the majority judgment as it purports to lay down authoritatively a principle of general application whether the proceedings arise out of Dominion or Provincial law. And in the next place, inasmuch as the question is one of fundamental importance as it concerns the powers of the judges of this Court to give relief against illegal imprisonment, I do not think there ought to be any doubt left in the mind of any one seeking relief as to the opinion of this Court on that point.

First of all, as to the existence of the practice of making second applications. In Ontario in *Taylor* v. *Scott* (1899), 30 Ont. 475 at p. 478, on an appeal to a Divisional Court from the judgment of McMahon, J., who refused to allow a second *habeas corpus* application concerning the custody of an infant, the learned judge who delivered the judgment said:

"Had it not been for the right given to a person confined or restrained of his liberty, by R.S.O. ch 83, sec. 6, to appeal to the Court of Appeal from the decision of a judge before whom he had been brought by *habeas corpus*, remanding him, it would have been difficult to uphold this judgment, as in that case the judgment of Ferguson, J., would not have been conclusive, having regard to the law that the decision of any Court or judge requiring to discharge such a person upon *habeas corpus* is not binding upon any other Court or judge before whom said person may be again brought upon *habeas corpus*."

Judgment

for which he cites a number of English authorities, as well as the decision of Osler, J. in the same Province. I will return to this case later.

In Quebec, in the case of *Rex* v. *Therrien* (1915), 25 Can. Cr. Cas. 275, Cross, J. says at p. 278:

"I take it to have been characteristic of that common law writ that its refusal by one judge did not prevent the party from procuring its issue by another judge and that he might thus go from judge to judge and Court to Court as long as there remained one to whom application could be made."

In these two Provinces there were, of course, at one time at least, more than one Court that had jurisdiction to issue the writ.

With regard to British Columbia, the practice has to my knowledge been in existence for over 30 years.

In the case of *Re Bowack* (1892), 2 B.C. 216, a previous

application had been made to McCREIGHT, J., who refused it. The second application was entertained and allowed by WALKEM, J., in spite of the fact that the applicant might have taken an appeal to the Divisional Court from the refusal of McCREIGHT, J. WALKEM, J. says at pp. 223-4:

"That practice, as stated by the Lord Chancellor, was that 'if release was refused, a person detained might—see *Ex parte Partington* [(1845)], 13 M. & W. 679, [684]—make a fresh application to every judge or every Court in turn, and each Court or judge was bound to consider the question independently, and not to be influenced by the previous decisions refusing discharge' . . . . An appeal on Mr. Bowack's behalf to the Divisional Court, from Mr. Justice McCreight, may, in its details of procedure, perhaps be launched, as it was in the *Bell-Cox's case*, though Lord Bramwell seems to have disapproved of the whole proceeding, as there was no *lis* in which to appeal, and no question of judicature involved. Be this as it may, I shall assume that Mr. Bowack's right of appeal could, if he chose to assert it, be in some way legally presented. Then comes the question—Does the fact that the Legislature has expressly given him that remedy impliedly operate as a bar to the proceedings before me? These proceedings undeniably involve the question of his personal liberty, and, as such, have in the past been regarded as a part of the subject's constitutional rights, and therefore as rights of which he should not be deprived by mere implication, for the spirit of our free institutions requires that the interpretation of all statutes shall be favourable to personal liberty'—*per* Lord Abinger, in *Henderson* v. *Sherborne* [(1837)], 2 M. & W. 236 at p. 239, as cited in Maxwell. Hence I must hold, that as the enactment giving the appeal has not expressly substituted it for the old practice, Mr. Bowack is entitled to the advantages which that practice gives him, by seeking, as he now does, my opinion as to the legality of his arrest and detention regardless of the fact of his failure before another judge. I might add that his application to me is in no sense an appeal from my brother McCreight, but is one as to which I have to exercise a primary jurisdiction without knowledge of the materials before him and upon much more evidence, as I am informed, than was presented to him."

Judgment

And of course, at the time of this decision, there was only the one Court in British Columbia.

Of the numerous second applications that have been made to me, one, *In re Tiderington* (1912), will be found reported in 17 B.C. 81; another, *Rex* v. *Campbell* (1916), in 22 B.C. 601; another, *In re Harrison* (1918), in 25 B.C. pp. 433, 541 and 545, the last case having come before four different judges, and up to the time of the judgment of the Court of Appeal, I have never heard that the jurisdiction of any judge of this Court to issue the writ depended on whether or not another judge had been applied to before.

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Turning to other jurisdictions, I find there is the same practice in force in Alberta.

In *Re Baptiste Paul* (1912), 7 D.L.R. 25, a second application for *habeas corpus* came on before Beck, J. He says (p. 26):

"A similar application was before my brother Simmons and dismissed. . . . . It is, nevertheless, my duty to consider the present application independently of and uninfluenced by the decision of Simmons, J.,"

citing *Cox* v. *Hakes,* and at the conclusion of his judgment says:

"My brother Simmons appears not to have adverted to the distinction which I have pointed out. I, therefore, direct the prisoner's discharge."

In the case of *Rex* v. *Jackson* (1914), 15 D.L.R. 545, Walsh, J. says:

"This is the third attempt which this woman has made to secure her freedom. The Chief Justice and my brother Simmons dismissed the applications which she made to them. For this reason I feel great diffidence in giving effect to the very strong opinion which I hold that her detention is illegal, but I must do so, as each successive judge to whom a *habeas corpus* application is made, must act upon his own view of the law applicable to it."

There was only the one Court in Alberta.

In Manitoba, in the case of *Rex* v. *Barre* (1905), 15 Man. L.R. 420, counsel for the Crown conceded the right of the prisoner to go from one judge to another.

There was only the one Court in Manitoba.

In Nova Scotia in *In re McKenzie* (1881), 14 N.S.R. 481 at p. 483, Weatherbe, J. in delivering the judgment of the Full Court, in considering whether there was a right of appeal in *habeas corpus* matters under a statute giving a general right of appeal, gives it as a reason for deciding that there was no such right,

Judgment

"because the party can go from one judge to another to get his order. He can go to each judge separately until he comes to one who is favourable to him, and that one has then the power to discharge him."

In *Rex* v. *Laura Carter et al.* (1902), 5 Can. Cr. Cas. 401, an application was made to Ritchie, J., who refused it. A second application was made to Townshend, J. He says at pp. 406-7:

"Had it been possible I would have referred the question to the Full Court in view of the difference of opinion which exists, but in the matter of the liberty of the subject I am of course obliged to act at once, and while regretting my inability to come to the same conclusion as my learned brother Ritchie, I must follow my own conscientious convictions of the

meaning of the statute. The prisoner must therefore be discharged. . . . . There was no contest before me that it was not competent after one judge had refused a writ, for another judge of the same Court to grant it."

There was only the one Court in Nova Scotia.

In New Brunswick, in *Ex parte Byrne* (1883), 22 N.B.R. 427 at pp. 436-7, Weldon, J. said in the Full Court:

"The writ of *habeas corpus* may be applied for first to one judge and so on to every judge of the High Courts, until the party succeeds, as was done some years ago in the Supreme Courts of Upper Canada in the fugitive slave case of Anderson,—during the delay in obtaining a writ of *habeas corpus* to deliver, an application was made to the Court of Queen's Bench in England and the writ was granted (see the case 7 Jurist, N.S. 121) and a messenger was sent from London to Toronto to serve it,—before the messenger had arrived the application to the sixth judge had been successful and the prisoner discharged."

There was only the one Court in New Brunswick.

In New South Wales, in *Ex parte Rowlands* (1895), 16 N.S.W.L.R. 239, the learned judge who delivered the decision of the Full Court says, at p. 246:

"This is an application for a writ of *habeas corpus*, and the law has always been that a person seeking this writ may go from Court to Court or from judge to judge, and that each Court or judge must consider the application without reference to any previous decision in the matter. It would require very strong language in a statute to induce us to hold that this right had been taken away and that this Court could not entertain an application for a writ of *habeas corpus* because an application had been previously made to a judge. Nothing has been shewn to us in any statute to convince us that this common law right has been taken away. If Mr. O'Connor were right in his contention, then it would almost necessarily follow that where an application was made to a judge in chambers then no other application could be made either to another judge or to the Court. In deciding that this right to apply for a writ of *habeas corpus* again and again has not been taken away we do not wish in any way to speak in contradiction to the decision of the Court in *Banks* v. *Norris* [(1890)], 11 N.S.W.L.R. 77; 6 W.N. 137 which seems to us to have no bearing upon this case."

Judgment

There was only the one Court in New South Wales.

In the case of *Ex parte Cuddy* (1889), 40 Fed. 62 at p. 65, Mr. Justice Field, one of the Justices of the Supreme Court of the United States, is thus reported:

"The writ of *habeas corpus*, it is true, is the writ of freedom, and is so highly esteemed that by the common law of England applications can be made for its issue by one illegally restrained of his liberty to every justice of the Kingdom having the right to grant such writs. No appeal or writ of error was allowed there from a judgment refusing a writ of *habeas corpus*; nor, indeed, could there have been any occasion for such an appeal

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or writ of error, as a renewed application could be made to every other justice of the realm. The doctrine of *res judicata* was not held applicable to a decision of one Court or justice thereon; the entire judicial power of the country could thus be exhausted. *Ex parte Kaine*, 3 Blatchf. 5, and cases there cited. The same doctrine formerly prevailed in the several States of the Union, and, in the absence of statutory provisions, is the doctrine prevailing now."

Owing to the absence of digests, I have not been able, in the time at my disposal, to ascertain the opinions of the judges of other jurisdictions as to the common law right to go from one judge to another, so that I will now refer to the practice in England.

In *Ex parte Partington,* the applicant first of all applied to the Court of Queen's Bench, which refused the discharge. He then made a second application before Pollock, C.B. at Chambers, who also refused it. He then applied for the third time, before the Court of Exchequer which was presided over by Pollock, C.B. In the report of the case in 9 Jur. 92 at p. 93, Parke, B. says during the argument:

"On an application for a *habeas corpus,* we are bound to make up our minds; and although this matter has already been before another Court, still, *in favorem libertatis,* the prisoner is entitled to take the opinion of every Court."

Pollock, C.B. adds:

"Yes, and of every judge."

Judgment

And to shew how unfettered any judge is by any previous determination, I may cite *In re Newlands* (1845), 9 Jur. 199, where Vice-Chancellor Knight-Bruce, at p. 200, says, referring to *Ex parte Partington*:

"To hold which, I must decide against the opinions of the judges of the Courts of Queen's Bench and Exchequer. If I had a strong opinion that they were wrong, I should act on that opinion. I, however, have not a strong opinion, but only such a doubt as must be overruled by the opinion of eight judges."

That is to say, the judge who hears a subsequent application has the same power as if he had heard the first application. If he is aware of the other judge's decision and agrees with it, he will so decide; if he differs he is bound to say so; if he has a reasonable doubt he should give the prisoner the benefit of it.

I think, however, if there ever was any doubt about the validity of the practice, and I should be surprised to find that it was ever definitely decided in the negative, that the question

was set at rest by the decision in *Cox* v. *Hakes* (1890), 15 App. Cas. 506. The nature and function of *habeas corpus* proceedings were there discussed at great length. There were two hearings. At the first hearing four Lords were present and the argument lasted for four days in July, 1889, and after deliberation it was reargued for three days before seven judges in May, 1890, and ever since that decision until the judgment of the Court of Appeal, I have never heard that the common law right to renew the application to any other judge was ever questioned. After consideration the Lord Chancellor (Lord Halsbury) delivered the leading judgment, in which he says:

"My Lords, probably no more important or serious question has ever come before your Lordships' House. For a period extending as far back as our legal history, the writ of *habeas corpus* has been regarded as one of the most important safeguards of the liberty of the subject. If upon the return to that writ it was adjudged that no legal ground was made to appear justifying detention, the consequence was immediate release from custody. If release was refused, a person detained might—see *Ex parte Partington* [(1845)], 13 M. & W. 679, 684—make a fresh application to every judge or every Court in turn, and each Court or judge was bound to consider the question independently and not to be influenced by the previous decisions refusing discharge. If discharge followed, the legality of that discharge could never be brought in question. No writ of error or demurrer was allowed: *City of London's Case* [(1610)], 8 Rep. 121 b.

"In days of technical pleading no informality was allowed to prevent the substantial question of the right of the subject to his liberty being heard and determined. The right to an instant determination as to the lawfulness of an existing imprisonment, and the twofold quality of such a determination that, if favourable to liberty it was without appeal, and if unfavourable it might be renewed until each jurisdiction had in turn been exhausted, have from time to time been pointed out by judges as securing in a marked and exceptional manner the personal freedom of the subject. It was not a proceeding in a suit but was a summary application by the person detained. No other party to the proceeding was necessarily before or represented before the judge except the person detaining, and that person only because he had the custody of the applicant and was bound to bring him before the judge to explain and justify, if he could, the fact of imprisonment. It was as Lord Coke described it, *festinum remedium*. The Act of Charles II., commonly called the Habeas Corpus Act, did but provide remedies and penalties to enforce the known state of the law and to prevent its evasion. It was confined to criminal cases or alleged criminal cases, and provided that except in cases of treason and felony plainly expressed upon the face of the warrant its strongest provision should have operation."

Judgment

And after referring to the provisions of the Habeas Corpus Act, he says (p. 517):

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"The essential and leading theory of the whole procedure is the immediate determination of the right to the applicant's freedom."

It will thus be seen that according to the Lord Chancellor, the application may be made to every judge in turn. Lord Bramwell was evidently of the same opinion, for at p. 523 he says:

"The Court applied to after refusal by a judge or other Court was not exercising an appellate jurisdiction in entertaining the application. It was exercising a primary jurisdiction. It need not have heard of the former application, nor known of the materials on which it was founded; and, indeed, those before it might be different from the former. If indeed such a proceeding was an appeal that appeal exists still. Clearly where the first application is to a single judge, and where to the High Court, the Lord Chancellor could grant the writ refused by them on application to him, and *vice versa*."

That is, if the applicant applied in the first instance to the highest judge in the land, he could none the less renew his application to any other judge who had jurisdiction to issue the writ.

Lord Field, who dissented on the question, as to whether the Court of Appeal had been given jurisdiction by the statute to hear appeals in *habeas corpus* matters, says, at pp. 544-5:

"But I cannot conceal from myself that the Legislature has still left to the subject a recourse in succession to such number of the highest tribunals in the land as, in my judgment, effectually prevents any hurtful consequences from any new limitation which they have effected. Whether they are strictly appeals or not, the subject has still the right of obtaining a practical review of any improper refusal of his application, not only by the Lord Chancellor, and by individual judges, but also by a Court composed of as many judges as the President may think it right to convene."

Judgment

The learned Chief Justice, however, relies upon the following passage in Lord Herschell's judgment:

"It will be convenient, before proceeding to an examination of the section of the Judicature Act upon which this case turns, to state briefly the mode in which the Courts have administered the law in relation to that writ. It was always open to an applicant for it, if defeated in one Court, at once to renew his application to another. No Court was bound by the view taken by any other, or felt itself obliged to follow the law laid down by it. Each Court exercised its independent judgment upon the case, and determined for itself whether the return to the writ established that the detention of the applicant was in accordance with the law. A person detained in custody might thus proceed from Court to Court until he obtained his liberty."

And the learned Chief Justice emphasizes the word "Court" in the expression from "Court to Court," and remarks that:

"Some of Lord Halsbury's expressions might indicate that he thought successive applications could be made to judges of the same Court, but I

apprehend that he meant what was more accurately expressed by Lord Herschell."

But the learned Chief Justice does not take into account Lord Herschell's remarks immediately following the passage quoted. Lord Herschell proceeded as follows:

"And if he could succeed in convincing any one of the tribunals competent to issue the writ that he was entitled to be discharged, his right to his liberty could not afterwards be called in question. There was no power in any Court to review or control the proceedings of the tribunal which discharged him. I need not dwell upon the security which was thus afforded against any unlawful imprisonment. It is sufficient to say that no person could be detained in custody if any one of the tribunals having power to issue the writ of *habeas corpus* was of opinion that the custody was unlawful."

What *tribunals* had "power to issue the writ"? Before the Judicature Act the four Courts of original jurisdiction and all the judges thereof. After the Act, as pointed out by Lord Field. It must therefore be clear that Lord Herschell did not use the word "Court" in the strict sense, but as a general term including all Courts and judges that "had power to issue the writ." It would, moreover, be impossible to give Lord Herschell's language any force if the word "Court" is to be construed strictly, for at the time of his judgment there was only one Court that had jurisdiction, namely, the High Court of Justice, which was divided into several divisions (to which the judges could be assigned interchangeably) for the dispatch of business, and it would therefore be impossible for the applicant to go from one Court to another in the strict sense.

Judgment

In the subsequent case of *Re Gaynor and Greene* (1905), before the Privy Council, reported in 9 Can. Cr. Cas. 205, the Lord Chancellor (Lord Halsbury) was evidently still of the same opinion, as he said during the argument,

"that in England, of course, a man could go to every judge in Westminster Hall for a writ if he claimed he was unlawfully detained."

In the case of *Secretary of State for Home Affairs* v. *O'Brien* (1923), A.C. 603, the Lord Chancellor (the Earl of Birkenhead) referring to the case of *Cox* v. *Hakes,* says (p. 611):

"All the judgments in the case will repay study; but while they illustrate and elaborate the conclusion so lucidly declared by Lord Halsbury, they do not perhaps add anything which is material to our present purpose."

And at p. 635, Lord Shaw, speaking of *Cox* v. *Hakes,* draws

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attention to the fact that it was argued at great length, and at p. 637 says:

> "The great importance happily attached by judges to the maintenance of the constitutional security for the liberty of the subject is well illustrated by the judgments of the noble and learned Lords in the case of *Cox* which I am about to cite."

Further on, speaking of the principles expounded in *Cox* v. *Hakes,* he says he views them as "set forth with great and authoritative power," and then proceeds to cite the passage from Lord Halsbury's judgment already quoted.

It is therefore evident that the judgment of the Lord Chancellor (Lord Halsbury) in *Cox* v. *Hakes,* is to be taken as the leading and authoritative judgment on the question, and it is impossible to accept the opinion of the learned Chief Justice, that the Lord Chancellor, who had twice heard the case and reserved his decision, as well as Lords Bramwell and Field, had made an inaccurate statement of the law.

So much for the decisions. Let us now look at the matter on principle. On what ground can there be any objection to a second application to another judge of the same Court, to obtain relief from unlawful imprisonment? By reason of the dignity of the Courts? Not convincing. Because of the doctrine of *res judicata?* But there are no parties and no *lis.* Because of the expense to the Crown? A poor reason, especially if it turns out that the Crown ought not to have opposed. Because, although the solicitor has made a slip, yet he has had his day in Court? Yes, if the slip of the solicitor is of greater importance than the liberty of the subject. If owing to the particular urgency, the solicitor is unable to get his materials in order for the first application, why should he be barred from making a second if it is *bona fide?* In *Loo Len's* case I am informed that the solicitor was called in on the evening of the day before his client was to be deported and had not even time to see his client in order to prepare the jurisdictional affidavit, and so had to go before my brother MORRISON without proper material. The utility to the person in prison of the *habeas corpus,* often termed "the writ of freedom," would be virtually destroyed if the penalty for failing on the first application by reason of the

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solicitor's inability or neglect to get his materials in order were to be a dilatory and costly appeal. To get any new material before the Court of Appeal would not be a matter of course. He would have to make a special application for leave, which might, of course, be refused. In short, if the only right left him were the right of appeal he might never get his real case before *any* Court. No doubt there may be an odd case where a solicitor, stimulated by the resources of a client who has already been adjudged to be in lawful custody by a judge who has fully considered the case, makes a knowingly hopeless second application, but that would only amount to an abuse of the process, and all legal process is susceptible of abuse, but generally speaking, the good sense of the profession can be trusted in this, as in other matters. But whatever the result of the application, the applicant has the right to be heard and to have the opinion of the second judge uncontrolled by that of the first. The common law gives him the right; there is no legislation which expressly abridges it; it is in accordance with the spirit of the statute of Charles; at any rate, there is nothing in the statute against it, but there is something in it about judges who fail in their duty.

With regard to the amendment to the Court of Appeal Act, which gives a right of appeal in *habeas corpus* cases, it is not difficult to shew that it is not of any real use to the subject in cases concerning imprisonment. As far as the right of appeal by the Crown is concerned, it of course destroys the finality of the proceeding if in favour of the applicant, which is what constitutes so strong a safeguard of liberty, as pointed out by their Lordships in *Cox* v. *Hakes*. In fact it violates one of the fundamental principles of true British justice, which is, that when anyone has gained his discharge by a competent tribunal, he shall not again be put in jeopardy for the same cause. Not only that, but the proceedings may go on in his absence and, even if represented by counsel, he may again lose his liberty and be overwhelmed with the cost of defending it. Another strange result of the amendment is that whereas if he is convicted of an offence against the Criminal Code, he has not to face a possible appeal if he gains his liberty, yet he has to do

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so if convicted under a local Act, so that the more venial the offence the more dilatory and costly the proceedings if the Crown chooses to take an appeal. On the other hand, the man who has failed before a judge needs no right of appeal with its inevitable expense, uncertainty and delay, for he can go in a summary way with either the same or different materials, before any other judge who has the same power and is just as free to act as if he had been the judge who heard the first application. In England, with its population of forty millions, and its highly complex society, the simple and summary remedy which has come down from time immemorial has been jealously maintained without interference by Courts of Appeal, for as Lord Bramwell says: "Hitherto we have got along without appeals and can thrive." Are we wiser than they? If so, would anyone point to *Loo Len's* case, with its gyrations of justice, as a proof of our superior wisdom?

The learned Chief Justice, however, appears also to reach the conclusion that where an appeal is given, that of itself destroys the right to make a second application, and in support of that statement he cites a *dictum* of Patterson, J.A. in the case of *In re Hall* (1883), 8 A.R. 135 at p. 150, who said:

"There is therefore no longer the possibility of going from Court to Court, as all the proceedings are in the same Court, *viz.*, the High Court of Justice."

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In that case a person held for extradition appealed from an order of Osler, J. to the Chancery Divisional Court. The Divisional Court refused his release and he appealed to the Court of Appeal. The Court of Appeal divided equally upon the question as to whether the alleged offence was one of forgery, which would render the prisoner liable to extradition, or one of embezzlement, which would not. The prisoner thereupon obtained another writ from the Common Pleas Division, which, however, again remanded him. He thereupon appealed again to the Court of Appeal, and that Court held that no new facts having been presented, they would not review the matter even though the previous appeal had been decided by a divided Court and the personnel of the Court had been changed. Hagarty, C.J. at p. 151 says:

"He now comes before the same Court on precisely the same question,

and desires to have it reheard or reargued. It is for all purposes the same Court sitting today. The accident of one judge occupying the place of another judge cannot make any legal difference."

All that the Court of Appeal decided, therefore was, that it would not again consider the application which was based on the same materials. So far as the report shews, the question as to the right of the applicant to go from one Court or judge to another was not in debate, and the statement of Patterson, J.A. quoted by the learned Chief Justice, was not only *obiter* but was made eight years before the decision in *Cox* v. *Hakes,* and is inconsistent therewith.

With regard to the case of *Taylor* v. *Scott, supra,* cited by the learned Chief Justice, that was a case where the right to the custody of an infant had been decided on a *habeas corpus* application. The application having failed, the applicant brought an action to establish her claim to the custody. The trial judge held that the matter had become *res judicata* and this view was upheld by the Divisional Court. It was evidently the view of the learned judge who delivered the judgment, that there was at one time the right to go from one judge to another on *habeas corpus* applications, but he appeared to think that the decision in *In re Hall* forced him to hold that the judgment of the first judge on a *habeas corpus* application not having been appealed, was conclusive and that there was no right to agitate the matter a second time. Reference, however, to the judgment of the House of Lords in the *O'Brien* case (1923), A.C. 620, shews that applications in respect of the custody of infants which may be brought before the Court by *habeas corpus* have no relevancy to cases involving illegal imprisonment. Viscount Finlay says:

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"The distinction between cases such as the present and cases such as *Ford's Case* (1892), A.C. 326 was very clearly stated in the Court of Appeal in *Reg.* v. *Barnardo* (1891), 1 Q.B. 194, 204, 209-10, 214. Lord Esher, M.R. said: 'The procedure' (*habeas corpus*) 'generally and originally has been used for the purpose of bringing up persons whose liberty was alleged to be actually interfered with; but the writ has also always been used with respect to the custody of infants, in order to determine whether the person who has the actual custody of them as children shall continue to have the custody of them as children. In such case it is not a question of liberty, but of nurture, control, and education.' It was accordingly held that the decision in *Cox's* Case, 15 App. Cas. 506 had no application to such cases as infants. Lindley, L.J. expressed himself in similar terms. 'But then it is said that no appeal lies from the order directing a writ of

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habeas corpus to issue, and reliance was placed on the recent decision of the House of Lords in *Cox* v. *Hakes*, 15 App. Cas. 506. That decision, however, appears to me to have no application to such a case as this. The question whether a person in prison ought to be set at liberty or not is entirely different from the question which of several persons ought to have the custody of a child.' Lopes, L.J. expressed himself to the same effect."

The judgment of the Divisional Court was therefore right on the ground that the question of the infant's custody had become *res judicata*, the form of the proceeding being immaterial, and there being no reason in principle why the doctrine should not apply. It is obvious, however, that the doctrine of *res judicata* can not have any application to a *habeas corpus* issued to inquire into the legality of imprisonment, as it has been frequently pointed out that such applications are anomalous in their nature and the very fact that a man who claims that he is illegally imprisoned has the right to go from one Court or judge to another and is entitled to their individual opinions, is inconsistent with the principle of *res judicata*.

To hold, as does the learned Chief Justice, that the mere fact that a right of appeal has been given has destroyed the heretofore existing right to go from one judge to another, is contrary to the well settled rule that the common law jurisdiction of a superior Court is never ousted by statute, except by express language or necessary intendment. If there is any doubt about this, two or three statements by eminent judges ought to suffice.

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By Tindal, C.J., in *Albon* v. *Pyke* (1842), 4 Man. & G. 421 at p. 424:

"The general rule undoubtedly is, that the jurisdiction of the superior Courts is not taken away, except by express words or necessary implication."

By Lord Campbell, in *Balfour* v. *Malcolm* (1842), 8 Cl. & F. 485 at p. 500:

"There can be no doubt that the principle is, that the jurisdiction of the Supreme Courts can only be taken away by positive and clear enactments in an Act of Parliament."

By Lord Penzance, in *Watton* v. *Watton* (1866), L.R. 1 P. & D. 227 at p. 228:

"When a statute is passed creating new rights, it ought, if possible, to be so construed as not to extinguish existing rights."

By Jessel, M.R., in *Jacobs* v. *Brett* (1875), L.R. 20 Eq. 1 at pp. 6-7:

"In the next place, I think nothing is better settled than that an Act of Parliament which takes away the jurisdiction of a superior Court of Law must be expressed in clear terms. I do not mean to say that it may not be done by necessary implication as well as by express words, but at all events it must be done clearly. It is not to be assumed that the Legislature intends to destroy the jurisdiction of a superior Court. You must find the intention not merely implied, but necessarily implied. There is another principle which is, that the general rights of the Queen's subjects are not hastily to be assumed to be interfered with and taken away by Acts of Parliament."

By Bowen, L.J., in *In re Cuno* (1889), 43 Ch. D. 12 at p. 17:

"In the construction of statutes, you must not construe the words so as to take away rights which already existed before the statute was passed, unless you have plain words which indicate that such was the intention of the Legislature."

Thus the conclusion of the learned Chief Justice, that there never was the right to go from one judge to another of the same Court, and that a right of appeal *ipso facto* destroys any such right, turns out to rest on a misinterpretation of Lord Herschell's judgment, and on an old Ontario *obiter,* dropped several years before the decision in *Cox* v. *Hakes,* and which itself was based on a suggestion found in an old and long since forgotten book on the English Judicature Act of 1873. And it is because of this misinterpretation and this *obiter* that one of the greatest of the common law rights of the subject is swept away and the "conclusion so lucidly declared by Lord Halsbury," which is the leading judgment in a decision of "great and authoritative power" is put aside. With all respect, I think it is still potent enough to voice the law for all inferior tribunals.

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To briefly summarize my conclusions on the question:

There was, and still is, the right at common law to renew the application, either on the same or on different grounds;

It was immaterial whether it was made to another judge of the same Court or a different Court, and it can make no difference in principle, assuming that all the judges had jurisdiction to issue the writ;

The judge hearing a renewed application has exactly the same power as the judge who heard the first application, and is uncontrolled in any way by the former decision;

In this way the true intent of the remedy was constantly preserved by the judges, which is to obtain a speedy and in-

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expensive determination of the legality of the imprisonment, which is in accordance with the spirit of the Act of Charles II.;

The doctrine of *res judicata* not only has no application to cases involving the liberty of the subject, but is inconsistent with the nature of the remedy;

The decision in *Cox* v. *Hakes,* as delivered by the Lord Chancellor, is binding on all inferior tribunals, and therefore this Court is not bound by the intrusive judgment of the Court of Appeal;

The Legislature in creating rights of appeal did not intend to, and did not impair the common law right to renew the application;

And finally, that no more simple or efficient remedy could be devised to safeguard the liberty of the subject and that it is the duty of this Court to uphold it.

Having now disposed of the preliminary objection, there is another matter to which I think I ought to refer, and that is to the legislation which is shewing an increasing tendency to destroy the right to the *certiorari*. Having lately had to hear several applications for discharge in which numerous technical points have been raised, I must say that the law seems to me to have got into a sorry condition, and in making this criticism, I am not embarking on any new venture. Ever since the time of Lord Mansfield, English judges have deemed it proper to criticize legislation which infringed on the common law rights of the subject, and have drawn attention to the dangers surrounding the aggrandizement of the executive power at the expense of the Courts by Acts of Parliament, which are of course passed by the ruling majority at the instance of the Executive and often without realizing their intention or effect. The reason of course is that the Courts, which are the natural and constitutional guardians of the liberties of the people, are independent of the executive power, while magistrates and justices are its nominees and hold office at its pleasure, and it is not an answer to say that the latter for the most part act conscientiously and try to do their duty. A fundamental requirement for the preservation of liberty and freedom of conscience is that there shall be something to check any tendency

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towards the establishment of autocratic power and the only effectual means hitherto devised, consists of Courts which are independent of the executive and have adequate power. The engine, in short, must have a governor to keep it from racing and smashing to pieces.

Now, it is true that in England Parliament has interfered with the right to the *certiorari,* but only to a limited extent. But what is only an ailment in one country may become an epidemic in another, and to such an extent has it spread in Canada that there seems to be a competition between Parliament and the Legislature as to which could most effectually cripple the common law powers of the Courts in dealing with illegal convictions. Parliament, however, has gone farther than the Legislature, for in The Opium and Narcotic Drug Act of last year, it has not only taken away the *certiorari* at the instance of the accused when tried by a magistrate and left it available to the Crown, but has also abolished any right of the accused to a case stated as well as his right of appeal to the County Court, although he might be charged with a very serious offence involving severe punishment. The accused is thus left at the mercy of the magistrate, and if the latter makes a mistake the Crown may, if it sees fit, seek to have it corrected, but there is no means of doing so left open to the accused in the Courts. It cannot therefore be denied that at least in the case of aliens this enactment is capable of causing irremediable injustice, as deportation automatically follows conviction, and moreover, it suggests a want of confidence in the Courts. But those who have any fears on the subject may feel assured that the Courts have no desire to turn loose criminals and peddlers of poison. If there is any room for criticism in that respect, it lies elsewhere than at the door of the Courts. On the other hand, the Courts consider it to be their duty not to allow the fundamental principles of justice to be violated and to see to it that every man has a fair trial and is not unlawfully sent off to prison by careless or incompetent or biased or circumspectious magistrates. And it is for this reason that the Courts in their efforts to see that justice is done, notwithstanding that they have been hindered

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by legislation, have resorted in the past to technical and questionable rulings, with the result that the law relating to the old and simple remedies has become incrusted with a mass of casuistical, confusing, and inconsistent decisions. It would be difficult to estimate the cost of all this judicial jugglery to both Government and subject throughout Canada. Is it not time to end it and have plain justice all round? Why not repeal all enactments destroying the common law right to the *certiorari,* make the depositions part of the record, and clothe the Court with power while rectifying immaterial error, and striking out unauthorized penalties, and reducing those which are too severe, to affirm the conviction if it appears that the accused has had a fair trial and ought to have been convicted? On the other hand, if the evidence was not such as to justify a conviction, or if some fundamental principle of justice was violated to the prejudice of the accused, why not empower the Court to discharge? It ought not to be impossible to frame an Act which would put the law on a straightforward basis, fair to the accused and intelligible to all concerned, and as there must necessarily be the same principles of justice applicable to all convictions, whether taking place under Dominion or Provincial law, there ought to be no difficulty in the way of Parliament and the Legislature passing the same law.

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The old safeguards of freedom and justice, which have their foundations deep in the common law of England, are a strong tower and shield. They are the result of centuries of struggle by a justice-loving race against arbitrary power, and they have put the British Empire in the vanguard of civilization. Let us, therefore, cleave to them as our greatest possession and preserve them firm and secure for our descendants and not suffer them to be undermined either by lack of appreciation or indifference or sinister propaganda. Let us beware of legislation which impairs them, or we shall lose them and there will remain to us only a spurious code void of the British spirit, which may become the weapon of a thinly veiled despotism. When vigilance ceases, liberty falls.

A word in conclusion. It may be said that some of my remarks are extrajudicial. So they are. It may even be said

that a judge ought not to make extrajudicial remarks. Possibly so. But at any rate there are occasions which invite them. This is one of them.

Objection overruled.

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REX v. GEE DEW

Criminal law—Conviction including hard labour—Unauthorized—Plea of guilty—Habeas corpus—Can. Stats. 1923, Cap. 22, Sec. 10—Criminal Code, Secs. 754 and 1124.

Upon an application in *habeas corpus* proceedings on a conviction under The Opium and Narcotic Drug Act for having unlawful possession of opium, the discharge of the prisoner was sought on the ground that there was an unauthorized imposition of "hard labour" in the conviction and commitment in answer to which counsel for the Crown urged that the Court should resort to the powers given by section 1124 of the Criminal Code.

Held, dismissing the application, that although there were no depositions for the Court to peruse to satisfy itself of the accused's guilt, the accused having pleaded guilty before the magistrate, the rule that the Court should hold a thing to be within the law when it is plainly within its spirit although not strictly within the letter, should be applied. The provisions of said section 1124 should therefore be given effect to and the "hard labour" clauses should be struck out of the conviction and commitment under the provisions of section 754 of the Criminal Code, it appearing by the memorandum of conviction that hard labour had not in fact been imposed.

Stradling v. *Morgan* (1560), 1 Plowd. 199 at p. 205 applied.

APPLICATION for a writ of *habeas corpus.* Counsel for accused raised two grounds for accused's discharge, first, that there was an unauthorized imposition of "hard labour" in the conviction, and second that the fine of $200 was made payable forthwith without lawful authority. Heard by HUNTER, C.J.B.C. at Chambers in Vancouver on the 8th of May, 1924. Statement

Mellish, and *Bray,* for the application.

Craig, K.C., contra.

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HUNTER, C.J.B.C.: After lengthy discussion, Mr. *Mellish* and Mr. *Bray* rested Gee Dew's claim to discharge on two grounds, namely, first, that there was an unauthorized imposition of "hard labour" in the conviction and commitment, and second, that the fine of $200 was made payable "forthwith," also without lawful authority.

There is no doubt that the imposition of hard labour is not authorized. As to the objection regarding "forthwith," the word is really otiose. When the magistrate imposes the fine, unless he names a time for payment, it becomes payable forthwith by operation of law, but by virtue of the statute the prisoner becomes entitled to his discharge before the end of the term imposed in default if "sooner paid."

With reference to the "hard labour," Mr. *Craig* for the Crown, having obtained a *certiorari,* urged that the Court should resort to the powers given by either section 1120 or section 1124 of the Code.

As to section 1120, it has been the subject of contradictory decisions, it being held on the one hand that it applies only to cases where the accused is being detained pending an indictment, and on the other, that it includes cases where the accused is in custody after a summary conviction. After listening to a close argument by Mr. *Mellish* and Mr. *Bray,* I must say I have some doubt as to the scope of the section, but I do not think it necessary to come to a decision, as I think Mr. *Craig's* contention, that in any event I have the necessary power under section 1124, must be acceded to.

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It was strongly urged by Mr. *Bray,* that the effect of section 24 of The Opium and Narcotic Drug Act of 1923, was to prevent the operation of the provisions of section 754, which are incorporated into section 1124, in the case of certain classes of convictions under the Drug Act. I am unable to follow that. I think that the intention of section 24 was to abolish appeals and cases stated in the case of convictions for the offences therein specified, but that it was not intended to restrict the power of the Court under section 1124 in dealing with any case within its scope.

It was then argued that in any event, as there were no depositions, sections 1124 had no application as the Court is required, if satisfied "upon perusal of the depositions" that the accused was guilty, not to interfere with the conviction. But in this case the prisoner pleaded guilty and there was no need of any deposition. I think the case is a good illustration of the rule established by *Stradling* v. *Morgan* (1560), 1 Plowd. 199, referred to in Lord Halsbury's judgment, namely, that the Court should hold a thing to be within the law when it is plainly within its spirit although not strictly within the letter. There was a memorandum of the conviction entered on the information by the magistrate, which runs thus:

"Pled [*sic*] Guilty. Sentenced to 6 months and fine of $200, or a further 3 months."

This being in exact conformity with the magistrate's powers and it not being suggested that it was not done in due course, it only remains to use the powers conferred by section 754, and to strike the hard labour clauses out of the conviction and commitment, which have crept in by an oversight, and thereby make them conform to the sentence.

It would be strange if a man who pleads guilty could use as a lever for discharge, the fact that an unauthorized penalty had slipped into the formal conviction and commitment, when the memorandum of the conviction shews that the magistrate did not impose that penalty.

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I see no reason why Gee Dew (being presumed to know the law) could not have obtained a copy of the memorandum of the conviction, which he could have got without paying any fee, by virtue of section 727, and then objected to the gaoler and asked him either to desist from enforcing the hard labour or to have it corrected by the magistrate, which no doubt he could have done as not being in conformity with the sentence. Failing that there might be some ground on which the Court could grant his discharge, although I doubt it, as both the sentence and the imprisonment itself were legal, and it may be that he would only have his action. But it is not necessary to consider that. The application must be dismissed.

Application dismissed.

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REX v. GEE DEW. (No. 3).

Criminal law—Conviction under The Opium and Narcotic Drug Act—Deportation—Warrant of deputy minister—No recitation that a board of inquiry was held—Effect of—Can. Stats. 1910, Cap. 27, Sec. 77; 1923, Cap. 22, Sec. 21.

The defendant was convicted of an infraction of The Opium and Narcotic Drug Act and on the termination of his imprisonment he was held for deportation. On an application for a writ of *habeas corpus* objection was taken that the warrant of the deputy minister of immigration committing him to the immigration officers for deportation was defective in that it did not shew or recite that a board of inquiry was held as provided in the Immigration Act and therefore did not disclose jurisdiction.

Held, that the issuing of the deputy minister's warrant is a proceeding and may properly be called a warrant of commitment. Section 77 of the Immigration Act is therefore an answer to the objection as it provides that no conviction or proceeding under the Act should be quashed for want of form and no warrant of commitment shall be held void by reason of any defect therein if it is alleged that the person has been convicted and there is a good and valid conviction to sustain the warrant.

APPLICATION for a writ of *habeas corpus*. Gee Dew was convicted for an infraction of The Opium and Narcotic Drug Act. Under a warrant of the deputy minister of immigration he was committed to the immigration officers and held for deportation. On the application the sole point raised was that the warrant of the deputy minister committing him to the immigration officers for deportation was defective in that although it states the prisoner to be an alien it does not shew or recite that a board of inquiry was held as provided by the Immigration Act and therefore does not disclose on its face jurisdiction. There was no affidavit that a board of inquiry was not held and in fact it appeared by the officer's return that such an inquiry had been held. Heard by GREGORY, J. at Chambers in Vancouver on the 8th of May, 1924.

Statement

Mellish, for the application.
Elmore Meredith, for the Crown, *contra*.

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GREGORY, J.: This is an application for a writ of *habeas corpus* and it has no merits. The defendant has been convicted of an infraction of The Opium and Narcotic Drug Act and is held for deportation under the provisions of that Act. There is no suggestion that he was not convicted and properly convicted nor that he is not an alien. Section 25 of that Act provides that an alien so convicted shall, at the termination of his imprisonment, be deported in accordance with the provisions of The Immigration Act. Section 21 prohibits the removal by *certiorari* of a conviction under that Act unto a Court of record.

The sole point raised is that the warrant of the deputy minister committing him to the immigration officers for deportation is defective in that, although it states the prisoner to be an alien, it does not shew or recite that a board of inquiry was held as provided by the provisions of The Immigration Act, and therefore does not disclose on its face jurisdiction, and two decisions of Mr. Justice Graham of the Supreme Court of Nova Scotia, to which I will refer later, were cited in support.

There is no affidavit that a board of inquiry was not held, and as a matter of fact such a board was held, as appears by the officer's return. Schedule EE to The Immigration Act provides a form which may be used for the deputy minister's warrant of deportation. The form used in the present case conforms substantially to that form, adapted as it must be in this instance to The Opium and Narcotic Drug Act. Section 77 of The Immigration Act provides that no conviction or proceeding under that Act shall be quashed for want of form, etc., and subsection (2) of the same Act provides that no warrant of commitment shall be held void by reason of any defect therein, if it is therein alleged that the person has been convicted and there is a good and valid conviction to sustain such warrant. This section, I think, disposes of Mr. *Mellish's* contention. The issuing of the deputy minister's warrant is surely a proceeding and I think also that it may properly be called a warrant of commitment. The Act calls it the deputy minister's warrant. It commits the person named to the immigration officer for deportation—it seems to be both a warrant of commitment and

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a warrant of deportation. Personally, I see no necessity for a board of inquiry in a case of deportation under The Opium and Narcotic Drug Act. Under The Immigration Act there is something to inquire into in at least many of the cases, but under The Opium and Narcotic Drug Act deportation follows conviction automatically and the only question that can be raised is, has there been a good conviction? It has already been held by the learned Chief Justice*, with whom I entirely agree, that in case of a deportation warrant consequent upon conviction of an offence under The Opium and Narcotic Drug Act, it is impossible to go behind the warrant except to shew that it contains a misstatement of fact, *e.g.*, that in fact there was no conviction. The cases of *In re Walsh, Collier and Filsell* (1913), 13 E.L.R. 132 and *In re Gardner, ib.* 147 were under The Immigration Act. It was sought to deport certain immigrants because they were not possessed of $25 in their own right, etc.—a board of inquiry had been held and so found. Mr. Justice Graham (p. 134) held that the finding was clearly wrong in law. A section of the Act restricting his power to review or quash was not taken away as the order was not made as the Act required "under its authority and in accordance with its provisions," and he added, "in a case in which I think the officer in charge was so obviously wrong, I feel justified in being technical." I quite agree with him in the circumstances of these cases, but in the present case I think that everything that has been done has been so obviously right and in accordance with the spirit of the Act that I would feel justified in being non-technical if there was any necessity of resorting to that position.

Judgment

I do not think that a warrant of a deputy minister should be treated quite like that of a justice of the peace; it appears to me to be a warrant of state.

The writ will be refused.

Writ refused.

* *Rex* v. *Chow Tong* (1924), 34 B.C. 12.

TOLERTON v. CUNARD STEAMSHIP COMPANY LIMITED.

MORRISON, J.

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TOLERTON v. CUNARD STEAMSHIP CO.

Carriers—Passenger's luggage—Delay in carriage through dock strike—Transhipment in course of passage—Trunk lost in transit—Loss limitation printed on ticket—Liability.

After consultation with an agent of the defendant Company, the plaintiff paid the Company for three tickets on the "Saxonia" (a steamship of the defendant Company) from Tilbury Docks to Halifax, and three railway tickets from Halifax to New Westminster, British Columbia, and a few days later the tickets for the steamship were sent her, with a document entitling her to secure railway tickets at Halifax. She sailed on the "Saxonia" on the 29th of September, 1919, but owing to a dock strike her luggage, including a trunk, was delayed, the Company promising to send it on later. In January following the defendant notified the plaintiff by letter that there were certain charges (railway and dock charges owing to the strike) the payment of which would facilitate prompt delivery of the luggage. The charges were paid and all the parcels arrived in New Westminster except the trunk. On the 17th of June, 1920, the defendant, concluding the trunk was lost asked the plaintiff to file her claim. A term on the steamship tickets limited the defendant's liability for loss of luggage to £10. This sum was offered the plaintiff but refused, the alleged value of the trunk far exceeding that amount. In an action to recover the value of the trunk and contents:—

Held, that the plaintiff did not read the limitation on the tickets nor was it called to her attention by the agent. She dealt with the defendant on the footing that she was to be transported along with all effects from Tilbury to New Westminster it being a Cunard routing through to New Westminster there being a special contract to that effect. She is entitled to such sum as may be found upon a reference to be the true value of the trunk's contents.

ACTION to recover the value of the contents of a trunk lost in transit from England to New Westminster, B.C., on the "Saxonia" (a steamship of the defendant Company) and Canadian Pacific Railway. The facts are sufficiently set out in the head-note and reasons for judgment. Tried by MORRISON, J. at Vancouver on the 21st of February, 1924. Statement

Arnold, and *J. A. MacInnes*, for plaintiff.

Alfred Bull, and *Reginald Tupper*, for defendant.

28th May, 1924.

MORRISON, J.: The plaintiff is an elderly woman, who for

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many years eked out a living as laundress in the County of Kent, England, and had accumulated considerable household articles, such as cutlery, linen, etc. In July, 1919, she decided to come to British Columbia together with other members of her family, intending to take up her residence in New Westminster. There was, at that time, an agent of the defendant Company, Southard by name, at a place called Ashford in the said County of Kent, whose advertisement came under the plaintiff's notice, and thither she went to purchase transportation by one of the defendant's ships plying to a Canadian port. She booked on the "Saxonia," which was soon to sail for Halifax, Nova Scotia. The agent, upon her further inquiry, undertook to secure accommodation as well on the train from Halifax, West. He recommended her to travel by the Canadian Pacific Railroad. She, therefore, purchased three tickets for the "Saxonia" from Tilbury Docks to Halifax and three railway tickets from Halifax to New Westminster on the C.P.R. She inquired from the agent as to what articles she would be permitted to take in trunks, and was told she could take anything but live stock. A few days later, the tickets for the steamship were sent to her together with a document entitling her to secure railway tickets at Halifax. She left as a steerage passenger on the "Saxonia" on September 29th, and upon arrival at Halifax she secured tickets for New Westminster as arranged. Owing to a dock strike at Tilbury her trunk was not sent on the "Saxonia" but was sent on later. She arrived in due course at her destination without her trunk. In January she received the following letter from the defendant:

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"Referring to your call here some time ago regarding some four missing packages, all of which are your property, one for Mrs. Cloke and one for Mr. Ralph. We are advised that these packages are at Halifax. Charges thereon amount to 16s. 6d. which we shall be pleased if you will please favour us with promptly in order that we may arrange prompt delivery of packages."

This was written by the defendant's agents at Vancouver. The amount was paid promptly although it does not appear that the plaintiff knew exactly how the charges arose. There were several letters written by the plaintiff inquiring about her trunks, in which she was of opinion that it was the C.P.R.

who had lost them. The defendant was satisfied that the trunk was lost and on June 17th, 1920, requested the plaintiff to file her claim therefor. One of the "packages" referred to in the above letter came, but the plaintiff's trunk in question did not. All of the other trunks therefore did arrive safely. It turned out that the charges were for railway and Port of London Dock charges in England owing to the strike.

The plaintiff appeared to me to be a woman of scant education and not at all accustomed to travel. She could not read without her spectacles, and even with them it is doubtful if she could understand unaided exactly the terms or conditions of any documents or ticket as affecting her rights thereunder. When the literature of the defendant arrived she had lost her spectacles and did not attempt to read the small print of the limitation on the ticket, and I am satisfied then no attempt had been made by the agent to direct her attention understandingly to it. That term limited the defendant's liability for loss of luggage on its ship to £10, which sum was tendered in due course to the plaintiff and refused. She then commenced this action. The objection to the plaintiff accepting the amount offered arises from the fact that the trunk contained articles which could not be placed in the category of "luggage," the alleged value of which far exceeded the sum tendered.

Judgment

The plaintiff's case must, of course, rest on contract as between her and the defendant Company. If the trunk had been lost whilst in the custody or possession of the defendant as ocean carrier, and if the legend on the steamship ticket was the only contract between them then *cadet questio*. However, the case presents a more difficult phase. I find as a fact that the plaintiff had in her mind exclusively the object of being transported along with all effects from London to New Westminster and she dealt with the defendant on that footing. That the exchange of the document given her by the defendant in England for a railway ticket at Halifax was understood by her to be merely one of the convenient facilities in the nature of a transfer, which she doubtless expected from such a well-known responsible concern as the defendant. That the transportation over the C.P.R. was only an extension of the ambit

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of service of the Cunard Company. It was what I may term in railway parlance a Cunard routing. Had it been a C.P.R. routing and Southard a C.P.R. agent he would be expected to have routed her *via* C.P.R. steamship and railway. Had there been any question about the quantity or character of her belongings it does not appear but that the plaintiff would have readily paid such extra sum as might have been demanded in order that her trunks would accompany her through to Westminster. Having regard to the plaintiff's station in life (she was a poor working woman) it may be readily assumed that without her trunk containing practically all her worldly possessions she would be as much concerned as she would be as to her own safety. She explicitly put the question to the agent as to her trunk, and I find that she was led by his answer to believe that it would be sent through to her destination and that her ticket included her trunk's transportation.

The limitation herein being for the protection of the Company may be waived by it, and there is sound authority for the submission that

"if the carrier permits the passenger either on payment or without payment of an extra charge to take more than the regulated quantity or knowingly permits him to take as personal luggage articles that would not come under that denomination, he will be liable for their loss, though not arising from negligence."

Judgment

I find there was such waiver and that there was a special contract for transportation of the plaintiff and her trunk from Tilbury to New Westminster and that there has been a breach of that contract by the defendant as claimed.

It is submitted by counsel, on behalf of the plaintiff, that failing his contention in support of the special contract with which I have dealt, then the letter of January 6th, 1920, and the payment in compliance therewith, constituted a new or subsidiary contract for the delivery of the said packages, in which there were no limitations or conditions, and that as regards the plaintiff's package there was a breach. That incident may be taken either way. Either as an affirmance of the original special contract or in the way submitted. In either case, I find the defendant liable for such sum as may be found upon a reference as to the true value of the trunk's contents.

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Criminal law—Extradition—Rape—Feigned marriage in United States—Cohabitation—What frauds vitiate consent—Criminal Code, Sec. 298.

Cohabitation after a feigned marriage is not rape within section 298 of the Criminal Code.

The proposition that fraud vitiates consent with regard to the crime of rape is not true if taken to apply without qualification. The only sorts of fraud which so far destroy the effect of a woman's consent as to convert a connection consented to in fact into a rape are frauds as to the nature of the act itself or as to the identity of the person who does the act.

The obtaining of a woman's consent by means of a feigned marriage is not "personating her husband" within the meaning of section 298 of the Criminal Code.

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APPLICATION on behalf of the State of California, U.S.A., for an order for extradition against one T. J. S. Skinner, *alias* Thomas Searle, alleged to have been guilty of the crime of rape in the State of California. The facts are that Skinner went through the form of marriage with the woman in question in the City of Spokane in the United States on the 17th of July, 1919. They lived in California as man and wife, the woman believing they were legally married until 1923, when she discovered the marriage was a feigned one, that there was no licence, no certificate of marriage in the proper offices in Spokane and the man who performed the marriage was not a clergyman or authorized to perform a marriage. It was further discovered that at the time of his alleged marriage he had a wife living in Canada.

Statement

Mayers, for the State of California.

J. W. deB. Farris, K.C., and *F. J. Lyons,* for defendant.

12th April, 1924.

CAYLEY, Co. J.: Extradition is sought by the State of California against the prisoner, Skinner, on the ground of rape committed in California under the following alleged circumstances:

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That Skinner went through the form of marriage with the woman on July 17th, 1919, and that they subsequently lived in California as man and wife, the alleged wife being of the belief that the marriage was legal until some time in 1923; that at the time of the alleged marriage Skinner had a wife in Canada; and finally that the woman ascertained that the alleged marriage with her was a feigned marriage, because there was no licence to marry, or certificate of marriage to be found in the proper offices at Spokane, and the man who performed the marriage was not a clergyman or authorized to perform a marriage. To put it briefly, rape resulted from the cohabitation of the parties in consequence of a feigned marriage.

In the application of the District Attorney of San Mateo County, California, for a requisition from the Governor of California (whether the requisition was granted by the Governor or not does not appear, but for the purposes of the present point it does not matter) the California law is quoted as follows:

"Rape is an act of sexual intercourse, accomplished with a female not the wife of the perpetrator under either of the following circumstances:

"1. Where the female is under the age of 18 years.

"2. Where she is incapable, through lunacy or other unsoundness of mind, whether temporary or permanent, of giving legal consent.

"3. Where she resists, but her resistance is overcome by force or violence.

"4. Where she is prevented from resisting by threats of great and immediate bodily harm, accompanied by apparent power of execution, or by any intoxicating narcotic, or anæsthetic, substance administered by or with the privity of the accused.

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"5. Where she is at the time unconscious of the nature of the act and this is known to the accused.

"6. Where she submits under the belief that the person committing the act is her husband, and this belief is induced by any artifice, pretense, or concealment practiced by the accused, with intent to induce such belief. (Amendment approved 1913; Stats. 1913, p. 212)."

The particular words in the canon of foreign law so stated are to be found in subsection 6 above, and it is argued that a feigned marriage constitutes that pretense which induces a woman to submit under the belief that the accused person is her husband. The case of *People* v. *McCoy* (1922), 208 Pac. 1016, is an American authority to support this contention, and I have now to consider whether section 298 of the Criminal Code of Canada would bear the same construction.

Mr. *Mayers,* of counsel for the State of California, argued

first that consent induced by fraud is not consent. Second, that the accused personated the woman's husband. But this is too broad as to the first argument, as a perusal of section 298 of the Code shews:

"Rape is the act of a man having carnal knowledge of a woman who is not his wife without her consent, or with consent which has been extorted by threats or fear of bodily harm, or obtained by personating the woman's husband, or by false and fraudulent representations as to the nature and quality of the act."

By this it appears that consent induced by fraud is not mentioned in section 298. Consent obtained by false and fraudulent representations is mentioned, but these false and fraudulent representations are narrowed down to, "representations as to the nature and quality of the act," which is a very different thing. Counsel for the State of California uses the words, "fraud vitiates consent."

Wills, J., in *Reg.* v. *Clarence* (1888), 22 Q.B.D. 23 at p. 27 says:

"That consent obtained by fraud is no consent at all is not true as a general proposition either in fact or in law. If a man meets a woman in the street and knowingly gives her bad money in order to procure her consent to intercourse with him, he obtains her consent by fraud; but it would be childish to say that she did not consent. In respect of a contract, fraud does not destroy the consent. It only makes it revocable."

In the same case, at p. 43, Stephen, J., says:

"It seems to me that the proposition that fraud vitiates consent in criminal matters is not true if taken to apply in the fullest sense of the word, and without qualification."

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Further down on the same page the same learned judge says:

"The only cases in which fraud indisputably vitiates consent in these matters are cases of fraud as to the nature of the act done."

Further on at p. 44 the same judge says:

"It [*i.e.*, sexual intercourse] is either criminal if the woman does not consent, or if her consent is obtained by certain kinds of fraud."

What kinds of frauds are indicated are pointed out by Stephen, J. in the same case at p. 44, when he says that the judgment in *Reg.* v. *Dee* (1884), 14 L.R. Ir. 468,

"justify the observation that the only sorts of fraud which so far destroy the effect of a woman's consent as to convert a connection consented to in fact into a rape are frauds as to the nature of the act itself, or as to the identity of the person who does the act."

Rex v. *Williams* (1923), 1 K.B. 340, is cited by counsel for the State of California as affirming the general proposition that

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"fraud of any kind vitiates consent," because at p. 344, Lord Hewart, C.J., says:

> "There is no doubt that before the passing of the Act of 1885 a man who by fraudulent pretence succeeded in obtaining sexual intercourse with a woman might be guilty of rape."

But Lord Hewart immediately proceeds to illustrate the statement by citing two cases, *Reg.* v. *Case* (1850), 4 Cox, C.C. 220 and *Reg.* v. *Flattery* (1877), 2 Q.B.D. 410, both of which are confined to sexual intercourse obtained by a pretense of medical treatment. This seems to limit Lord Hewart's general proposition. But again Lord Hewart is opposed by Stephen, J., in the *Clarence* case at p. 43, where the latter judge says "that fraud vitiates consent in criminal matters is not true if taken to apply in the fullest sense of the word and without qualification." It is also opposed to Wills, J., *supra.*

On the facts of these cases, *Reg.* v. *Case, Reg.* v. *Flattery* and *Rex* v. *Williams, supra,* which are all of pretended medical treatments, the law, I believe, is settled. But the present application for extradition is based on an entirely different kind of fraud. Those cited above are, in the language of Stephen, J. (*Reg.* v. *Clarence, supra*) "Cases of fraud as to the nature of the act done." This before me is not that kind of fraud at all. The woman here knew the nature of the act. In the *Clarence* case, *supra,* there were 13 judges. Nine of these seemed to agree with Stephen, J. on the points I have cited above. Four of them dissented from the judgment, but on other grounds as it seems to me, not questioning the *dicta* on the above points of the other judges I have cited, or so it seems to me.

Judgment

Mr. *Mayers* cites Pollock, B., in the same (*Clarence*) case at p. 63 as destroying any bearing which the *Clarence* case has on this case, because in the case of a wife there are considerations which differentiate her case from that of a woman not the man's wife. But the act Pollock, B. was considering was the communication of disease by the husband to the wife. Used as a general proposition (and I do not think it was so used) it is far too general and quite contrary to the opinions of Wills, J. and Stephen, J. cited above. Even in its specific application to communicating disease it is expressly differed from by Coleridge, C.J. at p. 65 of the same (*Clarence*) case. I think I

must take Stephen, J. and Wills, J. as my authority for the limitations imposed on the maxim that fraud vitiates consent.

But counsel urges a further argument and that is that the accused "personated" the woman's husband within the meaning of section 298 of the Code. I intimated my dissent at the hearing to this interpretation of the word "personating," and I was met with the definition of the word in Murray's Dictionary. I do not think this is enough. I think it is safe to say that there is no decision anywhere that a man who obtains a woman's consent by means of a feigned marriage is held to be "personating" her husband, nor do I think that the words of section 298 can bear that construction. The only construction that the cases support are those in which a stranger, personating the woman's husband, obtains the woman's consent. The case of *Reg.* v. *Dee* (1884), 14 L.R. Ir. 468, was that of a man who had connection with a married woman, she believing at the time that the man was her husband. The man was convicted of rape, thus refusing to follow *Reg.* v. *Barrow* (1868), L.R. 1 C.C. 156, which had decided that a similar act was not rape, thus there had been a conflict of authority, as to whether such personation was rape. Stephen, J. at p. 43 (*Clarence* case). The *Dee* case was in 1884.

The English Criminal Law Amendment Act was passed in 1885 and the date seems to be important to explain the preamble which reads:

Judgment

"Whereas doubts have been entertained whether a man who induces a married woman to permit him to have connection with her by personating her husband is or is not guilty of rape."

And then the enactment follows:

"It is hereby enacted and declared that every such offender shall be deemed to be guilty of rape."

I judge from this that what "personating the woman's husband," as it occurs in section 298 of the Code, means is inducing a "married woman" to give consent by personating that woman's husband. Counsel have not been able to find any case in which any different meaning has been attached to the words, and I must say that, as a matter of construing the English language, the words "the woman's husband" means the woman's husband and not a fakir who passes himself off as her husband. Both

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counsel agreed that the language of the American Act, section 261 (6) of the Penal Code of California, is much stronger than section 298 of our Code, and I think that may account for the judgment in the American case of *People* v. *McCoy, supra.*

Section 309 of our Criminal Code was not argued before me. This section deals with feigned marriage and reads as follows:

"Every one is guilty of an indictable offence and liable to seven years' imprisonment who procures a feigned or pretended marriage between himself and any woman, or who knowingly aids and assists in procuring such feigned or pretended marriage."

Now the consummation of such a marriage would be rape, according to the contention of the prosecution, but the Code nowhere says so. I think that there would have been some reference in section 298 to consent obtained by feigned marriage if the Legislature had so intended. I have before mentioned that feigned marriage is not extradictable.

Judgment

On the basis of the cases, I am not able to give effect to the argument of counsel for the State of California. Our Code, section 298, if I am right, is not the same in its meaning, nor the same in its definition of rape, as the California Penal Code, and that cohabitation following a feigned marriage is not rape under our laws.

Therefore I must refuse the application for extradition on these grounds.

Application refused.

APPENDIX.

Cases reported in this volume appealed to the Supreme Court of Canada:

MINISTER OF FINANCE v. CALEDONIAN INSURANCE COMPANY. *In re* LAND REGISTRY ACT AND HIGGINSON (p. 29).—Affirmed by the Supreme Court of Canada, 21st March, 1924. See (1924), S.C.R. 207; (1924), 2 D.L.R. 649, *sub nom. The King* v. *Caledonian Insurance Co.*

REX v. STEELE (p. 197).—Affirmed by the Supreme Court of Canada, 22nd April, 1924. See (1924), 4 D.L.R. 175.

SUCCESSION DUTY ACT AND ESTATE OF EDWARD H. GRUNDER, DECEASED, *In re* (p. 181).—Reversed by the Supreme Court of Canada, 18th June, 1924. See (1924), S.C.R. 406; (1924), 4 D.L.R. 123, *sub nom. Blackman* v. *The King.*

Case reported in 29 B.C. and since the issue of that volume appealed to the Supreme Court of Canada:

ROSEBERY-SURPRISE MINING COMPANY, LIMITED, AND THE ASSESSMENT ACT, *In re* THE (p. 529).—Reversed in part by the Supreme Court of Canada, 8th June, 1924. See (1924), S.C.R. 445; (1924), 4 D.L.R. 197.

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by the former decision. The doctrine of *res judicata* not only has no application to cases involving the liberty of the subject, but is inconsistent with the nature of the remedy. *Cox* v. *Hakes* (1890), 15 App. Cas. 506 followed; *Rex* v. *Loo Len* (1923), *ante*, p. 213 not followed. REX v. GEE DEW. - - **524**

9.——*Extradition — Rape — Feigned marriage in United States—Cohabitation—What frauds vitiate consent — Criminal Code, Sec. 298.*] Cohabitation after a feigned marriage is not rape within section 298 of the Criminal Code. The proposition that fraud vitiates consent with regard to the crime of rape is not true if taken to apply without qualification. The only sorts of fraud which so far destroy the effect of a woman's consent as to convert a connection consented to in fact into a rape are frauds as to the nature of the act itself or as to the identity of the person who does the act. The obtaining of a woman's consent by means of a feigned marriage is not "personating her husband" within the meaning of section 298 of the Criminal Code. THE PEOPLE OF THE STATE OF CALIFORNIA v. SKINNER. - - - - - - - - **555**

10.——*Gaming—Office used for betting—Advertising offer to guess or foretell result of football games — Construction — Criminal Code, Secs. 227(b)(i), 228, and 235(1)(g)—Can. Stats. 1922, Cap. 16, Sec. 12.*] Section 227, subsection (*b*)(i) as amended in 1922, and section 228 of the Criminal Code makes a person liable for an offence who "keeps a place for the purpose of money being received by such person all or any part of which . . . . is to be paid or given to any other person on any event or contingency, of, or relating to any . . . . game or sport," and section 235, subsection (1)(*g*) makes a person so liable who "advertises . . . . any offer, invitation or inducement to bet on, or guess or foretell the result of any contest." Accused published a newspaper in Vancouver in which prizes were offered to persons subscribing to the paper and paying the subscription and sending in on coupons printed in the paper guesses as to certain football games. On a certain date games were to be played between certain sets of teams each two of which playing against each other on that day had also played against each other in a similar series a year before. The subscriber was asked to guess or foretell whether the home team in each set would score more, less or the same number of goals in the game to be played than it did in the corresponding game in the previous year.

The accused was charged under sections 227(*b*)(i) and 228; also section 235(1)(*g*) and found guilty on both counts. *Held*, on appeal, as to the first count, affirming the decision of CAYLEY, Co. J. (MARTIN, J.A. dissenting), that the acts of the defendant as set forth in the case stated come within the section as amended in 1922. *Held*, further, as to the second count, affirming the decision of CAYLEY, Co. J. (MACDONALD, C.J.A. dissenting), that the "competition" advertised comes within the expression "any contest" in subsection (*g*) of section 235(1) and the accused was properly convicted. REX v. MULHOLLAND. - - **10**

11.——*Intoxicating liquors — Summary conviction — Prosecution to be within six months—Time of offence not disclosed in warrant of commitment—B.C. Stats. 1915, Cap. 59, Sec. 7; 1921, Cap. 30.*] On the summary conviction of a person charged with an infraction of the Government Liquor Act the warrant of commitment did not comply with the provisions of the Summary Convictions Act in not fixing the time when the offence was committed. *Held*, on appeal, affirming the decision of HUNTER, C.J.B.C. (MARTIN, J.A. dissenting), that as the commitment did not comply with said Act in an essential particular the conviction was properly quashed. REX v. RODGERS. - **16**

12.——*Prohibition — Information—Signature of informant—Warrant—Arrest in another county—Not backed by local magistrate—Effect on jurisdiction.*] An information under section 13 of the Summary Convictions Act must be in writing and signed by the informant. Given a valid information and the presence of the accused before a magistrate of the district where the offence is alleged to have occurred the jurisdiction of the magistrate to try attaches at once and he is not concerned with informalities or irregularities which may have occurred in connection with the execution of an otherwise valid warrant. Where, therefore, an accused charged with an offence under the Government Liquor Act was arrested at Fernie on a warrant issued by the magistrate at Port Alberni and brought back to Nanaimo for trial, the fact that the warrant was not backed by a justice at Fernie having jurisdiction to do so, does not affect the jurisdiction of the magistrate at Nanaimo to hear and dispose of the charge. REX v. KILMARTIN. - - - - - **151**

13.——*Sale of beer—Summary conviction—Appeal—Application to amend charge—B.C. Stats. 1921, Cap. 30, Sec. 46; 1922,*

Cap. 45, Sec. 7.] On an appeal from a summary conviction by a magistrate the County Court judge has no power to grant an amendment to the indictment which charges an offence similar to but different as to its penalty from the offence on which the accused was convicted. [Reversed on appeal]. REX v. PERRO. - - - **189**

14.——*Sale of liquor — Conviction — A stipendiary magistrate also a barrister appears for Crown on prosecution—Prohibition under section 399 of Municipal Act —Met by section 91(3) of Government Liquor Act—B.C. Stats. 1914, Cap. 52, Sec. 399; 1921, Cap. 30, Secs. 26 and 91(3).*] Accused was convicted by a stipendiary magistrate at Prince George on a charge of selling liquor contrary to section 26 of the Government Liquor Act. On the hearing of the charge another stipendiary magistrate, who was also a barrister, appeared as counsel for the prosecution on behalf of the Crown. On application for a writ of *habeas corpus* it was submitted on behalf of accused that a stipendiary magistrate is prohibited under section 399 of the Municipal Act from appearing on a prosecution of this nature, and the conviction should be quashed. *Held*, that the objection raised by reason of section 399 of the Municipal Act is met by section 91(3) of the Government Liquor Act and the appeal should be dismissed. [Reversed by Court of Appeal]. REX v. WESSELL. - - - - - **375**

15.——*Sale of liquor—Conviction—Warrant of commitment — Not sealed — Habeas corpus — B.C. Stats. 1915, Cap. 59, Sec. 54(3); 1921, Cap. 30, Sec. 26.*] A warrant of commitment upon a conviction under the Summary Convictions Act must be authenticated by the seal of the magistrate. REX v. HUGER. - - - - - - - - **157**

16.——*Search of premises under search warrant—Quantity of liquor found—Arrest of occupants without warrant — Offence charged under Government Liquor Act—Conviction—Habeas corpus and certiorari—B.C. Stats. 1921, Cap. 30, Sec. 26 — 1921 (Second Session), Cap. 55, Sec. 245—R.S.B.C. 1911, Cap. 1, Sec. 14.*] Police officers entered a premises under a search warrant and on finding a large quantity of liquor arrested the occupants without a warrant to arrest. Upon being charged of an infraction of section 26 of the Government Liquor Act the accused did not plead and their counsel raised the objections (1) that having been arrested without a warrant the magistrate had no jurisdiction to hear the charge; (2) that the police magistrate for Vancouver City alone and not the stipendiary magistrate for the County of Vancouver had jurisdiction to hear the charge under section 245 of the Vancouver Incorporation Act, 1921; (3) that no offence known to the common law was described in the warrant of committal inasmuch as the charge read, "unlawfully did keep for sale" whereas the section of the statute says "expose or keep for sale." Upon *habeas corpus* and *certiorari* in aid after conviction:—*Held*, as to the first objection that it is immaterial how the accused came before the magistrate if he had jurisdiction to take cognizance of the offence, which he had notwithstanding the objection raised to the jurisdiction at the time. That section 14 of the Interpretation Act, R.S.B.C. 1911, is an answer to the second objection and as to the third the offence was properly laid. REX v. IACI. - - - - - **501**

17.——*Speedy trial — Preferring new charge—Election—Criminal Code, Secs. 273, 825 and 834.*] The defendant was committed for trial on a charge under section 273 of the Criminal Code for that he "unlawfully with intent to resist his lawful apprehension shot a rifle at Provincial Constable Carr, and Inspector A. E. Ackland, R.C.M. Police." Upon the accused being brought up to elect counsel for the Crown handed the judge a new count that he "unlawfully with intent to do grievous bodily harm to Provincial Constable Carr and Inspector A. E. Ackland, R.C.M. Police, shot at said Carr and Ackland contrary to section 273 of the Criminal Code of Canada." The judge then apprised the accused of the nature of the charge on which he was committed and also of the new charge that he had just received. Then, the accused being asked to elect, elected to be tried before the learned judge without a jury. On the objection that the learned judge had no jurisdiction to add the second count until the accused had elected upon the charge upon which he had been committed:—*Held*, MCPHILLIPS, J.A. dissenting, that in effect that was what took place. On accused coming before him for election he apprised him of the original charge and the count proposed to be added, and accused being asked to elect he did so on both, and the judge's assent to the proposed new count was then added as evidenced by his conviction on that count. *Per* MCPHILLIPS, J.A.: The action of the Police Provincial and the Royal North West Mounted Police in entering the prisoner's house at night

mortgage on the property for the balance, but did not register it until the 15th of February, 1923. The plaintiffs under contract with B. and M. constructed a building on the property commencing work on the 8th of February, 1923, and completing it on or about the 20th of the same month. He registered a mechanic's lien against the property in respect of said work on the 22nd of March, 1923. In an action on the lien it was held that the lien had priority over the mortgage. *Held*, on appeal, reversing the decision of BARKER, Co. J., that priority of registration rules. As between owner and contractor or wage-earner the latter has a lien from the inception of the work, but where a third person is concerned (as the mortgagee in this case) the lien does not come into existence until registered. It comes within the operation of section 42 of the Land Registry Act which gives priority to the earlier registered instrument. MCRAE BROTHERS V. BROWNLOW, MORTON AND PLANTA. - - - - - - - - - **395**

2.——*Reopening case on terms—Timber licences—Interest in land—Vendor in position of mortgagee—"Request in writing"—Interpretation—R.S.B.C. 1911, Cap. 154, Sec. 9.*] On the enforcement of a mechanic's lien the action may be reopened to allow the plaintiff to make all necessary formal proofs on terms of paying defendant's costs to date, where the Court concludes the plaintiff's counsel made a slip arising from his being allowed to make an amendment reducing the amount claimed in the lien as filed. The defendant Wilson Company sold a timber licence under agreement for sale to the defendant X. L. Logging Company upon which only a small cash payment was made. The agreement which was duly signed by the parties contained a clause that the purchaser covenanted to construct a pole road from the sea to the northerly end of the limit. The X. L. Company while in possession contracted with the plaintiffs for the construction of the road. The plaintiffs completed the road the longer portion of which went through the limit in question but in the meantime the X. L. Company became bankrupt and was in default both as to the agreement for sale and on the road contract. The plaintiffs then filed a lien and brought action for the enforcement thereof against both companies. Under section 9(*a*) of the Mechanics' Lien Act the seller of land is a mortgagee and the main section provides that liens are only prior to the mortgage as against the increase in value "unless the same is done at the

request of the mortgagee in writing." *Held*, that an interest in a timber licence is an interest in land, that the Wilson Company having sold the timber licence is a mortgagee within section 9(*a*) of the Mechanics' Lien Act and as the clause in the agreement for sale for the construction of a log road implies in its terms a "request in writing" the road was constructed at the request in writing of the Wilson Company and the plaintiffs are entitled to judgment. RYAN *et al.* V. X. L. LOGGING COMPANY LIMITED AND WILSON LOGGING AND TIMBER COMPANY LIMITED. - - - - - - - - - **410**

MINES AND MINERALS — *Grubstake—Claims located after expiry of grubstake—Locality prospected during existence of grubstake—Claim that locations were discovered during grubstake—Fraud.*] The plaintiff and defendants entered into a grubstake agreement whereby the plaintiff was to pay expenses and $4 per day to the defendants who were to prospect for minerals in the fall of 1921, in the Gun Creek District, the claims staked to be equally divided. The defendants were accompanied by the plaintiff's son on the trip and about the 12th of September they reached the mouth of Cascade Creek. While there on two occasions one of the defendants went up the Creek and came back claiming he had found nothing. Certain claims were staked and the party returned home before winter. In the following spring the defendants went out alone and staked a number of claims on Cascade Creek known as the "Massena" group between the 1st of April and end of July. The plaintiff said as there was some depth of snow on Cascade Creek between April and July the defendants must have discovered the ore on these claims in the previous fall when with the plaintiff's son as they could not have made the discovery in the spring owing to the snow and he was entitled to an undivided one-half interest in the claims. There was further evidence of conversations the defendants had with prospectors in the spring of 1922 bearing on the plaintiff's case. It was held on the trial there was evidence to find the lode had been discovered in the fall of 1921 and the plaintiff should succeed. *Held*, on appeal, reversing the decision of HUNTER, C.J.B.C., that the case was founded on suspicion and that the evidence of defendants' conversations with the prospectors was unsatisfactory not being conclusive as to which group of claims it referred to; that the facts constituting fraud must be clearly and conclusively established and circum-

NEGLIGENCE—*Continued.*

this fire should be allowed to burn over the slashed area but should otherwise be kept under control. This fire was checked in places but was allowed to spread in certain directions over the whole cleared area. It burned itself out considerably by the end of June but was still smouldering in spots on the 6th of July, when a strong wind came up which appeared to fan into flame all the smouldering fires and late that evening Merville was destroyed, which included the plaintiff's property. The plaintiff's action for damages was consolidated with those of about fifty others to determine the question of liability. Three defences were raised: (a) that the effective cause of the damage was a fire that originated on an adjoining property; (b) that the fire of the 8th of June was in pursuance of a demand of an officer authorized by the forest branch of the department of lands under section 127A(1) of the Forest Act; (c) that such a wind as that of the 6th of July was never previously experienced in the district and constituted an "act of God" which would relieve the defendant from liability. *Held*, that on the evidence the fires that originated upon the various parts of the cleared area first reached the plaintiff's properties; that a fire started through a defective spark arrester on a locomotive which later gets out of control through a high wind cannot be adopted by an officer of the department as a legal fire pursuant to a demand as contemplated by section 127A(1), and the defendant is not relieved from the consequences of his negligence by the fact that an "act of God" has intervened. *Held*, further, that the defendant is guilty of negligence: (a) in operating a locomotive with a defective spark arrester at a time of year when everything surrounding the railway is in an inflammable condition; and (b) in allowing the debris to accumulate along the tracks, and the plaintiff is entitled to judgment. MCINTYRE V. COMOX LOGGING AND RAILWAY COMPANY. - - - - - - - - - - - **504**

4.——*Level crossing—Collision—Freight train and street-car—Signal—Obligation to look out — Charge — Jury's findings — Liability to passenger.*] The plaintiff and her husband were passengers on a west bound street-car of the defendant on Venables Street in Vancouver at about 10.20 on a December evening. On nearing the intersection of the street by the Great Northern Railway track the car was stopped by a flagman of the Great Northern who was there to stop traffic until a freight train

NEGLIGENCE—*Continued.*

backing in from the south had passed over. After stopping the street-car he signalled the freight train to back across the street. The motorman mistook the signal as being made to him and he started his car. The signalman made frantic efforts to stop him but he continued on and when half way across the Great Northern track his car was struck by the freight train and thrown over. The plaintiff's husband received injuries from which he died. In an action for damages the jury found the defendant Company negligent and in answer to the question "In what did the negligence consist?" answered "that the motorman did not exercise ordinary care and prudence in restarting his car." Judgment was given for the plaintiff. *Held*, on appeal, affirming the decision of MORRISON, J., that there was evidence to support the finding of the jury that the motorman did not exercise ordinary care and prudence in restarting his car, that the jury's answer to the question as to in what the negligence consisted was free from uncertainty and the appeal should be dismissed. DUTHIE V. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY LIMITED. **481**

5.——*Mineral claim owned by defendant —Compressor plant on claim—Claims transferred to another in trust—To be so held pending formation of new company—Trustee contracted for running tunnel with compressor plant—Fire originating from compressor plant — Fire spreading destroyed plaintiff's posts — Liability.*] Defendant Company owned the Little Bertha mineral claim on which was installed a compressor plant. The defendant with several others who owned a group of claims adjoining the Little Bertha agreed to transfer their claims to H. as trustee to be held by him pending his forming a company in Washington State which company was to take over the claims when complete and capable of being licensed in British Columbia, H. in the meantime to take over the management of the claims. The transfers were signed and placed in escrow pending the establishment of the new company. While the transfers were still in escrow H. contracted for the running of a tunnel on the claims and the compressor plant on the defendant's claim was used for carrying on the work. A fire originated through sparks from the plant and started a forest fire that eventually spread to the right of way of the Kettle Valley railway on which the plaintiff had piled two sets of posts which were destroyed. An action for damages against the defendant was dismissed. *Held*, on appeal, re-

PRACTICE—*Continued.*

solicitor the evidence in support must shew precisely that the severity of the illness and the period it covered reasonably precluded the possibility of giving notice of appeal within the statutory period. ROLSTON v. SMITH. - - - - - - - **235**

3.——*Appeal—Failure to enter in time—Application to extend time for setting down—Mistake of solicitor as to registry in which appeal book should be approved—Costs.*] On a motion to extend the time for setting down an appeal, it appeared that judgment was given on the 30th of August, 1923. Notice of appeal was filed on the 13th of September and served on the 18th of September. The appeal books were ready on the 25th of September but appellant's solicitor erred in thinking the books could be approved in Vancouver. Discovering his error on the 29th of September, he immediately forwarded a book for approval to the registry at Williams Lake. The book was never submitted to respondent's solicitor for approval. September the 28th was the last day for setting down the appeal in Vancouver. *Held*, MARTIN and MCPHILLIPS, JJ.A. dissenting, that although in not setting down the appeal in time there was gross negligence on the part of the appellant's solicitor the application should be acceded to where it can be done without prejudice to the respondent, but the appellant should pay the costs of the motion. DARRALL v. THE CEDAR CREEK MINING COMPANY LIMITED. - - - **43**

4.——*Application for leave to appeal to the Supreme Court of Canada—Action involving interpretation of Succession Duty Act and Land Registry Act—R.S.B.C. 1911, Cap. 217—B.C. Stats. 1921, Cap. 26—Can. Stats. 1920, Cap. 32.*] On a petition for an order directing the registrar of titles to register a title clear of a lien claimed on behalf of the Crown for succession duty, it appeared the lot in question had been sold under agreement for sale by a former owner who died before the final payment was made. A bond by a guarantee company was accepted to cover the succession duty on the estate and the executor on receiving the final payment conveyed the lot to the purchaser. A subsequent owner obtained an indefeasible title and then mortgaged to the petitioner who subsequently obtained judgment in a foreclosure action. A caution was then filed against the property by the minister of finance under section 50 of the Succession Duty Act. It was held by the Court of Appeal that the lot was not subject to the succession duty claimed. On an application for leave to appeal to the Supreme Court of Canada:—*Held*, that as it is a matter of some importance and of grave concern as to land titles, the Act being somewhat ambiguous, it is a proper case for granting leave to appeal. MINISTER OF FINANCE v. CALEDONIAN INSURANCE COMPANY. *In re* LAND REGISTRY ACT AND HIGGINSON. - - - - - - - **232**

5.——*Application to strike out appeal for want of security for costs—Security deposited after notice but before hearing—Costs of motion.*] Notice of appeal was given on the 22nd of December, 1923, in a County Court action. A demand for security for costs was made on the same day. No security being given in reply thereto notice of motion for an order for security was served on the 29th of December and an order was made on the 4th of January, 1924. On the 6th of January respondent's solicitor telephoned appellant's solicitor when the appellant's solicitor assured him security would be furnished. On the 7th of January respondent's solicitor served notice of motion to the Court of Appeal returnable on the 10th of January to dismiss the appeal on the ground that security had not been furnished. The necessary security was deposited with the registrar on the 9th of January. *Held* (MARTIN and GALLIHER, JJ.A. dissenting as to costs), that although the motion must be dismissed as the security has been furnished the respondent was in the circumstances entitled to make the motion and should be given the costs in any event in the cause. BREADY v. MCLENNAN. - - - - - - - **401**

6.——*Costs — Separate actions by the same plaintiff against the same defendants—Second action in Court of Appeal—Set-off by a judge of the Supreme Court—Jurisdiction—B.C. Stats. 1921 (Second Session), Cap. 11, Sec. 2.*] The plaintiff brought action against the defendants on a promissory note and obtained judgment for the amount of the note with costs, but it remained unsatisfied. Later the plaintiff brought another action on a guarantee against the same defendants in which it was successful on the trial but the judgment was reversed in the Court of Appeal with costs against the plaintiff. An application to a judge of the Supreme Court to set off the costs obtained in the second action against the sum due the plaintiff on the judgment in the first action was granted. *Held*, on appeal, affirming the decision of

PRACTICE—*Continued.*

McDONALD, J., that there was jurisdiction in the Court below to make the order. *Per* MACDONALD, C.J.A.: The case is concluded in favour of the respondent by *Royal Bank of Canada* v. *Skeans* (1917), 24 B.C. 193, the only difference being that in that case the order was made by this Court, but this circumstance makes no difference. *Per* MARTIN, J.A.: The order is not an attempt to vary the judgment of this Court but a process of enforcement *pro tanto* of the two judgments concerned in the attainment of which end the judgment of this Court is, under section 2 of the Court of Appeal Act Amendment Act, 1921 (Second Session), to be viewed as a judgment of the Court below. BANK OF HAMILTON v. ATKINS AND ATKINS. - - - - - - - - - **315**

7.——*Infant — Discovery — Right of examination — County Court Order VIII., rr. 17 and 21.*] Under County Court Order VIII., r. 17, an infant, a party to an action, may be examined by the opposite party for discovery before the trial. LANCASTER v. VAUGHAN. - - - - - - - - **159**

8.——*Judgment—Whether final or interlocutory — Time for appealing.*] In an action against a former partner for goods supplied and money lent, the defendant counterclaiming for an order for the taking of accounts, a garnishee under an order having paid into Court before the trial $754.93, it was found by the trial judge that there had been an *interim* settled account between the partners and he proceeded to take the accounts of the balance of the partnership finding a total indebtedness of $597.05 from the defendant to the plaintiff but subject to the following, *i.e.*, that of the moneys in Court $399.73 belongs to the plaintiff and $355.20 to the defendant, that the parties are jointly and severally indebted to a creditor in $527 that is to be paid out of the moneys in Court each party's share of the moneys in Court to bear one-half of said debt; that from the balance in Court the solicitor's costs of each party including the costs of taking accounts be paid; that the defendant is entitled to the costs of the action up to the time of the amendment of the statement of claim and the plaintiff to the costs of the action after the amendment, said costs to be set off one against the other, any balance in favour of either of them to be paid from what remains in Court (if any) to the credit of the other, and that any balance after the above adjustments remaining in Court be paid the plaintiff on account of defendant's debt to the plaintiff and that the plaintiff be entitled to sign judgment against the defendant for such balance as is still due. On the hearing of an appeal by the plaintiff counsel for the respondent contended that the appeal was from an interlocutory judgment and therefore out of time. *Held*, McPHILLIPS, J.A. dissenting, that although the form followed was not a happy one, there was, in fact, nothing further to be done but the taxation of costs and they, when taxed, are added to the judgment which must be regarded as final. MILLER v. KERLIN. - **140**

PRACTICE—*Continued.*

9.——*Mortgagor and mortgagee—Recovery of land—Joinder of causes of action—Marginal rules 188 and 189.*] A mortgagee, upon default of payment of interest and principal, brought an action for foreclosure, for a receiver and for possession. The mortgagor moved to set aside the writ and service thereof on the ground that the writ was issued without leave of the Court or a judge and did join causes of action for recovery of land and for relief, namely, foreclosure, possession and appointment of a receiver contrary to marginal rules 188 and 189. The motion was dismissed. *Held*, on appeal, affirming the decision of MORRISON, J., that the motion was properly dismissed as the claim for possession means possession in due course of law there being nothing to indicate a demand for immediate possession and the prayer for a receiver is complementary to the foreclosure proceedings and not in itself a cause of action. JONES v. COHN AND CANARY. - - - - - **321**

10.——*Notice of appeal—Not sufficient time to perfect order for security before hearing—Application to put case further down on list—Granted.*] Notice of appeal was served on the 22nd of December for the next sitting of the Court of Appeal commencing on the 8th of January following. Respondent's solicitor immediately demanded security for costs by letter to which he received no reply. After vacation he gave notice of motion for an order to enforce payment of security but did not obtain the order until the morning of the 8th of January. He then applied on the same day to the Court of Appeal to put the case at the bottom of the list of appeals in order to have sufficient time to make effective his order for security. *Held*, MARTIN and McPHILLIPS, JJ.A. dissenting, that there were reasonable grounds for making the application in the circumstances and as the extension can be made with no great prejudice to the appellant the application

2.——*Agreement for sale of land by testator—Balance of purchase price due at his death—Estate valued and bond accepted by Crown for duty—Right of purchaser or his assigns to registration free of lien for duty—R.S.B.C. 1911, Cap. 217, Secs. 16 and 28.*] H. sold a property under agreement for sale and died before the final payment was made on the purchase price. Shortly after his death the balance due was paid to the executor who conveyed to the purchaser. After *mesne* conveyances a certificate of indefeasible title was issued to A. He mortgaged to the petitioner who subsequently took foreclosure proceedings and obtained final order for foreclosure. The Minister of Finance then registered a caution claiming succession duty in respect of the lot. It was held by the trial judge that the balance due on the property at the time of deceased's death was subject to a lien in favour of the Crown in respect of the interest according to the rate payable under the Act. *Held*, on appeal, reversing the decision of MCDONALD, J. (MARTIN and GALLIHER, JJ.A. dissenting), that when the valuation of a deceased person's estate is settled and a surety bond in favour of the Crown for payment of the succession duty is obtained and accepted by the Crown the estate is freed from any claim by the Crown in respect of duty. MINISTER OF FINANCE v. CALEDONIAN INSURANCE COMPANY. *In re* LAND REGISTRY ACT AND HIGGINSON. - **29**

3.——*Interest in loan secured by mineral claims — Foreign executors — Action to recover—Affidavit of value and relationship—Bond to secure payment of succession duty — Security proves valueless — Succession duty payable—R.S.B.C. 1911, Cap. 217, Secs. 21 to 52.*] G. an American citizen, loaned $16,000 to V. and his wife in British Columbia, secured by two mortgages on certain mineral claims within the Province. Upon G.'s death, his executor brought action in British Columbia to recover said sums and for foreclosure. Before ancillary letters probate could be obtained in order to prove title on the trial, it was necessary to pay the probate and succession duties, but a bond to secure payment of the succession duty was accepted by the Crown upon the executors filing an affidavit of value and relationship which included a claim against V. and his wife of $16,000 secured by an

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interest in 14 mineral claims. Upon obtaining ancillary letters the executors proceeded with the action, obtained judgment, and issued execution which was returned *nulla bona*. The mineral claims could not be sold and proving to be worthless were later sold for taxes. On petition by the executors it was held that no duties became payable from the petitioners under the Succession Duty Act. *Held*, on appeal, reversing the decision of MORRISON, J. (MARTIN and MCPHILLIPS, JJ.A. dissenting), that the executors having in their affidavit of value and relationship valued the estate of the deceased within the Province at $16,000 for which a bond to secure the succession duty payable on that sum was given to and accepted by the Crown, the value of the estate within the Province has been determined in a manner that binds the parties and cannot be reopened by reason of the executors' failure to realize on their security. *United States Fidelity and Guaranty Co.* v. *The King* (1923), A.C. 808 followed. *Held*, further, MARTIN and MCPHILLIPS, JJ.A. dissenting, that the Legislature used the expression "a judge of the Supreme Court" in section 43 of the Succession Duty Act as meaning the representative of the Court itself, and not a *persona designata*. *In re* SUCCESSION DUTY ACT AND ESTATE OF EDWARD H. GRUNDER, DECEASED. - **181**

4.——*Wife — Domicil — Deceased Chinaman domiciled in China—Married to two wives in China — Two business establishments, one in China and one in British Columbia—Will—Bequest to each wife—Status —R.S.B.C. 1911, Cap. 217.*] A domiciled Chinaman contracted two lawful marriages in China to Chinese women of Chinese domicil. He had two business establishments, one in China and one in British Columbia and travelled back and forward between the two countries in his business interests but always retained his Chinese domicil. He died in Victoria, British Columbia, in September, 1910, and by his will bequeathed an annuity of $1,000 to each of his wives. A petition by the executor for a declaration that each wife was entitled to be recognized as his lawful wife and that succession duty be payable in accordance therewith, was refused. *Held*, on appeal, reversing the decision of MCDONALD, J., that both women should be recognized as wives of deceased, and they are entitled to the benefits extended to wives under the Succession Duty Act. *In re* LEE CHEONG, DECEASED. LEE SHECK YEW v. THE ATTORNEY-GENERAL FOR THE PROVINCE OF BRITISH COLUMBIA. - - - - - - - - **109**